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David M. Zlotnick

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**THE FUTURE OF FEDERAL SENTENCING
POLICY: LEARNING LESSONS FROM
REPUBLICAN JUDICIAL APPOINTEES IN
THE GUIDELINES ERA**

DAVID M. ZLOTNICK*

In the two years since the landmark Booker decision, federal sentencing policy has been in a state of suspended animation. This Article urges federal sentencing reform advocates to look to an unlikely source for realistic goals and ideological support—the experiences of Republican judicial appointees in the Guidelines Era. Its findings are based upon a long-term research project into cases in which Republican appointees stated their disagreement with the sentences required by law from the bench. The Article discusses the primary product of my research, forty comprehensive case profiles and their policy implications. Specifically, the Article demonstrates how the lessons of these Republican appointees are relevant to three of the critical issues in the post-Booker sentencing debate: first, the need for mandatory minimums, second, the desirability of a legislative “Booker fix,” and finally, specific areas for reform, such as the disparity between

* Distinguished Service Professor of Law, Roger Williams University School of Law, J.D., Harvard Law School. During 2002–2004, I was a Soros Senior Justice Fellow, a Visiting Scholar at the George Washington University Law Center, and a Visiting Professor at the Washington College of Law. I would like to thank these three institutions for the freedom and support to conduct the underlying research. Much appreciation is also due to Dan Freed, Ian Weinstein, Paul Hofer, Colleen Murphy, Jared Goldstein, Emily Sack, and Michael Yelnosky for their helpful comments on earlier drafts of this paper and the profiles. The research and editing assistance of Matthew Fabisch, Christine List, Adam Ramos, Alexandria Baez, Scott Carlson, and Kristina Hultman is gratefully acknowledged. Lastly, my appreciation and compassion is extended to the many inmates who provided their documents and life stories for this work without any expectation of legal assistance in their cases.

crack and powder cocaine sentences, that might have traction in what is likely to be a cautious Democratic Congress on criminal justice issues. By making use of these judges' insights, I argue that the sentencing debate can transcend tough-on-crime posturing to smart-on-crime policies that better protect both public safety and the public fisc. The Article concludes by drawing on these judges' words and deeds to construct a rhetorical framework for meaningful, bipartisan sentencing reform in the post-Booker era.

INTRODUCTION

Congress should not be distracted by off-the-mark suggestions that [mandatory minimum sentencing] is a soft vs. tough-on-crime issue. I am a former prosecutor and I chair an agency that views *crime control* as the most important goal of sentencing So the real issue is how to most effectively, efficiently, and fairly, achieve this important goal.

—*The Honorable William W. Wilkins, Jr.*¹

In the two years since the landmark *Booker* decision,² federal sentencing policy has been in a state of suspended animation. While many academics and judges were pleased that the decision returned a modicum of sentencing discretion, conservatives in Congress and the Justice Department immediately sought to devise a “*Booker* fix” to reverse the decision. Nevertheless, the Republican majority was unable to coalesce around a particular legislative solution before it lost control of Congress in the 2006 midterm elections. With the new Democratic majority, sentencing reformers have been re-energized and are considering ambitious post-*Booker* proposals from academia and sentencing reform groups.³ Still, their optimism may be

1. U.S.S.C. on Mandatory Minimums: *Testimony of Judge William W. Wilkins, Jr., Chairman of the United States Sentencing Comm.*, 6 FED. SENT'G REP. 67, 67 (1993). Judge Wilkins, appointed in 1986 by Reagan, served as the Chair of the U.S. Sentencing Commission from 1985–1994.

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

3. See, e.g., Douglas A. Berman, *Conceptualizing Booker*, 38 ARIZ. ST. L.J. 387, 416–23 (2006) (advocating a closer look at the constitutional guarantee of a jury trial, and suggesting a system that better balances the roles of the judge and the jury in sentencing); Frank O. Bowman III, *Mr. Madison Meets a Time Machine: The Political Science of Federal Sentencing Reform*, 58 STAN. L. REV. 235, 256–59 (2005) (advocating for a simplified and more lenient guidelines system); see also THE CONSTITUTION PROJECT SENTENCING INITIATIVE,

misplaced. Modern sentencing policy has seemingly defied the law of gravity. With few exceptions,⁴ penalties that go up seem to stay up because politicians of both parties fear being labeled soft on crime.⁵ Therefore, this Article urges sentencing advocates to look to an untapped source for realistic goals and ideological support—the experiences of Republican judicial appointees during the mandatory Guidelines Era.

These findings are drawn from a long-term research project that included anonymous interviews of federal judges and research on cases in which federal judges stated from the bench their disagreement with the sentence required by law.⁶ The most recent product of this effort is forty comprehensive profiles of these cases, all involving Republican appointees. This Article discusses the profiles and their policy implications and also provides internet links to the profiles for readers, researchers and policymakers.

Part I briefly lays out the pre- and post-*Booker* sentencing regime, paying attention to what *Booker* did and did not

RECOMMENDATIONS FOR FEDERAL CRIMINAL SENTENCING IN A POST-BOOKER WORLD 11–18 (2006), available at <http://www.constitutionproject.org/pdf/SentencingRecs-Final1.pdf> (providing an outline of a simplified federal guidelines system); Kate Stith & Karen Dunn, *A Second Chance for Sentencing Reform: Establishing a Sentencing Agency in the Judicial Branch*, 58 STAN. L. REV. 217, 220–33 (2005) (advocating the creation of a Judicial Sentencing Agency in the Judicial Branch composed of a majority of federal judges).

4. See *infra* pp. 38–42, discussing the “safety-valve,” which is 1994 legislation that permitted judges to sentence low-level offenders below a mandatory minimum in certain limited situations. The Violent Crimes Control and Law Enforcement Act, Pub. L. No. 103-322 § 80001, 108 Stat. 1796, 1985 (1994) (codified at 18 U.S.C. § 3553(f) (1994 & Supp. II 1996) and U.S. SENTENCING GUIDELINES MANUAL § 5C1.2 (2006)).

5. See Sara Sun Beale, *What's Law Got to Do with It? The Political, Social, Psychological and Other Non-Legal Factors Influencing the Development of (Federal) Criminal Law*, 1 BUFF. CRIM. L. REV. 23, 40 (1997); see also Dan Schnur, *Davis Won by Toeing the GOP Line: Democratic Candidates Are Using the Conservative Agenda to Win Elections, but Where Does That Leave Republicans?*, L.A. TIMES, Nov. 5, 1998, at B9; Jason Belmont Conn, *Felon Disenfranchisement Laws: Partisan Politics in the Legislatures*, 10 MICH. J. RACE & L. 495, 513 (2005) (“In today’s political atmosphere, being viewed as ‘tough-on-crime’ is electorally beneficial. A politician benefits from a perception that he will make preventing crime and punishing offenders priorities of his term in office.”).

6. See David M. Zlotnick, *Shouting Into the Wind: District Court Judges and Federal Sentencing Policy*, 9 ROGER WILLIAMS U. L. REV. 645 (2004); David M. Zlotnick, *Symposium on Sentencing Rhetoric: Competing Narratives in the Post-Booker Era*, 11 ROGER WILLIAMS U. L. REV. 449 (2006); David M. Zlotnick, *The War Within the War on Crime: The Congressional Assault on Judicial Sentencing Discretion*, 57 SMU L. REV. 211, 227–28 (2004).

change, and explains the two-year sentencing policy stalemate since the decision. Part II explains the importance of case studies for sentencing policy and elaborates upon my rationale for using a Republican appointee data set. Part III explores the root causes of Republican appointee dissatisfaction during the mandatory Guidelines Era and isolates four kinds of cases that most distressed these judges. Part IV shows how the lessons of Republican appointees from the Guidelines Era are directly relevant to three of the critical issues in current sentencing policy: first, the need for mandatory minimums; second, the desirability of a legislative “Booker fix” proposal; and finally, specific areas for reform that might have traction in what is likely to be a still cautious Democratic Congress on criminal justice issues. Part V draws on these judges’ statements and deeds to provide a theoretical and rhetorical framework for moderate but meaningful sentencing reform. The Conclusion ends with a plea for the new Congress to listen to these federal judges. By making use of these judges’ insights, I argue that the sentencing debate could move from tough-on-crime posturing to smart-on-crime policies that better protect both public safety and the public fisc.

I. THE SENTENCING WORLD BEFORE AND AFTER *BOOKER*

A. *The Federal Sentencing Regime in the Pre-Booker Years*

1. The Sentencing Guidelines

Before *Booker*, twenty-five years of “tough-on-crime” politics had dramatically altered the sentencing universe in the federal courts. Before 1984, federal sentencing permitted unfettered judicial sentencing discretion and significant back-end parole board power with a strong emphasis on rehabilitation. However, perceived sentencing disparities and judicial leniency led to the Sentencing Reform Act of 1984 (“SRA”).⁷ By abolish-

7. 18 U.S.C. §§ 3551–3626 (2000 & Supp. III 2003); 28 U.S.C. §§ 991–998 (2000). On the federal level during the 1960s and 1970s, a bipartisan consensus began to form that unfettered judicial and parole board discretion resulted in too much sentencing disparity. The prevailing account of the reform movement is that it was liberals, such as Judge Marvin Frankel, who initially pushed for sentencing reform, arguing that racial minorities and the socio-economically disadvantaged received harsher sentences. Later, conservatives, interested in a more

ing parole, the SRA solved the problem of post-sentencing disparity.⁸ At the front end, the SRA created the United States Sentencing Commission ("Sentencing Commission"), which mandates the creation of a sentencing guideline system for all federal crimes. After three years of controversy, the Sentencing Commission released the first version of the Sentencing Guidelines in 1987.⁹ The critical feature of the new Guidelines was their mandatory nature. In the majority of cases, judges were restricted to a narrow sentencing range somewhere on a 138-box sentencing grid.¹⁰ The vertical axis of the grid was controlled by the offense level (and offense-related characteristics);¹¹ the horizontal axis by features of the defendant's crimi-

punitive and determinate system, joined and eventually came to dominate the coalition. See KATE SMITH & JOSE A. CABRANES, *FEAR OF JUDGING: SENTENCING GUIDELINES IN THE FEDERAL COURTS* 35-37 (1998).

8. The statute requires inmates to serve at least 85% of their sentences. See 18 U.S.C. § 3624(b)(1) (2000) (limiting good behavior credit to fifty-four days per year).

9. The first Commissioners had significant conflicts over substantive and procedural nature. See, e.g., Paul H. Robinson, *Dissent from the United States Sentencing Commission's Proposed Guidelines*, 77 J. CRIM. L. & CRIMINOLOGY 1112 (1986); Janet Alberghini, Comment, *Structuring Determinate Sentencing Guidelines: Difficult Choices for the New Federal Sentencing Commission*, 35 CATH. U. L. REV. 181 (1985).

10. The SRA requires that each box on the grid prescribes a range with a high end generally not more than twenty-five percent longer than the low end. There were two initial exceptions. First, the government could elect to move for a downward adjustment based upon a defendant's cooperation with law enforcement. Second, the Guidelines also made provisions for exceptions called "departures" which allowed a judge to go above or below the applicable guidelines range if the judge found that the case fell outside "the heartland" of circumstances and factors considered by the Sentencing Commission. Some departure grounds were affirmatively recognized by the Guidelines, while others, such as age, socioeconomic background, gender, and substance abuse were specifically forbidden or discouraged. All departures, and in fact all Guidelines calculations, were made subject to judicial review. Despite encouragement from the Supreme Court in the *Koon* case, many appeals courts remained hostile to creative uses of the departure power. *Koon v. United States*, 518 U.S. 81, 97 (1996) ("Indeed, the text of § 3742 manifests an intent that district courts retain much of their traditional sentencing discretion."). See, e.g., *United States v. Rybicki*, 96 F.3d 754, 757-59 (4th Cir. 1996). The 2002 Feeney Amendment further cut back on this option. See PROTECT Act, Pub. L. No. 108-21, § 103, 117 Stat. 650, 669 (2003) (codified at 18 U.S.C. § 3553(b)(2)); see also Zlotnick, *The War Within the War on Crime*, *supra* note 6, at 213 ("The Feeney Amendment provisions have the potential to gut downward departures . . .").

11. Every crime is assigned an initial base offense level. Additional factors can then raise or lower the offense level: for example, the defendant's role in the offense or the defendant's acceptance of responsibility (by pleading guilty), or obstruction of justice (lying at trial). U.S. SENTENCING GUIDELINES MANUAL §§ 3E1.1, 3C1.1 (2006).

nal record.¹² For offenses involving narcotics and financial loss, the Sentencing Commission chose to set offense levels largely based upon the quantifiable component of the crime. This choice resulted in drug sentences being driven more by drug amounts than culpability factors. The Commission also amplified the impact of an offense's quantifiable component by adopting a "real offense" sentencing system. "Real offense" sentencing required the sentencing judge to look at all related "relevant conduct" to determine the offense level, not just the conduct related to the offense of conviction.¹³ Thus, in drug cases, relevant conduct soon became more important than the offense of conviction.

2. Mandatory Minimums for Narcotics and Firearms Offenses

However, the pre-*Booker* sentencing regime had another component as important as the Sentencing Guidelines: mandatory minimum statutory penalties that operated independently of the Guidelines. The most significant modern mandatory minimums, those for narcotics offenses, were born in the wake of the national outcry that followed the cocaine-induced death of Boston Celtic draft pick Len Bias.¹⁴ Congress responded

12. The horizontal axis of the Guidelines quantifies the defendant's criminal history. Points are assigned for prior convictions based on factors such as seriousness, remoteness, and whether the current offense was committed while on parole or probation. Based on the total criminal history points, a defendant is placed in Criminal History category I-VI, with the applicable sentencing range escalating in the higher categories. Once a defendant's adjusted offense level and criminal history category are determined, the Guidelines direct the sentencing judge to a range on the grid. For example, a defendant with an offense level of twenty-six and a criminal history category of I was subject to a sentence that falls between sixty-three and seventy-eight months. *See id.* § 5A ("Sentencing Table").

13. For example, assume a defendant was found guilty of one count of possession with intent to distribute cocaine based upon evidence obtained in a single seizure. Nevertheless, the Guidelines require that the base offense level include any other drug transactions or contemplated transactions that involved the same course of conduct. *See id.*

14. *See* Eric E. Sterling, *The Sentencing Boomerang: Drug Prohibition Politics and Reform*, 40 VILL. L. REV. 383, 408-12 (1995) (discussing the expedited course pursued by then House Speaker Tip O'Neill in seeking passage of the Anti-Drug Abuse Act in order to placate constituent outrage over the cocaine overdose death of Boston Celtics basketball star Len Bias). At the time, most thought that Bias died of a crack overdose, leading to a hysteria over that drug in particular. Later, it was determined that his death was due to snorting powder, not smoking crack. *See* Marc Mauer, *The Disparity on Crack-Cocaine Sentencing*, BOSTON GLOBE, July 5, 2006, available at

with the Anti-Drug Abuse Act of 1986 ("the 1986 Act") which created quantity-based mandatory minimums for most drug felonies.¹⁵ These mandatory penalties started at five and ten years for fairly minor quantities,¹⁶ and escalated to twenty years and life without parole for recidivists.¹⁷ In 1988, Congress extended the reach of the drug mandatory minimums by making them applicable to conspiracy charges to possess or distribute narcotics.¹⁸

http://www.boston.com/news/globe/editorial_opinion/oped/articles/2006/07/05/the_disparity_on_crack_cocaine_sentencing/.

15. Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207 (codified at 21 U.S.C. § 841(b)(1)(A) (2000)).

16. The 1986 Act also increased drug sentences in more subtle ways. For example, quantity was now determined by the weight of the entire "mixture or substance," not just the amount of actual narcotics present. While the increase was intended to punish dealers who increased their sales by using cutting agents, the result was that drugs that are generally heavily diluted or that require a "carrier medium," were now virtually certain to trigger a mandatory minimum penalty. The best example of the "carrier medium" effect was found LSD cases. Because the weight of an actual dose of LSD is negligible, too small to be put into a pill or vial, it is generally impregnated onto sheets of paper, with individual doses identified by stickers or decals. Because a ten-year mandatory sentence requires only ten grams of LSD, most LSD dealers who used paper of a regular weight easily exceeded the ten gram requirement. For example, from October 1995–September 1996, 39.8% of LSD defendants received at least a ten-year mandatory minimum sentence. An additional 39.8% received a five-year mandatory minimum. U.S. SENTENCING COMM'N, 1996 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS 53 (1996), available at <http://www.ussc.gov/annrpt/1996/tab-38.pdf>.

17. According to contemporaneous Congressional statements, the bill's mandatory minimums were supposed to be targeted at the drug kingpins and wholesalers who were responsible for importing and distributing narcotics on a national or regional scale. For instance, Congress intended "the Federal government's most intense focus ought to be on major traffickers, the manufacturers or heads of organizations, who are responsible for creating and delivering very large quantities of drugs." H.R. Rep. No. 99-845, at 11–12 (1986). Accordingly, Congress adopted quantities to trigger mandatory minimums "based on the minimum quantity that might be controlled or directed by a trafficker in a high place in the processing and distribution chain." *Id.* at 12. However, the triggering quantities were lowered as Democrats and Republicans, and the House and Senate, each tried to out-tough each other. See Sterling, *supra* note 14. For example, the 1986 Act requires five- and ten-year mandatory minimums for just five and fifty grams of crack cocaine, amounts generally transacted by the lowest level street dealers. *Id.*

18. See The Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690 § 6470, (amending 21 U.S.C. § 846). Before this amendment, drug distribution conspiracies were covered by the general federal conspiracy statute, which carries a maximum five-year sentence. With the 1988 bill, not only were more cases eligible for the mandatory penalties, but these defendants were now subject to punishment for the entire quantity of drugs in the conspiracy of which they were aware or should reasonably have been aware. Moreover, because modern conspiracy law requires little active involvement before one is deemed to have joined a conspir-

During the Guidelines Era, Congress also added important mandatory minimum penalties for offenses involving firearms. In 1984, the penalty for using or carrying a firearm during a violent crime was made a consecutive, five-year mandatory term.¹⁹ In 1986, Congress extended this penalty to drug-trafficking crimes, and increased the mandatory minimum to ten years for certain types of firearms.²⁰ In later amendments to this statute, Congress increased the penalty for a "second or subsequent conviction" to a consecutive and mandatory minimum of twenty years, and then again to twenty five years.²¹ In 1986, Congress also passed the Armed Career Criminal Act ("ACCA"), which made possession of a firearm or ammunition by a felon with three prior convictions for "crimes of violence" subject to a fifteen-year term mandatory minimum.²² This new fifteen-year mandatory minimum applied even to an ex-felon's simple possession of a firearm (or even a bullet), without any requirement of related criminal conduct.²³

3. The First Sentencing Commission and the New Mandatory Minimum Statutes

The new drug and gun mandatory minimums were problematic for the first Sentencing Commission, which had largely been relying on past sentencing data to establish the penalties

acy, even taking a phone message or giving a ride to a friend is enough, so long as a jury believes the defendant agreed to assist the primary actor. *See, e.g., United States v. Esparsen*, 930 F.2d 1461, 1471-72 (10th Cir. 1991) (recognizing that to be found guilty of conspiracy, "[t]he defendant need not know all the details of the operation and may play only a minor role or have only a slight connection to the conspiracy . . . [and that while mere] presence at the scene of the crime does not, by itself, prove involvement . . . [it] is a material factor.").

19. *See Comprehensive Crime Control Act of 1984*, Pub. L. No. 98-473, § 1005(a), 98 Stat. 1837, 2138 (1984).

20. *See Firearm Owner's Protection Act*, Pub. L. No. 99-308, § 104(a)(2)(A)-(F), 100 Stat. 449, 456-57 (1986).

21. *Anti-Drug Abuse Act of 1988*, Pub. L. No. 100-690, § 6212, 102 Stat. 4181, 4360 (1988).

22. *Firearm Owners' Protection Act*, § 104(e) (codified at 18 U.S.C. § 924(e)). Possession of a firearm by a convicted felon (regardless of whether the felony was a state or federal conviction) had been a federal offense since 1968 but the mandatory minimum was just a year. *See Gun Control Act of 1968*, Pub. L. No. 90-618 § 102(924)(b), 82 Stat. 1213, 1224 (1968).

23. As will be discussed *infra*, Part III, the definition of what constituted a "crime of violence" was also defined very broadly.

for the draft Guidelines.²⁴ Because the new mandatory minimums were substantially higher than past drug sentences, the first Commission decided to use the mandatory minimums to set the floor for most Guideline sentences for drug offenses. Quantities above the amount necessary to trigger a mandatory minimum were set incrementally higher. With this decision, the Commission guaranteed that most Guideline drug sentences would be even more severe than the new mandatory minimums. The Commission chose this route, in part, because the Commission was powerless to permit sentences below a mandatory minimum.²⁵ The only exception initially provided by Congress was a government controlled motion for defendants who cooperated in the investigation and prosecution of another offender.²⁶

4. The Impact of Prosecution Policies on the Pre-*Booker* Sentencing Regime

While Congressional action created the Guidelines and the new mandatory minimums, it is critical to recognize the role that prosecutorial policy set by the Justice Department and the charging practices of local United States Attorneys Offices played during the pre-*Booker* years. At the start of the Sentencing Guidelines Era, the Reagan Administration declared a federal "War on Drugs" and stressed the importance of increasing drug and gun prosecutions and issued tougher plea policies

24. Symposium, *Alternative Punishments Under the New Federal Sentencing Guidelines*, Speech by Commissioner Ilene H. Nagel, 1 FED. SENT'G REP. 96, 103 (1988) (stating that the Commission chose to, "in its first iteration of guidelines, . . . anchor the sentencing guidelines to estimates of past practice, that is, to estimates of time actually served," to wit the "research staff provided [the Commission] with analyses of 10,000 cases as well as additional data for a larger sample of 40,000 cases.").

25. As statutory penalties, the mandatory minimums trumped the Guidelines. For example, if the Guidelines called for a sentence of seventy to eighty-seven months, but the statutory mandatory minimum called for ten years, the Guideline sentence had to be adjusted to 120 months. See U.S. SENTENCING GUIDELINES MANUAL § 5G1.1(b) (2006).

26. Judges were powerless to sentence below a mandatory minimum even when the defendant makes a good faith effort to cooperate but is unable to do enough to satisfy the government. See 18 U.S.C. § 3553(e); see also *United States v. Wade*, 504 U.S. 181, 183–84 (1992) (holding that judges have "no power to go beneath the minimum" without a "substantial assistance" motion from the prosecution).

that called for more severe sentences.²⁷ The budgets of the Justice Department and federal law enforcement agencies such as the FBI, DEA, and ATF also ballooned.²⁸ In response, federal prosecutors brought many more of these drug cases, either from federal law enforcement or by accepting cases initiated by arrests by city and state law police, acting alone or in concert with federal agencies.²⁹ As a result, federal prosecutions rose from 59,682 in 1986 to 116,582 in 2004, with narcotics enforcement leading the increase by a substantial margin.³⁰ Ad-

27. Under the "Thornburgh Memo," federal prosecutors across the country were told to charge and obtain a conviction and sentence on the most serious conduct in an indictment that could be readily proven. See Memorandum from Richard Thornburgh, Attorney General, to Federal Prosecutors (Mar. 13, 1989), reprinted in THOMAS W. HUTCHINSON & DAVID YELLEN, *FEDERAL SENTENCING LAW AND PRACTICE: SUPPLEMENTAL APPENDICES VOLUME 621* (1989) (commonly known as "the Thornburgh Memo").

28. Karin Graham Horwatt, *An Attorney Is Not A Rolls Royce: The Comprehensive Forfeiture Act of 1984 and the Sixth Amendment Right to Effective Assistance of Council After United States v. Monsanto*, 1 WM. & MARY BILL RTS. J. 145, 166-67 (1992).

29. In President Reagan's October 1982 remarks announcing federal initiatives against drug trafficking and organized crime:

[t]he president called for (and got): (1) more personnel—1,020 law enforcement agents for the Drug Enforcement Agency, Federal Bureau of Investigation, and other agencies, 200 assistant U.S. attorneys, and 340 clerical staff; (2) more aggressive law enforcement—creating 12 regional prosecutorial task forces across the nation "to identify, investigate, and prosecute members of high-level drug trafficking enterprises;" (3) more money—\$127.5 million in additional funding and a substantial reallocation of the existing \$702.8 million budget from prevention, treatment, and research programs to law enforcement programs; (4) more prison bed space—the addition of 1,260 beds at 11 federal prisons to accommodate the increase in drug offenders to be incarcerated; (5) more stringent laws—a "legislative offensive designed to win approval of reforms" with respect to bail, sentencing, criminal forfeiture, and the exclusionary rule; (6) better interagency coordination—bringing together all federal law enforcement agencies in "a comprehensive attack on drug trafficking and organized crime" under a cabinet-level committee chaired by the attorney general; and (7) improved federal/state coordination, including federal assistance to state agencies by training their agents.

Steven Wisotsky, *A Society of Suspects: The War on Drugs and Civil Liberties*, CATO POLY ANALYSIS NO. 180, n.35 (Oct. 2, 1992), <http://www.cato.org/pubs/pas/pa-180.html> (citing *President's Message Announcing Federal Initiatives Against Drug Trafficking and Organized Crime*, 18 WEEKLY COMP. PRES. DOC. 1311, 1313-14 (Oct. 14, 1982)).

30. See BUREAU OF JUSTICE STATISTICS, *FEDERAL CRIMINAL CASE PROCESSING, 2002: WITH TRENDS 1982-2002, RECONCILED DATA*, <http://www.ojp.usdoj.gov/bjs/abstract/fccp02.htm> (last visited Sept. 10, 2007); TRAC Reports, Inc., *Federal Judicial District (U.S.): Number Prosecuted*

ditionally, beginning in 1991 with Attorney General Thornburgh's "Project Triggerlock," federal firearms indictments also dramatically increased as successive administrations encouraged local federal prosecutors to pursue felon-in-possession and other federal firearm violations.³¹ The impact of the increase in penalties and the more aggressive prosecution policies on the federal criminal justice system was staggering. In 1984, the federal prison population was 32,317 and by 2007 it stood at 199,510.³²

B. The Post-Booker Sentencing World

1. *The Booker Decision & the End of Mandatory Guidelines*

This section first discusses the impact of *Booker* on the sentencing regime and then moves on to describe the policy stalemate that followed. The *Booker* opinion has two separate majorities. The "merits majority" held that the Sixth Amendment forbids any judicial fact finding that results in a manda-

http://trac.syr.edu/tracreports/crim/136/include/table_3.html (last visited Sept. 23, 2007).

31. See *infra* note 193 for a discussion of Project Triggerlock and its successor programs.

32. See Federal Bureau of Prisons, *Weekly Population Report*, <http://www.bop.gov/locations/> (follow "Weekly Population Report" hyperlink) (last visited Sept. 10, 2007). These changes also dramatically altered the makeup of the federal criminal docket. In 1983, drug cases accounted for only 16% of the federal district court criminal docket. See BUREAU OF JUSTICE STATISTICS, FEDERAL CRIMINAL CASE PROCESSING 1982-93, www.ojp.usdoj.gov/bjs/pub/pdf/fccp93.pdf (last visited Sept. 10, 2007). With the war on drugs and the shift of more drug cases to the federal system, the numbers skyrocketed. In 2003, drug cases accounted for over 27% of criminal cases filed. See U.S. DEPT OF JUSTICE, U.S. ATTORNEYS' ANNUAL STATISTICAL REPORT: FISCAL YEAR 2003 14 (2003), http://www.usdoj.gov/usao/reading_room/foiamanuals.html (follow "2003" hyperlink) (last visited Sept. 23, 2007). As a result, over 53% of current federal inmates are serving sentences for drug offenses. The average federal drug sentence before 1984 was 65.7 months. ADMIN. OFFICE OF THE U.S. COURTS, NATIONAL PROFILE AND ENFORCEMENT TRENDS OVER TIME, <http://trac.syr.edu/tracdea/findings/national/drugpri8199.html> (last visited Nov. 28, 2007) (on file with the Iowa Law Review) [hereinafter TRAC study]. By 1991, the average federal drug sentence increased to 95.7 months. While there has been a slight decrease in drug sentences over the past ten years, the increase in the federal prison population has continued as the total number of prosecutions has continued to increase. Federal prosecutions rose from 71,437 in 1995 to 116,582 in 2004. See TRAC Reports, *supra* note 30.

tory increase in a defendant's sentence.³³ That kind of fact finding, *Booker* holds, is reserved for juries. As a result, the provisions of the SRA that made the results of judicial Guideline calculations mandatory are unconstitutional. Thus, the "merits majority" is the portion of the opinion that killed the mandatory Guidelines that had governed federal sentencing since 1987.³⁴

A separate "remedial majority," authored by Justice Breyer, held that the best way to effectuate Congressional intent in the SRA was to make the Guidelines "advisory" in nature but otherwise uphold the rest of the SRA.³⁵ Thus, *Booker* instructs judges to continue to calculate and consider the Guideline range, but also requires them to weigh all the sentencing factors set forth in the SRA codified at 18 U.S.C. § 3553(a). In addition, the "remedial majority" held that the Court of Appeals should continue the review of sentences on appeal, but instituted a "reasonableness" standard of review.

The reasonableness standard was itself the subject of a recent Supreme Court decision, *Rita v. United States*, which held that the Courts of Appeals may apply a "presumption of reasonableness" within Guidelines sentences.³⁶ While it was

33. See *Booker*, 543 U.S. at 225–44.

34. The merits majority in *Booker* was the culmination of a revolutionary line of Sixth Amendment jurisprudence that did not exist when the Sentencing Guidelines were born. See Peter B. Rutledge, *The 2004 Gunderson Lecture: Apprendi, Blakely, and Federalism*, 50 S.D. L. REV. 427, 432 (2005); David Yellen, *Reuschlein Lecture: Saving Federal Sentencing Reform After Apprendi, Blakely, and Booker*, 50 VILL. L. REV. 163, 168–69 (2005).

35. *Booker*, 543 U.S. at 244–68.

36. 127 S.Ct. 2456, 2462 (2007). The Court noted, however, that while called a "presumption," it is neither binding nor burden shifting. Rather, the Court reasoned that by the time a Court of Appeals reviews a within Guidelines sentence, both the Sentencing Commission (in the abstract), and the District Court (under the specific facts of the case), have already deemed that the applicable Guideline range adequately weigh the § 3553(a) factors. *Id.* While the majority also emphasized that this permissible "presumption" does not apply at the district court, Justice Souter argued in dissent the decision creates strong incentive for sentencing judges to stay within the Guidelines and thus may preserve "the very feature of the Guidelines that threatened the jury trial right." *Id.* at 2487. Another highly anticipated case on reasonableness, *Claiborne v. United States*, 127 S. Ct. 551 (2006), which concerned appellate review of sentences outside the Guidelines, was dismissed after the defendant died after argument but before an opinion was issued. However, the Court quickly replaced *Claiborne* with *Gall v. United States*, No. 06-7949, 127 S. Ct. 2933 (2007) and *Kimbrough v. United States*, No. 06-6330, 127 S. Ct. 2933 (2007). *Gall* will consider whether a defendant must show extraordinary circumstances to justify a substantial variance below the Guidelines range. *Kimbrough* will consider to what extent, if any, a district court can base a

widely hoped that *Rita* would clarify the reasonableness standard, as noted by Professor Doug Berman, the case is “more likely to create continued confusion because everyone will be able to find some passages to their liking.”³⁷ Nevertheless, the initial consensus is that while *Rita* might make it harder to challenge within Guidelines sentences in some circuits, the opinion will not significantly shift the prevailing post-*Booker* sentencing practices.³⁸

However, it is critical to recognize that while judges are no longer strictly bound by the Guidelines ranges, the statutory mandatory minimums for drug and gun offenses survived *Booker* intact. Mandatory minimums were not affected by *Booker* because unlike the Guidelines, which require a series of judicial fact finding decisions, mandatory minimums generally have a one-fact trigger which can easily be submitted to a jury. In fact, since at least 2000, federal prosecutors have been charging and proving the fact required to trigger mandatory minimums in most criminal cases.³⁹

variance on its disagreement with the policy underlying the Guidelines treatment of an offense, in this case for crack cocaine.

37. See Sentencing Law and Policy Blog, *Rita Has Something for Everyone* (Except Victor Rita), June 21, 2007, http://sentencing.typepad.com/sentencing_law_and_policy/2007/06/rita-has-someth.html (last visited Sept. 23, 2007).

38. Victor Rita was tried and convicted of perjury, making false statements, and obstruction of justice for his conduct into an investigation of illegal machine gun “kits.” *Rita*, 127 S.Ct. at 2459. His Guideline range was 33 to 41 months. *Id.* at 2461. He tried to argue that his twenty-five years of stellar military service made a within Guidelines range sentence unreasonable under *Booker* but that argument was rejected by the Supreme Court and his sentence of 33 months was affirmed. *Id.* at 2470. For an overview of the case see Linda Greenhouse, *Justices Support Guidelines for Sentencing*, N.Y. TIMES, June 22, 2007, at A18. For a more detailed discussion of *Rita* and reactions to it, see generally Douglas A. Berman, *Rita, Reasoned Sentencing, and Resistance to Change*, 85 DENV. U. L. REV. 7 (2007).

39. This trend was the result of prosecutors’ attempts to not run afoul of the Supreme Court’s opinion in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), the first case in the line of Sixth Amendment cases that ultimately led to *Booker*. See Memorandum from Christopher A. Wray, Assistant Attorney Gen., U.S. Dep’t of Justice, Criminal Division, to All Fed. Prosecutors, on Guidance Regarding the Application of *Blakely v. Washington* to Pending Cases, at 8, http://sentencing.typepad.com/sentencing_law_and_policy/files/chris_wray_doj_memo.pdf (last visited Sept. 23, 2007). For drug mandatories, indictments included the quantity trigger and for felon-in-possession cases, the fact that the defendant had been previously convicted of a felony offense.

2. The Politics of Stalemate

At the end of Justice Breyer's remedial majority, he explicitly recognized Congress' right to have the final word on sentencing policy.⁴⁰ Given that *Booker* outraged conservatives, who viewed the opinion as a judicial coup d'état,⁴¹ many commentators initially believed it was only a matter of time before Congress acted.⁴² For more than two years, however, that didn't happen. Some credit restraint on the part of the Sentencing Commission, the Judicial Conference, many commentators who repeatedly advocated a "go slow" and "wait-and-see" approach—essentially a rearguard action designed to maintain the *Booker* status quo.⁴³ More importantly, for two years, dis-

40. "Ours, of course, is not the last word. The ball now lies in Congress' court. The National Legislature is equipped to devise and install, long term, the sentencing system, compatible with the Constitution, that Congress judges best for the federal system of justice." *Booker*, 543 U.S. at 265.

41. Rep. Tom Feeney (R-FL), said that "The Supreme Court's decision to place this extraordinary power to sentence a person solely in the hands of a single federal judge—who is accountable to no one—flies in the face of the clear will of Congress," and added that the decision was an "egregious overreach." See Stop the Drug War, *Supreme Court Ends Current Federal Sentencing System*, Jan. 14, 2005, <http://stopthedrugwar.org/chronicle-old/370/bigruling.shtml> (last visited Sept. 23, 2007). According to a defense attorney group, "[t]he Justice Department is livid" over the opinion as well. *Id.* (quoting Jack King, Commc'n Dir. for the National Assoc'n of Crim. Def. Lawyers); see also *Congress' Reaction to Booker and Fanfan*, TALKLEFT, <http://www.talkleft.com/story/2005/01/13/498/98079> (last visited Sept. 23, 2007); Testimony of Daniel P. Collins, former Fed. Prosecutor and Deputy Attorney Gen., before Subcomm. on Crime, Terrorism, and Homeland Sec. (Feb. 10, 2005) (on file with author) (claiming that *Booker* "effectively demolish[ed] in one stroke the entire edifice of federal sentencing reform that has been carefully built over the last 20 years.").

42. See *supra* note 40 and accompanying text. See Pamela A. MacLean, *Cracking the Code: After Booker Judges Reduce Crack Cocaine Sentences*, 27 NAT'L L. J. 1 (Oct. 3, 2005); see also Bowman, *supra* note 3, at 257–58; Andrew D. Leipold, *Why Are Federal Judges So Acquittal Prone?*, 83 WASH. U. L. Q. 151, 222 n.255 (2005).

43. See, e.g., Paul J. Hofer, *Immediate and Long-Term Effects of United States v. Booker: More Discretion, More Disparity, or Better Reasoned Sentences?*, 38 ARIZ. ST. L.J. 425, 462–63 (2006) (citing examples of the go slow approach); Sandra D. Jordan, *Have We Come Full Circle? Judicial Sentencing Discretion Revived in Booker and Fanfan*, 33 PEPP. L. REV. 615, 675 (2006) (urging everyone to take a "wait and see" approach to sentencing post-*Booker*); Ronald F. Wright, *Incremental and Incendiary Rhetoric in Sentencing After Blakely and Booker*, 11 ROGER WILLIAMS U. L. REV. 461, 468–71 (2006) (noting that judges have taken varied approaches in sentencing post-*Booker* to try to mitigate Congressional backlash to their actions); see also *Judges Urge Congress to Respond Slowly to U.S. Supreme Court's Sentencing Guidelines Ruling*, DAILY RECORD (Rochester, NY), Feb. 25, 2005, 2005 WLNR 3138287 (reporting on testimony before Sentencing Commission from judges urging caution in responding to *Booker*); Testimony

strict judges showed significant restraint in exercising their newly recovered discretion and largely continued to sentence as if the Guidelines were still mandatory. Thus, Sentencing Commission data from the first two years after *Booker* reveals only a slight increase in sentences below the advisory Guidelines ranges.⁴⁴

In addition, at least in the initial post-*Booker* period, conservatives struggled to find a viable “*Booker* fix.” Justice Department prosecutors were not in favor of jury sentencing, fearing that complicated verdict forms would spell more acquittals.⁴⁵ While some new mandatory minimums were proposed, these bills did not gain sufficient traction as the Iraq war and other issues had more resonance with the public than crime in the streets.⁴⁶ However, as more post-*Booker* data became available, conservatives began to hone their message that both leniency and sentencing disparity were on the rise, claiming to have found troubling individual sentences as well as sen-

of Judge Paul G. Cassell, Chairman, Judicial Conference Comm. on Criminal Law, before Subcomm. on Crime, Terrorism, and Homeland Sec. on *How Judges are Properly Implementing the Supreme Court's Decision in United States v. Booker* (Mar. 16, 2006), available at http://www.utd.uscourts.gov/judges/cassell_final.pdf; stating on behalf of the Judicial Conference that there is no need for any immediate action on sentencing legislation); Letter from More than Forty Former U.S. Attorneys to the Senate and House Sentencing Committees (Mar. 1, 2005), available at <http://www.nacdl.org/public.nsf/75164f8d67544f8a85256ada0066b78e/386f8f203041a2e285256f8e006f593c?OpenDocument#news000> (follow top “click here” hyperlink) (advocating Congress “go slow” when considering responses to the *Booker* decision).

44. See U.S. SENTENCING COMM’N, FINAL REPORT ON THE IMPACT OF *UNITED STATES V. BOOKER* ON FEDERAL SENTENCING (2006), available at http://www.ussc.gov/booker_report/Booker_Report.pdf (finding that sentencing severity has remained constant, above guidelines range sentences doubled to 1.6 percent and that sentences below range did not substantially increase in percentage or scope).

45. See Reply Brief for the United States at 11, *United States v. Booker*, 543 U.S. 220 (2005) (Nos. 04-104, 04-105) (the U.S. Government emphasized that “requiring jury verdicts on sentence-enhancing facts would produce a distorted and unmanageable system that would regularly produce sentences that were not proportional to the offense of conviction, failed to recognize important differences between defendants, and failed to operate in a consistent manner.”).

46. See Manuel Garcia, Jr., *How Will the Iraq War Affect Americans?*, SWANS (SPECIAL ISSUE ON IRAQ), Feb. 2, 2004, <http://www.swans.com/library/art10/iraq/garcia.html> (last visited Sept. 23, 2007) (“The typical American is most likely to feel the political effect of the Iraq War as a diminishing of any public discussion of social welfare issues, because ‘the war’ and ‘diminished resources’ have made the passage of such social legislation more remote.”).

tencing patterns that justified the re-imposition of restrictions on judicial discretion.⁴⁷

At the macro level, conservatives noted that sentences outside the Guidelines increased ten percent in the first thirteen months after *Booker*. Looking deeper into the data, they also cited to particular districts where compliance with the Guidelines was below fifty percent, buttressing their claim that “liberal pockets” of judges were undermining uniformity.⁴⁸ Lastly, they pointed out that downward variances from the sentencing guidelines under *Booker* now exceeded upward variances by a ratio of 22:1, reflecting judicial efforts to undermine the severity of the sentencing regime.⁴⁹

With this ammunition, in 2006, conservative legislators started to promote more aggressively new and broader mandatory minimums.⁵⁰ Separately, the Justice Department and at least one key conservative Congressman settled on the concept of “topless” guidelines as their favored “*Booker* fix solution.”⁵¹

47. For example, on June 21, 2005, Attorney General Gonzalez cited a child pornography case in which he claimed a judge had used his newly returned discretion to award a lenient sentence to dangerous individual. He also cited a different case that resulted in an upward variance from the Guidelines to warn about an increase in sentencing disparity post-*Booker*. The full texts of his remarks are available at <http://www.usdoj.gov/ag/speeches/2005/06212005victimssofcrime.htm>. But see *NADCL Report: Truth in Sentencing? The Gonzales Cases*, 17 FED. SENT. R. 327 (June 2005), available at <http://www.nacdl.org/public.nsf/newsreleases/2005mn010> (defending these sentences as justified by differences in the offenders and the offense).

48. Statement of William M. Mercer, United States Attorney for the District of Montana before the Comm. on the Judiciary, Subcomm. on Crime, Terrorism, and Homeland Security, Mar. 16, 2006, available at <http://judiciary.house.gov/media/pdfs/mercer031606.pdf>; see also Jeff Eckhoff, *Data Show More Variety In Sentencing Some Judges Use Too Much Discretion, Are Too Lenient, Critics Say*, DES MOINES REGISTER, Mar. 19, 2006, available at <http://www.november.org/stayinfo/breaking06/SentencingData.html>; Sean O'Sullivan, *State's Judges Showing More Leniency*, THE NEWS J., Apr. 8, 2005, available at www.delawareonline.com (reporting claims of Delaware U.S. Attorneys Office that Delaware federal judges are sentencing below the Guidelines in a large percentage of cases).

49. O'Sullivan, *supra* note 48.

50. See Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, 120 Stat. 587 (2006) (codified in sections of 18 U.S.C. and 42 U.S.C.) (seeking to apply mandatory minimums to participants in gang violence); Methamphetamine Epidemic Act, H.R. 3889, 109th Cong. (2005) (seeking to apply mandatory minimums to methamphetamine users). See *infra* notes 204–05 for a discussion of the gang bill.

51. See Remarks prepared by Attorney General Alberto Gonzalez given at the National Center for Victims of Crime First National Conference, 21 June 2005, Washington D.C.,

Under a “topless guidelines” regime, the lower end of a defendant’s guideline range would be established by the facts found by the jury. However, instead of the current narrow ranges in each box on the grid, the upper end of every defendant’s range would be the statutory maximum for each crime. The proponents of “topless guidelines” believe that this arrangement would technically comply with *Booker*, because sentences above the minimum would be at the discretion of the judge, not dependent on any mandatory judicial fact finding.⁵² But, by instituting a mandatory sentence floor based on the jury verdict, judges would be prevented from lowering sentences based on non-Guideline factors currently allowed by the *Booker* decision.⁵³

The Democratic Congressional victories in the 2006 mid-term elections undeniably slowed the momentum for topless guidelines and encouraged sentencing reform advocates to believe that legislation to ameliorate some of the worst inequities of the current regime might be possible (such as the disparity between crack and powder cocaine sentences). In addition,

<http://www.usdoj.gov/ag/speeches/2005/06212005victimssofcrime.htm> (last visited, Oct. 14, 2007). Rep. Sensenbrenner, who chaired the Judiciary Committee in the House, introduced H.R. 1528, “Defending Americas Most Vulnerable: Safe Access to Drug Treatment and Child Protection Act of 2005.” Section 12 of the Act would have eliminated all downward departures from the Guidelines range, thereby not just “fixing” *Booker* but going further and ensuring that there would be no sentences below the Guidelines range without a government motion. See *Topless Guidelines Bill in the Works from Sensenbrenner*, SENT’G L. & POL’Y BLOG, Mar. 30, 2006, http://sentencing.typepad.com/sentencing_law_and_policy/2006/03/topless_guideli.html (last visited Sept. 23, 2007). See *infra* pp. 60–61 for a discussion of the debate on the constitutionality of “topless guidelines.”

52. See Gina Holland, *Judges Press Sentencing Commission on Federal Guidelines*, LAW.COM, Nov. 18, 2004, <http://www.law.com/jsp/article.jsp?id=1100535357414> (quoting Assistant Attorney General Christopher Wray that “[o]f all the legislative proposals being discussed as possible solutions,” the topless guidelines bill “adheres most closely to the principles of sentencing reform—truth-in-sentencing, certainty and fairness in sentences, and the elimination of unwarranted sentencing disparities.”); see also Douglas A. Berman, *Tweaking Booker: Advisory Guidelines in the Federal System*, 43 HOUS. L. REV. 341, 357–58 (2006) (suggesting that topless provisions would likely be constitutional in an advisory guidelines system). But see U.S. District Judge Paul Cassell, *Written Testimony of Judge Cassell at the Booker Hearing Before the House Judiciary Committees Subcomm. on Crime, Terrorism, and Homeland Security*, reprinted in 18 FED. SENT’G REP. 198 (2006) (stating that the constitutionality of “topless provisions” hinges largely on the vitality of the Supreme Court’s decision in *Harris v. U.S.*, 536 U.S. 545 (2002), but that *Booker* seriously calls *Harris* into question).

53. See *infra* pp. 60–61 for a more detailed discussion of the merits of “topless guidelines.”

there has been renewed attention to broader, structural issues such as the Guidelines' over-reliance on quantity-based sentencing and prosecutorial charging practices that result in draconian mandatory minimum sentences.⁵⁴ This Article now turns to how the case profiles of Republican appointees can be used to continue to forestall reactionary *Booker* fixes such as more mandatory minimums or "topless guidelines" and to determine if there are sentencing reform issues for which there may be broad support within the judiciary.

II. THE CASE FOR THESE CASE STUDIES IN SENTENCING POLICY

A. *Why Case Studies?*

The Sentencing Commission, the Justice Department, and groups such as The Sentencing Project⁵⁵ publish and analyze a myriad of data about sentencing decisions, and there is much to learn in these numbers. My research, in contrast, employed the case study method. As a result of this methodological choice, this Article makes no claims of statistically significant results. Nevertheless, the case study method has much to offer sentencing policy makers.⁵⁶ First, while the media has long

54. For a more detailed discussion of this issue, see *infra* pp. 54–58, discussing the “stacking” of consecutive and escalating 924(c) gun counts.

55. See The Sentencing Project, www.sentencingproject.org (last visited Oct. 14, 2007).

56. My methodology is discussed in more detail on my website at <http://faculty.rwu.edu/dzlotnick/federalsentencingstudy.html> (last visited Oct. 14, 2007). Initially, I conducted about twenty-five telephone and in-person interviews of federal judges. In a few districts, I spoke to multiple judges. For larger districts, I talked to just a few but spread these out over the country. I tried to obtain interviews based on personal contacts, not because a judge had a reputation for having strong views about sentencing. Once at the courthouse, many judges were willing to pass me onto the next office as well. Because most of these judges preferred to remain anonymous, to obtain cases to profile, I searched the files of Families Against Mandatory Minimums (“FAMM”). For over ten years, FAMM has been collecting information from federal inmates about their cases. FAMMs basic case summary form, sent into prisons through their publications asks: “Did the judge say he wished he didn’t have to give you such a long sentence?” See *generally* Families Against Mandatory Minimums, <http://www.FAMM.org> (last visited Oct. 14, 2007). These files helped identify possible judges to research. I then followed up with the inmates and their families to obtain sentencing transcripts and Presentence Investigation Reports (“PSIs” or “PSRs”). Due to changes in Bureau of Prison regulations in 2002, obtaining PSIs became very difficult. Thus, while the prerequisite for follow-up was that a judge spoke out at sentencing, inclusion of a judge and a case in the forty profiles was governed by my ability to obtain sufficient official documentation about the case. While I sent the draft pro-

reported judicial complaints about sentencing policy in a variety of formats, this Article and its profiles offer the most detailed portraits of individual federal cases from the mandatory Guidelines Era that are currently available on the Internet for use by researchers and policymakers.

Second, the case study method is particularly well-suited for exploring sentencing policy because of the Anglo-American tradition that the punishment should fit the crime. Indeed, the march of the modern criminal law and sentencing policy can be seen as an effort to match culpability and social harm with the appropriate punishment.⁵⁷ Thus, simply knowing the percentage of judicial downward departures or other aggregate statistics about the application of the Guidelines reveals very little about the qualitative nature of the cases and whether the sentence in an individual case was in accord with the sentencer's notions of just punishment. Only by looking at a select number of cases in-depth can policymakers obtain the richer context necessary to evaluate whether a particular judge's desire to impose a less harsh sentence is consistent with mainstream values or represents a dangerous leniency that needs to be cabined by legislative restrictions on discretion.

Third, case studies offer other insights that would be missed by only looking at aggregate data. For example, in these profiles the judges stated their reservations about the length of the sentence in open court but did not bend the Guidelines calculations or the rules for downward departures (as critics argue judges routinely do). As a result, these cases never showed up in departure statistics or anywhere else that would capture these judges' concerns. Only by gathering the sentencing transcripts and the pre-sentence reports was I able to capture this otherwise hidden cross-section of cases and the underlying policy issues they represent. Fourth, these case profiles also provide a much needed counterweight to the nega-

files to the judges, their willingness or unwillingness to comment did not affect whether I decided to publish the profile. Please note that all references to "Anonymous Interviews" in this Article reference conversations with Republican appointees.

57. See Aaron J. Rappaport, *Rationalizing the Commission: The Philosophical Premises of the U.S. Sentencing Guidelines*, 52 EMORY L.J. 557, 596 (2003) ("[M]ainstream just desert theory considers two factors to be critically important in assessing culpability—the mental culpability of the defendant and the actual harm caused by his or her conduct."); see also Arnold H. Loewy, *Culpability, Dangerousness, and Harm: Balancing the Factors on which our Criminal Law is Predicated*, 66 N.C. L. REV. 283 (1987–1988).

tive image of the federal judiciary advanced by conservatives over the past twenty-five years.⁵⁸ In my profiles, although the defendants are arguably less culpable or less dangerous than envisioned by Congress when it predetermined the punishments that applied, these judges followed the law despite their desire for a different result. In other words, these case studies provide a storehouse of “dog-did-not-bite-man,” counter-stories to add balance and realism to the often distorted debate over sentencing policy and judicial discretion.⁵⁹

Fifth, reproducing portions of the transcripts in the profiles captures the human element of sentencing. No statistics can match the power of the moment when personal conscience conflicts with fidelity to office. In these profiles, one can hear these judges try to explain their lack of discretion, express their outrage at Congress, and sometimes apologize to the defendant (while at the same time not condone or excuse the defendant’s criminal conduct). But these transcripts are more than monologues; they are also conversations with the defendants. While a few of these defendants are defiant and angry, most tended to apologize to the judge, family, and community for the harm they caused, even as they complained about the unfairness of the sentence or the trial. Many can be seen trying to come to terms with their fate. A select few are able to show surprising insight into the judge’s dilemma, even at the moment when their freedom is about to be taken away. As one defendant who received a mandatory life sentence put it to the judge:

58. See, e.g., Stephanie Simon, *Call of the West: Rein in the Judges; Conservative Ballot Measures in Many States would Check Judicial Power. South Dakotans Seek a Right to Sue Jurists, Montanans to Recall*, L.A. TIMES, Oct. 15, 2006, at A1 (noting that conservatives lawmakers are introducing legislation to curb the actions of what they term “runaway judges”); see also Catherine G. Patson, Note, *The Constitutionality and Implications of the Prison Litigation Reform Act*, 42 N.Y.L. SCH. L. REV. 205, 254 (1998) (quoting then Senator Bob Dole as “accus[ing] liberal judges appointed by President Clinton of being ‘the root causes of the crime explosion.’”); Todd Gillman, *GOP Group Plans to Turn Up Scrutiny on Federal Judges*, DALLAS MORNING NEWS, July 27, 2003 (on file with author).

59. Sentencing policy is too often driven by stories about individual cases. New criminal offenses are created in response to a particularly heinous crime and judicial discretion vilified in response to generally poorly explained examples of supposedly lenient sentences. See Edwin Meese & Rehett Dehart, *How Washington Subverts Your Local Sheriff*, POLY. REV. (Jan.–Feb. 1996), available at <http://www.hoover.org/publications/policyreview/3585206.html> (bemoaning the increase in the federalization of crime including the passage of a federal carjacking and other unnecessary duplications of traditionally state defined crimes).

I think about it sometimes, your Honor, and I would hate to be in your shoes . . . because it must be hard for a man to pass judgment on someone, and maybe he does want to give him that time, and maybe he doesn't. But I pretty much know it's out of your hands, and that must be an awful feeling.⁶⁰

B. Why Republican Appointees from the Guidelines Era?

I focused on cases from Republican appointees for several reasons.⁶¹ Law review articles and surveys tend to examine the judiciary in the aggregate.⁶² Moreover, while the media has reported comments by former Chief Justice William Rehnquist and Justice Anthony Kennedy that were critical of reduced judicial discretion and long sentences,⁶³ no survey or study has sought to identify the sentencing policy concerns of Republican appointees at the district court level. By focusing on Republican sentencers, I hoped first to determine if this subgroup of judges had distinct concerns (or possibly less severe complaints than their Democratic counterparts). While

60. Sentencing Transcript at 52–53, *United States v. Rudy Martinez*, No. 91-Cr-53 (N.D. Ill. Apr. 23, 1992) (remarks made by defendant Rudy Martinez to Judge Milton I. Shadur).

61. My initial research included judges appointed by all Presidents. A discussion of additional insights from those interviews and case studies can be found in my earlier articles and in additional profiles and judicial quotes on the website, available at <http://faculty.rwu.edu/dzlotnick/federalsentencingstudy.html> (last visited Oct. 14, 2007).

62. See, e.g., SMITH & CABRANES, *supra* note 7.

63. In an August 9, 2003 speech to the American Bar Association, Justice Kennedy stated that “I can accept neither the necessity nor the wisdom of federal mandatory minimum sentences. In too many cases mandatory minimum sentences are unwise and unjust . . .” U.S. Supreme Court Justice Anthony Kennedy, Address to the American Bar Association (Aug. 9, 2003), available at <http://www.famm.org/PressRoom/PressKit/Judgesspeakout.aspx>. He added that in the federal criminal justice system, “[o]ur resources are misspent, our punishments too severe, our sentences too long.” *Id.*; see also U.S. Supreme Court Justice William H. Rehnquist, Luncheon Address, (June 18, 1993), in U. S. SENTENCING COMM’N, DRUGS & VIOLENCE IN AMERICA: PROCEEDINGS OF THE INAUGURAL SYMPOSIUM ON CRIME AND PUNISHMENT IN THE UNITED STATES 286–87 (1993) (“These mandatory minimum sentences are perhaps a good example of the law of unintended consequences [T]he mandatory minimums have led to an inordinate increase in the federal prison population and will require huge expenditures to build new prison space Indeed, it seems to me that one of the best arguments against any more mandatory minimums, and perhaps against some of those that we already have, is that they frustrate the careful calibration of sentences, from one end of the spectrum to the other, which the sentencing guidelines were intended to accomplish.”).

this information would be interesting in its own right, given the politics of criminal justice reform, identifying issues that most troubled Republican appointees might help sentencing reformers to prioritize their agenda and formulate proposals on which they might find credible allies.

Second, by excluding Democratic appointees, I hoped to immunize my findings from accusations that they were biased by the views of "liberal, activist" judges. In my opinion, for there to be any movement on sentencing policy, the myth that only "liberal" judges thought pre-*Booker* sentences were too long and discretion too limited must be shattered. The profiles in this Article provide such ammunition.

To the charge that my sample size is too small and too distant in time to be relevant to the current debate, for the broadest issues discussed in this Article—opposition to mandatory minimums, mistreatment of low-level offenders, the need to decrease the role of the quantity component in sentencing calculations, and abusive charging practices—there is significant evidence that the opinions of the profiled judges are within the mainstream of the federal judiciary in this period. This evidence includes the policy positions and reports of the official organs of the judiciary, whose committees were dominated throughout this period by Rehnquist appointees,⁶⁴ as well as by broader surveys of the federal judiciary.⁶⁵

64. See generally Judicial Conference of the United States, www.uscourts.gov/judconf.html (last visited Nov. 30, 2007) (The federal judiciary speaks first through the Judicial Conference. The Chief Justice presides over the Conference whose membership includes the chief judge of each circuit court, the chief judge of the court of international trade and an elected district judge from each regional judicial circuit. Much of the Conferences work is done through a network of committees. The membership of these committees is controlled entirely by the Chief Justice). See Letter from Leonidas Ralph Mecham, Secretary, Judicial Conference, to Honorable Orrin Hatch, Chairman, Comm. on Judiciary (Apr. 3, 2003), available at www.uscourts.gov/judiciary2003/feeneyamendment.pdf; Letter from Sim Lake, Chairman, Comm. on Criminal Law of the Judicial Conference of the United States, to Honorable F. James Sensenbrenner, Jr., Chairman, Comm. on the Judiciary, (Apr. 25, 2005) (on file with author); see also U.S. GEN. ACCOUNTING OFFICE, MANDATORY MINIMUM SENTENCES: ARE THEY BEING IMPOSED AND WHO IS RECEIVING THEM? (Nov. 1993); U.S. SENTENCING COMM'N, SPECIAL REPORT TO CONGRESS: MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM (Aug. 1991) [hereinafter U.S. SENTENCING COMM'N, SPECIAL REPORT]; BARBARA S. MEIERHOEFER, THE GENERAL EFFECT OF MANDATORY MINIMUM PRISON TERMS: A LONGITUDINAL STUDY OF FEDERAL SENTENCES IMPOSED (1992). Prior to the Feeney Amendment in 2002, by statute, a majority of the Commissioners had to be federal judges, balanced by the party of the appointing presi-

With regard to whether my results are still representative of Republican appointees in the post-*Booker* era, I have several responses. First, many of these judges are still sitting. Second, the current Judicial Conference and its committees have remained steadfast since *Booker* in their opposition to mandatory sentencing and any “*Booker* fix” that mimics the inflexibility of the Guidelines.⁶⁶ Third, post-*Booker*, several George W. Bush appointees have written powerful and influential opinions criticizing some of the issues highlighted in Part III, including the crack/powder disparity and prosecutorial “stacking” of fire-

dent. The Commission consistently has recommended that crack penalties be lowered. See U.S. SENTENCING COMM’N, SPECIAL REPORT TO CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY, at G-145, 5(D)(3) (1995), available at <http://www.ussc.gov/crack/chap1-4.pdf>; U.S. SENTENCING COMM’N, SPECIAL REPORT TO CONGRESS: MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM, at 1 (Aug. 1991). I have also collected more than forty additional public statements of Republican appointees from transcripts and speeches, in addition to the judges profiled (which are also available on the website <http://faculty.rwu.edu/dzlotnick/federalsentencingstudy.html>), as well as the additional anonymous interviews I conducted to supplement my case research. To the extent that specific issues, such as “924(c) stacking” did not appear on the radar screen of a majority of Republican appointees during the mandatory Guidelines Era, I would contend this was likely a result of differences in local and federal prosecutorial policy, rather than in an endorsement of such policies by other judges in this cohort.

65. See generally Barbara S. Vincent & Paul J. Hofer, *FJC Report on Mandatory Minimum Penalties: The Consequences of Mandatory Minimum Prison Terms: A Summary of Recent Findings*, 7 FED. SEN’G REP. 33 (1994) (90% of federal and state judges surveyed thought mandatory minimums for drug violations were a bad idea). In 1996, the Federal Judicial Center Survey on sentencing reported that 73% of district and 69% of circuit court judges felt that mandatory guidelines were not necessary to direct the sentencing process, rather most judges favored an advisory guidelines system; additionally, 79% of federal district judges asked, favored the idea of “delinking” the guideline levels from the mandatory minimums. See MOLLY TREADWAY JOHNSON & SCOTT A. GILBERT, THE U.S. SENTENCING GUIDELINES: RESULTS OF THE FEDERAL JUDICIAL CENTER’S 1996 SURVEY (1997); U.S. SENTENCING COMM’N, FIFTEEN YEARS OF GUIDELINES SENTENCING: AN ASSESSMENT OF HOW WELL THE FEDERAL CRIMINAL JUSTICE SYSTEM IS ACHIEVING THE GOALS OF SENTENCING REFORM (2004) [hereinafter FJC SURVEY]; LINDA DRAZGA MAXFIELD, U.S. SENTENCING COMM’N, SURVEY OF ARTICLE III JUDGES ON THE FEDERAL SENTENCING GUIDELINES (Mar. 2003).

66. See Letter from Sim Lake, Chairman, Comm. on Criminal Law of the Judicial Conference of the United States, to Honorable F. James Sensenbrenner, Jr., Chairman, Comm. on the Judiciary (Apr. 25, 2005) (on file with author) (opposing Section 12 of H.R. 1528, which contained Rep. Sensenbrenner’s “Booker fix,” stating “Section 12 does not represent a sound alternative to the present day advisory guideline system, [and] the Judicial Conference strongly opposes this proposal.”). Judge Lake is a Reagan appointee.

arm mandatory minimums,⁶⁷ suggesting that a tectonic shift in this group has not occurred.⁶⁸

More fundamentally, even if one is not persuaded that views of the judges interviewed and profiled for this Article represent the majority view of Republican appointees on sentencing policy, the very existence of a substantial cohort of Republican appointees who were this outraged by sentencing outcomes undermines the conservative drumbeat that discretion has to be curtailed to control liberal, soft-on-crime judges. In fact, for sheer vehemence, some of the rhetoric from these judges is easily on par with statements by the most liberal Democratic appointees. For example, in explaining his inability to depart, Judge Lyle E. Strom (D. Utah), appointed by President Reagan, told a defendant that "I know it's no justification or solace to you, but I am serious when I say this is an outra-

67. In *United States v. Perry*, Judge William Smith criticized the 100:1 crack to powder ratio and reflected "[T]he growing sentiment in the district courts is clear: the advisory Guideline range for crack cocaine based on the 100:1 ratio cannot withstand the scrutiny imposed by the sentencing courts when the § 3553 factors are applied." 389 F. Supp. 2d 278, 307 (D.R.I. 2005); see also *United States v. Angelos*, 345 F. Supp. 2d 1227, 1241-43 (D. Utah 2004) and discussion *infra* pp. 66-68.

68. It is probably fair to say that George W. Bush judges appointed from 2000 to 2005 tended to be slightly more conservative in political outlook, especially in their views on "judicial activism," as well as younger. Given their view of judicial power, and perhaps their own recognition of their relative inexperience both on and off the bench, fewer of these judges seemed willing to speak out publicly against sentencing policy decisions made by the two other branches, and when they did so, their statements and opinions tended to show greater deference to Congress and the President. To the extent that some distinctions can be made by the appointing President, holdover Nixon appointees were probably the most vested in the pre-Guidelines rehabilitative ethos. Some of them had cut their teeth as private and public lawyers in the civil rights era, thus some of these judges may have been protective of judicial power vis-à-vis the other branches. For example, Judge Robert Lee Carter (S.D.N.Y.), a Nixon appointee, had previously served in a number of leadership roles within the NAACP including a stint as General Council from 1956-1968. Federal Judicial Center, <http://www.fjc.gov/servlet/tGetInfo?jid=392> (last visited Nov. 15, 2007). Judges appointed by President George H.W. Bush are also represented in my sample but they are a hard group to characterize, perhaps because this President had to obtain the advice and consent of a Democratic Senate. Certainly, having come into the system with the Guidelines already in place, these judges tended to focus their objections more on specific cases and substantive issues than at the system generally. It is fair to say that some of these judges were considered sentencing moderates and some as conservative by lawyers surveyed by the Almanac of the Federal Judiciary.

geous sentence, and I apologize to you on behalf of the United States Government.”⁶⁹

Moreover, while all the modern Republican Presidents are represented here, the largest cohort in my sample are judges appointed by President Reagan, the first President in the modern era who consciously set about to remake the federal judiciary, and under whose administration the war on drugs began. The fact that so many Reagan judges were fierce opponents of the new mandatory minimums and mandatory Guidelines should shatter the notion that judicial dissatisfaction with the pre-*Booker* world can be attributed to a liberal, power hungry judiciary.⁷⁰

III. REPUBLICAN APPOINTEES IN THE SENTENCING GUIDELINES ERA

This Part begins with a brief overview of what is already generally known about how Republican appointees viewed the pre-*Booker* sentencing regime. This introductory section also briefly clarifies the occasional confusion in judicial statements between the Guidelines and mandatory penalties and reveals

69. See David Zlotnick, Profile of Judge Lyle E. Strom (D. Neb.), <http://faculty.rwu.edu/dzlotnick/profiles/strom.html> (last visited Oct. 14, 2007) [hereinafter Profile of Judge Lyle E. Strom (D. Neb.)]. Similarly, Judge Garnett Thomas Eisele (E.D. Ark.) labeled one guideline sentence “truly tragic.” David Zlotnick, Profile of Judge Garnett Thomas Eisele (E.D. Ark.), <http://faculty.rwu.edu/dzlotnick/profiles/eisele.html> (last visited Oct. 14, 2007) [hereinafter Profile of Judge Eisele (E.D. Ark.)]. During an anonymous interview, another Reagan appointee stated: “I feel like an apparatchik in a totalitarian regime . . .” Mandatory guidelines are “horrid in theory, worse in practice.” Interview with Atlantic Judge 3 (Sept. 6, 2002) (interviewee wishes to remain anonymous). At least one Reagan appointee, Judge John Martin, resigned from the bench in protest over Congressional restrictions on judicial discretion. See Ian Urbina, *New York’s Federal Judges Protest Sentencing Procedures*, N.Y. TIMES, Dec. 8, 2003, at B1. Please note that all interviews were conducted by the author, and all quotations are based on his own notes, which are available on file with the author. In order to protect the wishes of the judges who wish to remain anonymous, their names and the locations of the interviews have been omitted.

70. With the passage of the Guidelines, Reagan judges were being instructed how to sentence in minute detail by Congress and the Sentencing Commission in far-away Washington, clearly contrary to the Reagan Revolution’s anti-Washington rhetoric and federalism themes. In addition, while many of the Reagan era judges describe themselves as tough-on-crime, many if not most were not longtime criminal practitioners or deeply ideological about criminal justice issues before ascending the bench. Lacking the drug warrior mentality that dominated at Main Justice, some of the outcomes in drug and gun cases seemed a foolish waste of both financial and human resources.

how persistent and largely hidden regional differences in federal prosecution policies led to some variation in judicial experiences under the pre-*Booker* regime. The substantial middle of this Part details the main contribution of this Article—an exploration of four specific issues that appear to have provoked the most serious disagreement from Republican appointees in this period: the disparity between crack and powder cocaine, sentences for low-level offenders, life or “virtual life” sentences for more serious, but still non-violent first time drug offenders, and two kinds of firearms cases involving mandatory minimum penalties. Here, I make substantial use of materials from my web-based profiles, as well as providing quotations from my anonymous judicial interviews.

A. *The Roots of Judicial Dissatisfaction with the Pre-Booker Sentencing Regime*

1. Mandatory Minimums and the Guidelines

It is well accepted that judicial opposition to mandatory minimum sentencing was overwhelming during the pre-*Booker* period.⁷¹ Indeed, abolition of mandatory minimum statutes has long been the official position of the federal judiciary, including official organs such as the Judicial Conference’s Criminal Law Committee (whose members were appointed by Chief Justice Rehnquist during the Guidelines Era).⁷² My research suggests that rank and file Republican appointees who did not serve in leadership positions were part of the majority of the federal judges who opposed mandatory minimum sentencing laws.⁷³ Moreover, most Republican judges I interviewed also

71. See Vincent & Hofer, *supra* note 65; see also Anne Gearan, *Supreme Court Justice Says 2 Million Behind Bars Too Many*, DULUTH NEWS TRIB., Apr. 10, 2003, available at 2003 WL 18613878 (reporting on the critical remarks by fellow conservative Supreme Court Justice Anthony M. Kennedy).

72. Both the Judicial Conference and its Criminal Law Committee have been resolute in their opposition to mandatory minimum statutes. See *Mandatory Sentences: Committee on Criminal Law of the Judicial Conference of the United States*, 5 FED. SENT’G REP. 202, 202 (1993) (The Criminal Law Committee declaring “the prime requisite for a workable [sentencing] system is to eliminate the deleterious effects of minimum sentencing mandated by statute.”).

73. See FJC SURVEY, *supra* note 65. Comments from Republican judges interviewed included, “Most judges find mandatory minimums really difficult. There is no need for statutory mandatory minimums.” Interview with Western Judge 3 (Sept. 30, 2002) (interviewee wishes to remain anonymous). “I could live

stated that they saw no need for mandatory penalties because the Guidelines and appellate review were sufficient to guard against excesses in judicial discretion.⁷⁴

In fact, during the research for my study, only one Republican appointee defended mandatory minimums, but even that judge acknowledged that his position was more a recognition of Congress's power to set punishment than an assessment of their efficacy.⁷⁵ In contrast, every other Republican judge interviewed or profiled for this study said that they had personally imposed at least one mandatory minimum sentence (and sometimes many) that was unnecessary and unjust.

In addition, the majority of Republican appointees I interviewed would have preferred voluntary guidelines or at least mandatory guidelines with greater room for downward departures.⁷⁶ Republican appointees often also agreed with their

with the Guidelines if Congress did away with mandatory minimums." Interview with Midwestern Judge 2 (Oct. 28, 2002) (interviewee wishes to remain anonymous).

74. Some also noted that mandatory minimum statutes distorted the proper functioning of the Guidelines. One judge asked, "[w]hy do we need mandatory minimums if we have guidelines?" Interview with Southern Judge 1 (Sept. 4, 2002) (interviewee wishes to remain anonymous); see also Vincent & Hofer, *supra* note 65, at 33 ("[M]andatory minimums have influenced, and some would say distorted, the guidelines and thus the entire federal sentencing structure"); Henry Scott Wallace, *Mandatory Minimums and the Betrayal of Sentencing Reform: A Legislative Dr. Jekyll and Mr. Hyde*, 40 FED. B. NEWS & J. 158 (1993) ("th[e] calibration of minimum sentences . . . has corrupted the entire federal sentencing system."). When pressed in interviews about whether any mandatory minimums made sense, for example, for first-degree premeditated murder, the general response was that because every judge would punish first-degree murderers at or near the maximum allowed anyway, mandatory minimums for serious violent crimes were unnecessary.

75. See Letter to David M. Zlotnick, Professor of Law, Roger Williams University of Law, from Judge Paul R. Matia, Northern District of Ohio (July 23, 1998) (on file with author). Judge Matia indicated that the "right to determine what . . . the penalty for [criminal] acts should be, belongs to the people, acting through their duly elected representatives in our republican form of government." *Id.* He "never had a case in which a mandatory minimum sentence troubled [him]." *Id.*

76. The judicial reaction to the Guidelines and mandatory minimums in the pre-*Booker* era was probably the result of the relationship between judicial discretion and sentencing severity. Thus, while it is fair to say that there has been a strong judicial consensus that Congress has taken too much sentencing discretion from judges, there is real disagreement over how much discretion judges actually need. Second, while many federal judges also believed that many post-1986 sentences were more severe than necessary, there again was a wide difference on the scope of this problem. However, what largely united the judiciary in this period was that the combination of less discretion coupled with higher penalties created too great a potential for an unjust sentencing outcome that they were powerless to affect. However, judges did not always express their disagreement with a sen-

Democratic counterparts that the Sentencing Guidelines, as written, were too complex and inflexible and had their own significant problems, both structurally and with regard to specific offenses.⁷⁷ However, because many judges were unhappy with both the Guidelines and mandatory minimums, their statements in sentencing transcripts and speeches often refer to them interchangeably. In addition, because the Guidelines and the drug and gun mandatory minimum penalties became effective in the same general time frame, and because the drug Guidelines were for all practical purposes pegged to the mandatory minimums, it is sometimes hard to separate out whether a judge's complaint about a sentence in a case is the result of a mandatory minimum or from the operation of the Guidelines. For this reason, the profiles discussed in this Part attempt to tease out in each case whether a particular sentence objected to was the result of a mandatory minimum, a Guideline provision, or a combination of both, even if the judges did not do so, to enable sentencing reformers to determine how to best address these judicial complaints.

Lastly, while this Part is organized by issue, there is an important historical aspect to the judicial response to the pre-*Booker* sentencing regime that is beyond the scope of this Article. In briefest summary, the initial judicial reaction to the Sentencing Guidelines and the new mandatory minimums was

tencing outcome in these terms. Rather, many referred either to the discretion issue or the severity problem, without noting that it is really a combination of both that has hamstrung their sense of fairness. In addition, there were also areas where some judges, both Democratic and Republican appointees, believed federal penalties were too light. The most common complaint, pre-Sarbanes-Oxley, was that white collar penalties were too lenient. In addition, in areas such as Indian Country where federal prosecutors also handle crimes usually prosecuted in the state courts, some judges complained that the Guideline penalties for sexual abuse crimes were too low, particularly when compared to drug offense penalties. Interview with Southwestern Border State Judge 1 (Sept. 30, 2002) (interviewee wishes to remain anonymous).

77. For example, on the Guidelines, one Republican judge noted that "[t]he present regime requires micro findings and is unduly cumbersome." Interview with Atlantic Judge 2 (Oct. 15, 2002) (interviewee wishes to remain anonymous). In particular, the mandatory use of acquitted conduct was singled out as philosophically unfair. One profile in particular in my study demonstrates this issue. See David Zlotnick, Profile of Judge Ira DeMent (M.D. Ala.), <http://faculty.rwu.edu/dzlotnick/profiles/dement.html> (last visited Oct. 14, 2007) [hereinafter Profile of Judge Ira DeMent]; see also Freed, Daniel J., *Reforming the Commission: Internal Rules and Revised Guidelines*, 9 FED. SENT'G REP. 64, 65 (1996) (noting that in a 1996 survey, fewer than 20% of district judges and probation officers thought acquitted conduct should be considered at sentencing).

overwhelmingly negative.⁷⁸ However, the federal judiciary's opposition to the Guidelines softened over time. The softening process involved a variety of factors too extensive to fully discuss in this Article, but certainly included the following: judges learning "to live with" the Guidelines,⁷⁹ new judges without pre-Guidelines experience more readily accepting the existing regime,⁸⁰ legislation and Guideline amendments that ameliorated some judicial complaints,⁸¹ and moderation of Justice

78. See, e.g., Cynthia K.Y. Lee, *A New "Sliding Scale of Deference" Approach to Abuse of Discretion: Appellate Review of District Court Departures Under the Federal Sentencing Guidelines*, 35 AM. CRIM. L. REV. 1, 3 (1997); Tracey Thompson, *Applying a Formula to Justice: Sentencing Rules Limit Judicial Discretion*, WASH. POST, June 12, 1989, at A1 (Reporting sentencing reform "drew immediate opposition from judges, who saw it as an intrusion by the executive branch into the judicial domain."). Approximately two hundred judges even held that the Sentencing Guidelines were unconstitutional as a violation of the separation of powers doctrine. See, e.g., *Gubiensio-Ortiz v. Kanahale*, 857 F.2d 1245 (9th Cir. 1988). In 1989, however, the Supreme Court reversed these lower court decisions and upheld the constitutionality of the Guidelines in *Mistretta v. United States*, 488 U.S. 361 (1989).

79. When the judiciary realized that it would have to live with this system, many judges set about to understand how it worked, and to some extent, to test the limits of their discretion with this framework. Judicial downward departures, which had been relatively few in the first years, then rose to 8.4% by 1995. See U.S. SENTENCING COMM'N, ANNUAL REPORT (1995), available at <http://www.ussc.gov/ANNRPT/1995/ANNUAL95.htm>.

80. In some percentage of cases as well, the scope of which is subject to significant disagreement, there were judges who obtained outcomes more to their liking by manipulating Guidelines calculations, or by browbeating prosecutors into more lenient plea offers, or by making other rulings adverse to the government. Bowman and Heise make a persuasive argument that given the ability of prosecutors to appeal, most cases of "manipulation" of the Guidelines were an exercise in which judges, prosecutors, and defense lawyers were complicit, based on their joint assessment that the a lesser sentence was appropriate. See Frank O. Bowman III & Michael Heise, *Quiet Rebellion II: An Empirical Analysis of Declining Federal Drug Sentences Including Data from the District Level*, 87 IOWA L. REV. 477, 528-29 (2002). I have argued that in some cases, judges, probation officers, and defense attorneys took the time and initiative to conduct a more thorough investigation of the case and the defendant's background which produced defensible grounds for a departure. See Zlotnick, *Shouting into the Wind: District Court Judges and Federal Sentencing Policy*, *supra* note 6, at 668-69.

81. See The Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 80001, 108 Stat. 1796, 1985 (1994) (codified at 18 U.S.C. § 3553(f) (1994 & Supp. II 1996), reprinted in U.S. SENTENCING GUIDELINES MANUAL § 5C1.2 (2006)) (creating the safety-valve, discussed *infra* pp. 38-42); U.S. SENTENCING GUIDELINES MANUAL app. C, amend. 459 (2006) (amended Nov. 1, 1992) (allowing additional Guideline reduction for early plea); *Id.* amend. 488 (amended Nov. 1, 1993) (amending the manner in which LSD is weighed for sentencing purposes); *Id.* amend. 503 (amended Nov. 1, 1994) (limiting relevant conduct to quantities transacted after a defendant joined a conspiracy); *Id.* amend. 505 (amended Nov. 1, 1994) (capping the drug table at Level 38 to prevent life

Department prosecutorial policies during the Clinton presidency.⁸² However, the pendulum swung back in 2002, with more rigid prosecutorial policies by the Bush Administration and other high profile conflicts with the federal judiciary.⁸³

2. Over-Federalization of Crime

My research suggests that over-federalization of crime was another root cause of Republican appointee dissatisfaction with the pre-*Booker* sentencing regime.⁸⁴ As lifelong Republicans, most were quick to champion federalism and states' rights. Thus, federal prosecutions of small-time drug and gun crimes were often seen by them as an unwarranted invasion into the domain of the states' criminal justice systems. One Republican appointee argued that the combination of overlapping jurisdic-

sentences based solely on quantity); *Id.* amend. 516 (amended Nov. 1, 1995) (amending the manner in which marijuana plants are counted). There was also a little help from the Supreme Court. See *United States v. Koon*, 517 U.S. 1234 (1996) (adopting more lenient standard of review for downward departures).

82. Under Attorney General Reno, plea agreements could now be based on "an individualized assessment of the extent to which particular charges fit the specific circumstances of the cases." Memorandum from Janet Reno, Attorney Gen., to United States Attorneys and Litigating Divisions, Principles of Federal Prosecution (Oct. 12, 1993) (on file with author) (more commonly known as the "Reno Blue Sheet").

83. The most significant conflict with the federal judiciary involved the 2002 Feeney Amendment which placed additional restraints on the already narrowly circumscribed downward departures and instituted new "depart and tell" reporting provisions, which some judges feared were an attempt to intimidate them from departing. See Zlotnick, *The War Within the War on Crime*, *supra* note 6 (discussing the controversy over the Feeney Amendment and the judicial reaction to this bill); see also Mark Hamblett, *Federal Judges Attack Sentencing Restrictions: Judicial Conference Calls for Feeney Amendment Repeal*, N.Y.L.J., Sept. 24, 2003, at 1, col. 1. The second Bush administration also reversed directions on charging discretion and revoked the Reno Blue Sheet. See Memorandum from John Ashcroft, Attorney Gen., to All Federal Prosecutors (Sept. 22, 2003) (which again required pleas to the most severe charge in the indictment and otherwise attempted to end charge and fact bargaining by prosecutors). The battle over Terry Schiavo's health care was also a flashpoint between the federal judiciary and the Congress in this period. See Mike Allen, *Delay Wants Panel to Review Role of Courts: Democrats Criticize His Attack on Judges*, WASH. POST, Apr. 2, 2005, at A9 (reporting that House Majority Leader Tom DeLay said that "the time will come for the men responsible for this to answer for their behavior," after the refusal of several federal courts to interfere with the Florida judicial system's decisions in the Terry Schiavo case).

84. See Edwin A. Meese, *Putting the Federal Judiciary Back on the Constitutional Track*, 14 GA. ST. U. L. REV. 781, 793 (1998) (suggesting that an effective way to limit judicial activism is for Congress to limit the federalization of crime and federal jurisdiction in general).

tion and tougher, federal penalties “distorted the market” for prosecution, driving too many cases into federal court because law enforcement quite naturally sought “a higher return.”⁸⁵ A western Republican appointee went so far as to state that all the drug cases he had seen so far belonged in state court, as did fifty percent of the felon-in-possession gun cases.⁸⁶ Some judges were also concerned about disparity issues, noting that defendants prosecuted in state court for essentially the same offenses received very different sentences.⁸⁷

The federalism complaint was fueled in part by the dramatic increase in both absolute numbers and the percentage of the federal docket taken up by drug and gun cases in the Guidelines Era.⁸⁸ In fact, in certain districts, federal district court practice came to look like a busy urban superior court, grinding out dispositions with little individualized attention. One judge in a busy border state noted that on some days, he might take sixty guilty pleas in minor drug and immigration cases, forcing a “gang plea” situation with multiple defendants pleading at once.⁸⁹

These judges were also critical of the process of federalization, recognizing that congressional action was often motivated by a highly publicized crime or crimes, rather than by deliberate study and consideration.⁹⁰ In this vein, one judge noted

85. Interview with Atlantic Judge 3 (Oct. 11, 2002) (interviewee wishes to remain anonymous).

86. Interview with Western Judge 1 (Sept. 30, 2002) (interviewee wishes to remain anonymous).

87. Profile of Judge Lyle E. Strom, *supra* note 69 (recognizing that defendant's brother and another co-defendant were prosecuted in state court and received significantly less time).

88. Drug case filings increased 65% from 1994 to 2001, surging to more than 80,000 cases per year. Similarly, firearms cases increased exponentially with an 83% increase from 1997 to 2001. OFFICE OF HUMAN RESOURCES AND STATISTICS, ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, FEDERAL JUDICIAL CASELOAD: RECENT TRENDS 8 (2001). In comparison, from 1989 to 1998, the number of criminal filings increased, but only by 25% in all categories combined. See PATRICK WALKER & PRAGATI PATRICK, ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, TRENDS IN FIREARMS CASES FROM FISCAL YEAR 1989 AND THE WORKLOAD IMPLICATIONS FOR THE U.S. DISTRICT COURTS (2000), available at <http://www.uscourts.gov/firearms/firearms00.html>; see also Frank O. Bowman, *The Year of Jubilee . . . or Maybe Not: Some Preliminary Observations about the Operation of the Federal Sentencing System After Booker*, 43 HOUS. L. REV. 279 (2006).

89. Interview with Western Judge 5 (Oct. 2, 2002) (interviewee wishes to remain anonymous).

90. Congress federalized a variety of other offenses, such as carjacking and child pornography, and added mandatory penalties to some of these crimes. Some

that he thought the carjacking statute was an absurdity.⁹¹ Another claimed more broadly that because of federalization, the federal criminal justice system was so overwhelmed that it "is sliding down the edge of a razor."⁹²

Surprisingly, drug warrior fatigue also showed up in some of the interviews. While most Republican appointees still voiced their commitment to tough narcotics enforcement (though not to the severity of sentencing laws), there was a recognition by some that federal intervention seemed to have no impact on the drug culture and willingness of young men, especially minorities, to engage in drug trafficking. For example, Judge Matsch (D. Colo.), after being required to impose a thirty-year sentence on a first-time offender stated, "[T]he purpose of [the sentence], as I've already indicated, is to try to warn other people away from it, principally, and I've sentenced a lot of people and more keep coming. So I don't know. But that's what I must do here."⁹³

of the sentences in these cases also troubled individual judges. See Benjamin Weiser, *A Judge's Struggle to Avoid Imposing a Penalty He Hated*, N.Y. TIMES, Jan. 13, 2004, at A1. More recently, the wave of corporate scandals resulted in legislative directives to increase the Guideline penalties for white-collar criminals in the Sarbanes-Oxley bill. See Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, §§ 805, 905, 1104, 116 Stat. 745 (2002) (directing the Sentencing Commission to increase the Guidelines; imposing higher penalties for white-collar offenders based on a variety of factors). This has recently produced some long white-collar sentences, such as that of WorldCom Founder Bernard Ebbers, who received a twenty five year sentence. See Peter J. Henning, *White Collar Crime Sentences After Booker: Was the Sentencing of Bernie Ebbers Too Harsh?*, 37 MCGEORGE L. REV. 757 (2006). Nevertheless, it is fair to say that the story of judicial dissatisfaction during the mandatory Guidelines Era was largely driven by the penalties, both mandatory and under the Guidelines, for drug and gun cases.

91. Interview with Western Judge 1, *supra* note 86. Carjacking was federalized pursuant to 18 U.S.C. § 2119 (2000). The statute was passed following public outcry when a Maryland woman was killed in the course of a carjacking. See William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 532 (2001-2002) (noting that car jackings are rare but that the bill was a "politically valuable symbolic statement to voters.").

92. Interview with Atlantic Judge 3 (Sept. 6, 2002) (interviewee wishes to remain anonymous). On the other side of the coin, judicial critics have asserted that judicial opposition to the growth of the federal criminal docket is rooted not in federalism, but in resentment against an increased workload and an elitist attitude about the business of the federal courts. At least one judge interviewed for this study made comments that sounded in this theme, stating that "federal court was a special place," and therefore "there should be a very good reason for a drug case to be in federal court." Interview with Southern Judge 3 (Nov. 2, 2002) (interviewee wishes to remain anonymous).

93. See David Zlotnick, Profile of Judge Richard P. Matsch (D. Colo.), <http://faculty.rwu.edu/dzlotnick/profiles/matsch.html> (last visited Oct. 14, 2007).

However, the degree of concern about over-federalization of crime seemed to depend heavily on the policies and priorities of the local United States Attorney's Office in each federal judicial district. While ostensibly controlled by the Justice Department, in reality local U.S. Attorney's Offices had enough independence during the Sentencing Guidelines Era to shape very different sentencing environments within which judges had to operate.⁹⁴ For example, studies have shown wide variations in the willingness of U.S. Attorney's Offices to accept cases for federal prosecution, with some taking virtually every drug case brought to them and other offices declining federal prosecution unless a higher threshold quantity of narcotics was involved.⁹⁵ Similarly, inter-district variations in federal prosecutors' willingness to make substantial assistance motions directly impacted the number of defendants who faced mandatory mini-

A few Republican appointees gravitated to an even more radical stance, especially with regard to "soft drugs" such as marijuana. One southern Republican judge, in an area that saw a fair amount of cultivation cases said "[m]arijuana is a fact of life and we should recognize it. It's no more serious than a martini and one can't say anymore that it's a stepping stone [to more expensive drugs] because crack is so cheap in [city omitted]." Interview with Southern Judge 1 (Sept. 4, 2002) (interviewee wishes to remain anonymous). Another argued that all marijuana cases should be handled in state court as well as the "out the back door" cases. Interview with Western Judge 1, *supra* note 86. Sounding much like a liberal drug reformer, this judge also contended that the war on drugs should be more about avoiding drug use than fighting drug sales. On the other hand, many other Republican appointee statements about the war on drugs tend to be more nuanced and sometimes self-conflicting. Republican appointees expressed ambivalence about the competence of state courts to address the drug and gun epidemic. These judges frequently noted that state courts were under-funded and ill-equipped to deal with the war on crime by themselves, and hence needed federal assistance. "State courts are in a state of collapse, are under-funded and staffed. They cannot deal with the fallout of the drug culture." Interview with Atlantic Judge 3, *supra* note 92. They also were frequently resentful that state courts were not tough enough on drug offenders, with one judge arguing that "inefficiency of state courts" was not a good reason to bring a drug case to federal court. Interview with Southern Judge 3, *supra* note 92.

94. The persistence of regionalism in the federal criminal justice system should not be surprising. Most federal prosecutors and judges had their start in the local system and do not discard local values and practices overnight. For example, gun cases are often dealt with more seriously in urban areas in comparison to rural and Western states that have a tradition of personal gun ownership. While several administrations, including the current one, have attempted to rein in these offices, local federal prosecutors still have a large degree of autonomy and have shown varying degrees of fealty to new Justice Department policies. See Ian Weinstein, Symposium, *The Historical Roots of Regional Sentencing Variation*, 11 ROGER WILLIAMS U. L. REV. 495 (2006).

95. Zlotnick, *Shouting into the Wind: District Court Judges and Federal Sentencing Policy*, *supra* note 6, at 673.

mum sentences. Other regional differences flowed from differences in crime patterns and jurisdictional anomalies.⁹⁶ Examples include the flood of drug and immigration cases in the border states and the higher percentage of violent crime on the criminal docket in the federal districts that have jurisdiction over traditional crimes of violence committed within tribal boundaries.⁹⁷ Thus, this Part also tries to note where regionalism issues and the policies of local U.S. Attorney's affected the consistency of my findings on each of the specific issues discussed herein.

B. Specific Areas of Concern for Republican Appointees

1. The Special Case of Crack Cocaine

There is ample evidence that a majority of the federal judiciary has long believed that sentences for crack cocaine are too severe in comparison to other drug offenses, most particularly powder cocaine. The Sentencing Commission has issued reports on this issue four times and twice recommended that Congress lower the mandatory minimums for crack. In 2007, the Commission passed an amendment, effective November 1, 2007, that lowers the offense level for crack offenses by two points.

In September 2006, the Judicial Conference voted in favor of a recommendation from its Criminal Law Committee that the disparity between crack and powder cocaine be remedied.⁹⁸ In addition, many individual judges have also spoken out about the excessiveness of crack penalties and their disparate racial

96. Even the same statutory offense can look very different depending on the location. For example, drug cases in border states tend to consist of courier cases involving large amounts of drugs possessed by low-level operatives. In the inner cities, drug cases tend to involve more retail and intermediate wholesale.

97. Technically speaking, criminal jurisdiction over Indian Country is shared between the federal government and tribal governments. See Kevin K. Washburn, *Tribal Courts and Federal Sentencing*, 36 ARIZ. ST. L.J. 403, 405 (2004). However, Congress has conferred jurisdiction in Indian Country on the federal courts over many violent crimes, such as rape and murder, which ordinarily would not fall to federal jurisdiction. See *id.*; see also Major Crimes Act, 18 U.S.C. § 1153 (2000); Indian Crimes Act, 18 U.S.C. § 1151 (2000).

98. That Committee is now chaired by Judge Paul Cassell (D. Utah), a well-known conservative academic and now judge. See *infra* pp. 66–67.

impact.⁹⁹ For example, in September 1997, twenty-eight former United States Attorneys, now federal circuit and district court judges, signed a joint letter addressed to the Chairmen of the House and Senate Judiciary Committees asserting their belief that “the current disparity between powder cocaine and crack cocaine, in both the mandatory minimum statutes and the guidelines, can not be justified and results in sentences that are unjust and do not serve society’s interest.”¹⁰⁰ The letter went on to add that the solution was not to raise penalties for powder because, the judges wrote, these sentences are already “severe.”¹⁰¹ These judges were appointed by every President between Nixon and Clinton and included fourteen Republican appointees.¹⁰²

My research suggests that the Republican signatories of the 1997 former U.S. Attorneys’ letter fairly represent the majority view of Republican appointees on this issue, although there may be a substantial contingent whose sentiment is that crack penalties should still be somewhat higher than for powder cocaine.¹⁰³ For example, other Republican appointees have

99. See David Zlotnick, Profile of Judge William M. Nickerson (D. Md.), <http://faculty.rwu.edu/dzlotnick/profiles/nickerson.html> (last visited Oct. 14, 2006) [hereinafter Profile of Judge Nickerson (D. Md.)]. Public commentary by judges about crack continues to this day. For example, Judge Reggie B. Walton (D. D.C.), a Bush II appointee who served as the Associate Director of the Office of Drug Control Policy under Bush I, recently criticized the sentencing disparity as “unconscionable.” Matt Apuzzo, *Are Drug Penalties Unfair?: Crack Sentences ‘Unconscionable,’ Judge Says*, CHI. SUN-TIMES, Nov. 15, 2006, at 36.

100. 1997 Statement on Powder and Crack Cocaine to the Senate and House Judiciary Committees, *reprinted in* 10 FED. SENT’G REP. 194, 194–95 (1997–1998). The same letter was resubmitted to the Sentencing Commission for its 2002 hearings on the issue with twenty-eight judges signing on. See Statement to the United States Sentencing Commission Concerning the Penalties for Powder and Crack Cocaine Violations, submitted by Certain United States Circuit Court of Appeals and District Court Judges Who Previously Served as United States Attorneys (Apr. 15, 2002), available at http://www.ussc.gov/r_congress/02crack/ch1.pdf. (on file with author).

101. See Statement on Powder and Crack Cocaine, *supra* note 100.

102. The judges who signed the 1997 letter are as follows: Michael Daly Hawkins, Boyce F. Martin, Jr., Gilbert S. Merritt, Jon. O. Newman, Raymond L. Acosta, Sarah Evans Barker, Walter E. Black, Jr., Catherine C. Blake, Clarence A. Brimmer, Robert J. Cindrich, John T. Curtin, Glen H. Davidson, Raymond J. Dearie, Gustave Diamond, Peter C. Dorsey, John Hannah, Jr., William W. Justice, William C. Lee, William T. Moore, Frederick J. Motz, Alan H. Nevas, Manuel L. Real, James M. Rosenbaum, Barefoot Sanders, Fred J. Scullin, Jr., Donald E. Walter, Rodney S. Webb, George E. Woods. See Statement on Powder and Crack Cocaine, *supra* note 100.

103. See *infra* Part IV.C.1.

stated that the crack penalties constitute a “grave injustice”¹⁰⁴ and that the crack/powder disparity is “completely unacceptable,”¹⁰⁵ and a “discrepancy that has no basis in fact.”¹⁰⁶

One example is the case of William Gaines, sentenced by Judge Robin Cauthron (W.D. Okla., a President George H.W. Bush appointee).¹⁰⁷ Even according to the government’s version of the offense, William was not a central figure in the Oklahoma City cocaine ring that resulted in a twenty-nine count indictment against twelve individuals in 1994. William was charged in only two counts: a broad conspiracy count and a distribution count.¹⁰⁸ The government contended that William had two roles in the conspiracy, as a “cook and cook trainer”

104. Interview with Midwestern Judge 1 (Nov. 26, 2002) (interviewee wishes to remain anonymous).

105. Interview with Western Judge 4 (Oct. 17, 2002) (interviewee wishes to remain anonymous).

106. Interview with Midwestern Judge 2 (Oct. 28, 2002) (interviewee wishes to remain anonymous).

107. See David Zlotnick, Profile of Judge Robin Cauthron (W.D. Okla.), <http://faculty.rwu.edu/dzlotnick/profiles/cauthron.html> (last visited Oct. 14, 2007) [hereinafter Profile of Judge Cauthron (W.D. Okla.)]. For additional crack cocaine cases, see David Zlotnick, Profile of Judge Joseph F. Anderson, Jr. (D. S.C.), <http://faculty.rwu.edu/dzlotnick/profiles/anderson.html> (last visited Oct. 14, 2007); David Zlotnick, Profile of Judge Sharon Lovelace Blackburn (N.D. Ala.), <http://faculty.rwu.edu/dzlotnick/profiles/blackburn.html> (last visited Oct. 14, 2007); David Zlotnick, Profile of Judge Charles R. Butler, Jr. (S.D. Ala.), <http://faculty.rwu.edu/dzlotnick/profiles/butler.html> (last visited Oct. 14, 2007); David Zlotnick, Profile of Judge Ira DeMent (M.D. Ala.), <http://faculty.rwu.edu/dzlotnick/profiles/dement.html> (last visited Oct. 14, 2007); David Zlotnick, Profile of Judge Marilyn L. Huff (S.D. Cal.), <http://faculty.rwu.edu/dzlotnick/profiles/huff.html> (last visited Oct. 14, 2007); David Zlotnick, Profile of Judge Alex Kozinski (9th Cir.), <http://faculty.rwu.edu/dzlotnick/profiles/kozinski.html> (last visited Oct. 14, 2007) [hereinafter Profile of Judge Kozinski (9th Cir.)]; Profile of Judge Nickerson (D. Md.), *supra* note 99; David Zlotnick, Profile of Judge Phillip Reinhard (N.D. Ill.), <http://faculty.rwu.edu/dzlotnick/profiles/reinhard.html> (last visited Oct. 14, 2007); David Zlotnick, Profile of Judge James M. Rosenbaum (D. Minn.), <http://faculty.rwu.edu/dzlotnick/profiles/rosenbaum.html> (last visited Oct. 14, 2007); David Zlotnick, Profile of Judge Sam Sparks (W.D. Tex.), <http://faculty.rwu.edu/dzlotnick/profiles/sparks.html> (last visited Oct. 14, 2007); David Zlotnick, Profile of Judge Lyle E. Strom (D. Neb.), *supra* note 69; David Zlotnick, Profile of Judge Clyde Roger Vinson (N.D. Fla.), <http://faculty.rwu.edu/dzlotnick/profiles/vinson.html> (last visited Oct. 14, 2007); Profile of Judge Richard W. Vollmer, Jr. (S.D. Ala.), <http://faculty.rwu.edu/dzlotnick/profiles/vollmer.html> (last visited Oct. 14, 2007); David Zlotnick, Profile of Judge Samuel G. Wilson (W.D. Va.), <http://faculty.rwu.edu/dzlotnick/profiles/wilson.html> (last visited Oct. 14, 2007).

108. See Profile of Judge Cauthron (W.D. Okla.), *supra* note 107.

and as a distributor of small quantities of crack.¹⁰⁹ While William admitted that he occasionally sold marijuana to support his family, he denied being part of this cocaine distribution organization. However, based on audio recordings and the testimony of several co-conspirators, William was found guilty.

He was sentenced to 292 months despite being a first offender, in part, because the conspiracy was alleged to have trafficked approximately 10.6 kilograms of crack, which was assessed as relevant conduct against William. At the sentencing hearing, Judge Cauthron recognized that the sentence seemed disproportionate to the offense and the offender, but she asserted that there was nothing that she could do about it. She told William's defense attorney,

[M]any of your arguments are valid ones in specific given cases. There are times when the [G]uidelines do not result in fairness or equity. It is of concern to me any time someone with no criminal history can face exposure as high as Mr. Gaines does based on a first conviction. But, in any event, the guidelines are the law and they have been found to be constitutional and the way to change them is through the political process. . . . I am committed by an oath of office to follow the law and the guidelines are the law.¹¹⁰

It also seems fairly certain that William obtained very little profit from the operation, as demonstrated by the fact that at the time of his arrest he was holding down a job as a janitor, which paid \$6.25 per hour.¹¹¹ William's sentence seems even more unfair when compared to the sentences of his more culpable co-defendants who cooperated and testified against William and others.¹¹² For example, Ramon Cartznes, the Mexican connection and the wholesaler who provided virtually all the crack and powder for a period of time, received only a seventy-two-month sentence.¹¹³

109. The government presented testimony that a leader of the group asked William to show someone else how to cook powder cocaine into crack. The process of making crack cocaine can be easily found on the Internet. See *How Do People Make Crack and Freebase Cocaine*, <http://www.a1b2c3.com/drugs/coc05.htm> (last visited Oct. 17, 2007).

110. Profile of Judge Cauthron (W.D. Okla.), *supra* note 107.

111. See *id.*

112. See *id.*

113. Morris Johnson, who at least for a time was the number three person in the organization, was sentenced to 120 months. Floyd Bush and Charles Watson, who testified against William, got 120 months despite their acknowledged roles as

Interestingly, while many commentators have focused on the racial impact of crack sentences,¹¹⁴ Republican appointees seemed to be mostly concerned with proportionality. Particularly for small-time figures like William, meting out crack sentences that far exceeded the penalties imposed for armed robbers, rapists, and even some murderers troubled these judges.¹¹⁵ Moreover, while Congress claimed that the mandatory minimums were intended to apply to kingpins and importers, it is well understood that cocaine is imported into the United States as powder and is only converted to crack at the end of the retail chain.¹¹⁶ Thus, the real kingpins and importers are subjected to a much less severe penalty structure than the small-time dealers and addicts who deal in small quantities of crack.¹¹⁷ For the judges who had to impose these penalties, there was something perverse about punishing the smallest fish in the distribution chain the most severely.¹¹⁸

2. Low-Level Offenders—Girlfriends, Junkies & Couriers

In sentencing low-level offenders, Republican appointees came face-to-face with the absurdities of the 1986 Act's manda-

steady distributors for the organization in Oklahoma City. Three of those convicted along with William were given more severe sentences: Timothy Johnson, 410 months; Kevin Johnson, 292 months; and Nick Owens, 360 months (remanded for resentencing). *Id.*

114. See U.S. SENTENCING COMM'N, SPECIAL REPORT TO CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY 154 (1995) ("The 100-to-1 [crack/powder disparity] is a primary cause of the growing disparity between sentences for Black and White federal defendants.").

115. See Profile of Judge Kozinski (9th Cir.), *supra* note 107; Profile of Judge Richard W. Vollmer, Jr. (S.D. Ala.), *supra* note 107. One western Republican judge stated that "generally speaking," the Guidelines were too severe for non-violent offenders and not severe enough for violent offenders. He noted that some sex crimes carried less time than drug courier offenses. Interview with Western Judge 3, *supra* note 73; see also Profile of Judge Joseph F. Anderson, Jr. (D. S.C.), *supra* note 107; Profile of Judge Sharon Lovelace Blackburn, *supra* note 107.

116. *Mandatory Minimum Sentencing Laws: Hearing Before the S. Comm. on Crime, Terrorism and Homeland Security, Comm. on the Judiciary*, 112th Cong. 8 (2007) (statement of Eric E. Sterling, President, The Criminal Justice Policy Found.).

117. Mark A. Adams, *The Federal Sentencing Guidelines as Legal Process Jurisprudence*, 31 AM. CRIM. L. REV. 259, 260 n.5 (1994).

118. One Atlantic judge observed he has yet to see a kingpin in his court, instead he dealt mostly with dealers who controlled only a few blocks and nevertheless ended up being sentenced to 300–400 months. Interview with Atlantic Judge 3 (Sept. 6, 2002) (interviewee wishes to remain anonymous).

tory minimum quantity triggers and the Guidelines' real offense approach to relevant conduct: as one Mid-Atlantic Reagan appointee put it: "Quantity shouldn't mandate result."¹¹⁹ Another Republican appointee looked at the problem more philosophically, arguing that the Guidelines failed to sufficiently individualize punishment. This judge was very direct about her desire to "look at the whole person and not hold a ghetto dealer to the same standard as a bank president." But she noted, "Congress worried about empathy, so it tied judges' hands."¹²⁰

Quantity and culpability collided most often for Republican appointees in cases that involved three types of low-level offenders—those who became involved as romantic partners, through substance abuse, or as drug couriers working for minimal remuneration. Because of their prevalence, these three categories are discussed in more detail in this section. However, several other types of low-level offenders were also sometimes mentioned by these judges including very young and older defendants,¹²¹ law enforcement and prison guards convicted of assaultive conduct on their charges,¹²² and immigration sentences for non-violent offenders, with some judges arguing that since these defendants were going to be deported anyway, the government should shorten their sentences to save money.¹²³

119. Interview with Atlantic Judge 2, *supra* note 77.

120. Interview with Midwestern Judge 1 (Nov. 26, 2002) (interviewee wishes to remain anonymous).

121. See David Zlotnick, Profile Judge James C. Fox (E.D. N.C.), <http://faculty.rwu.edu/dzlotnick/profiles/fox.html> (last visited Oct. 17, 2007) (very young defendant); Profile of Judge Marilyn Huff (S.D. Cal.), *supra* note 107 (older defendant); David Zlotnick, Profile of Judge Hector M. Lafitte (D. P.R.), <http://faculty.rwu.edu/dzlotnick/profiles/lafitte.html> (last visited Oct. 17, 2007) (young crack defendant).

122. One Bush II appointee who presided over such a case stated he felt the inmate created a risk of harm, but that guards did not stop beating him so they were guilty of the crime. *Id.* Still, he felt their behavior "was aberrant and deserved less time," even if the Guidelines rules did not allow a departure under the circumstances. Interview with Western Judge 2 (Oct. 2, 2002) (interviewee wishes to remain anonymous).

123. One western judge noted that prison sentences seemed to do little to deter illegal immigration and at great cost to the government. Interview with Western Judge 1, *supra* note 86. However, these concerns seem restricted to border states which saw a lot of these cases and hence did not appear to necessarily constitute a national theme.

a. *The "Girlfriend" Cases*

Of all the low-level offender cases, the so-called "girlfriend" cases seemed to bother Republican appointees the most. Generally, these female defendants had a minor role in the offense. They may have taken messages, stored drugs, assisted in transport, or sometimes engaged in small quantity sales activity. However, they rarely made a substantial profit and their primary motivation for criminal conduct was their relationship with a man who was a drug dealer. Moreover, even if the quantity of drugs in the conspiracy was reasonably foreseeable to them, they rarely had any influence over the scope of the operation. One judge commented that the Guideline's focus on drug quantity made no sense in these cases because the women defendants are only there because "they are follow[ing] a man around."¹²⁴ In the most troubling examples, the male defendant was able to negotiate a cooperation agreement and lesser sentence precisely because his larger role made him valuable to the government, while his female partner—out of fear, loyalty, or ignorance—could not make a similar deal.¹²⁵

124. Interview with Southern Judge 1 (Sept. 4, 2002) (interviewee wishes to remain anonymous); see also Profile of Judge Sam Sparks (W.D. Tex.), *supra* note 107. Another stated that it is hard to disregard things the Guidelines tell judges to ignore like the fact that these are "mothers with children." Interview with Western Judge 1, *supra* note 86. One more was even more forthright, stating that he felt bad for female defendants, citing his Texas upbringing, but also his views about who is running the show. Interview with Western Judge 3, *supra* note 73.

125. The issue of cooperation disparity in these cases is just one aspect of the larger issue about the distorting effect of cooperation agreements, which itself received substantial criticism throughout the Guidelines Era. Several judges interviewed for this study noted their general concerns with cooperation created disparity, with statements such as "cooperation skews cases." Interview with Western Judge 4 (Oct. 17, 2002) (interviewee wishes to remain anonymous). "There is a lack of accountability . . . prosecutors have unilateral discretion." Interview with Atlantic Judge 3 (Sept. 6, 2002) (interviewee wishes to remain anonymous). Overall, however, this issue did not rise to the fore for Republican judges. In some instances it was because prosecutors took pains to avoid this result. One Republican judge stated with mixed emotions that there was less of this problem in her district because she believed that the local U.S. Attorney sometimes gave cooperation agreements when not warranted to be fair in sentencing. Interview with Midwestern Judge 1 (Nov. 26, 2002) (interviewee wishes to remain anonymous). Others indicated they would not sentence the cooperators until all the other defendants were sentenced to allow them the opportunity to give a more culpable cooperator a higher sentence to avoid co-defendant disparities. Interview with Western Judge 1, *supra* note 86. Still others, because of a pro-government orientation, were willing to tolerate some cooperation disparity because of the Government's obvious need for this kind of evidence in drug conspiracies.

Without question, the 1994 "safety-valve" law has helped to reduce the sentences of some of these defendants.¹²⁶ The safety-valve allows judges to sentence below an otherwise applicable mandatory minimum statute if the offender meets certain conditions intended to establish that they are a low-level, non-violent offender. For these reasons, the safety-valve was welcomed by the judiciary, and, despite its limitations, eventually came to be used in almost twenty-two percent of drug cases by 2001.¹²⁷ However, my research revealed that some "girlfriend" cases continued to trouble judges because of limitations written into the safety-valve that excluded some defendants who judges believed were deserving of sentence relief.¹²⁸

A poignant illustration of a post-safety valve "girlfriend" case comes from a 2002 case before Reagan appointee Judge James D. Todd (W.D. Tenn.).¹²⁹ The defendant, Lakisha Murphy, had been with her boyfriend, Cedric Robertson, since she was fifteen.¹³⁰ Cedric was a member of the "Crips" and a drug dealer. He was also a paraplegic and Lakisha was his primary caretaker, who fed and bathed him. Because Lakisha spent most of her time caring for Cedric at his house, she clearly was aware of Cedric's illegal activities, as he was still a principal of the group despite his disability. In the course of the investigation, Lakisha admitted she occasionally helped Cedric with his drug business and even made a few retail sales when none of Cedric's gang mates were around; however, when she was not helping Cedric with his health needs, she usually had a job as a

126. See *supra* note 4.

127. U.S. SENTENCING COMM'N, 107TH CONG., DRUG OFFENDERS RECEIVING SAFETY VALVE AND MANDATORY MINIMUMS FOR EACH DRUG TYPE, Datafile USSCFY01 (2001), available at <http://www.ussc.gov/ANNRPT/2001/table44.pdf>.

128. Referring to the criminal history limitation, a Republican judge noted that "some pretty minor conduct can disqualify a defendant" from the safety valve. Telephone Interview with Midwestern Judge 2 (Oct. 28, 2002) (interviewee wishes to remain anonymous). More frequently, because the Guidelines offense levels for drug crimes increased with the quantity of drugs, even a low-level drug offender's Guideline range could run significantly above the otherwise applicable mandatory minimum in a conspiracy case with lots of relevant conduct or a large seizure. In such cases, even if eligible, the safety valve would only help with a two-point offense level reduction. See Jane L. Froyd, *Safety Valve Failure: Low-Level Drug Offenders and the Federal Sentencing Guidelines*, 94 NW. U. L. REV. 1471, 1498-99 (2000).

129. See David Zlotnick, Profile of Judge James Todd (W.D. Tenn.), <http://faculty.rwu.edu/dzlotnick/profiles/todd.html> (last visited Oct. 8, 2007).

130. *Id.*

cashier to support herself and was not considered to be a full-time employee of the conspiracy by the government.¹³¹

Because more than fifty grams of crack was involved in the offense, Lakisha faced a ten-year mandatory minimum sentence. She also had two prior petty offenses which placed her in criminal history category II; thus, she was ineligible for the safety valve.¹³² Perhaps on principle, or out of love or fear, Lakisha refused to cooperate with the police. Thus, although Cedric received a longer sentence than her, four of her male co-defendants, who were far more culpable, received less time than Lakisha because they received substantial assistance motions from the government. Judge Todd noted this disparity, stating "it seems unfortunate in this case that you're doing more time than some of these guys did . . . and there's nothing I can do about it."¹³³ Judge Todd also spoke directly to Lakisha at the sentencing hearing before he imposed the ten-year sentence, saying:

The tragedy of this [case], Ms. Murphy, is that you made a very poor choice of boyfriends

. . . .

I have no doubt that this was Cedric Robertson's drug operation. . . . [But] a woman can stand by her man without becoming a criminal herself. . . . But you had the misfortune in this case of having a boyfriend who couldn't use his arms and his legs and couldn't care for himself, so you became his arms and his legs. And in doing so, you did, in fact, become a criminal

. . . .

[But] part of the problem in this case, Ms. Murphy, is that the sentencing guidelines passed by Congress have tied my hands as to what discretion I have. They also have passed mandatory minimums which also tie my hands.¹³⁴

131. *Id.*

132. *Id.*

133. *Id.*

134. *Id.* For discussion of additional "girlfriend" cases, see David Zlotnick, Profile of Judge James A. Parker (D.N.M.), <http://faculty.rwu.edu/dzlotnick/profiles/parker.html> (last visited Oct. 8, 2007);

b. Addiction Motivated Defendants

A significant number of drug addicted persons become involved in low-level distribution activities to support their own substance abuse problems.¹³⁵ The Sentencing Guidelines, however, do not allow judges to consider drug addiction at sentencing, and of course, the statutory mandatory minimums have no exception except cooperation. Some Republican appointees disagree with this policy choice. For example, a Midwestern judge stated that he although he supported the concept of drug enforcement and harsh penalties for the top rungs of drug operations, he mostly saw people from the lower levels, many of whom were only involved because they are addicts. This was where he “really struggle[d] with the Guidelines.”¹³⁶ Another stated that while he is “not sympathetic to those who victimize others,” he was “sympathetic to those with substance abuse problems.”¹³⁷

Methamphetamine cases in particular seem to typify this kind of case. Another Midwestern judge who saw a lot of these cases noted that in her district, most of the methamphetamine dealers were also users. She called them “22-year old babies,” who were often “kids who couldn’t go to college and don’t have good judgment.”¹³⁸ However, as a result of lengthy Guideline sentences, prison was turning them into hardened criminals by the time they got out. Thus, she would prefer that these defendants get intensive drug treatment and sentences in the three-year range.¹³⁹ However, the addict case which seemed to most infuriate Republican judges were the ones in which the defendant was able to successfully complete drug treatment while on bail. An excellent example of this kind of case comes from an-

Profile of Judge James M. Rosenbaum (D. Minn.), *supra* note 107; Profile of Judge Sam Sparks (W.D. Tex.), *supra* note 107; Profile of Judge Clyde Roger Vinson (N.D. Fla.), *supra* note 107.

135. Addicts rarely make it very far in the drug world because suppliers cannot trust them not to use too much of the product, and in any event, addicts are not very reliable employees. See Elaine M. Chiu, *The Challenge of Motive in the Criminal Law*, 8 BUFF. CRIM. L. REV. 653, 719–20 (2005) (discussing how many drug “steerers” who get arrested are drug addicts working for others).

136. Telephone Interview with Midwestern Judge 2, *supra* note 128.

137. Interview with Western Judge 2, *supra* note 122.

138. Telephone Interview with Midwestern Judge 1 (Nov. 26, 2002) (interviewee wishes to remain anonymous).

139. *Id.*

other Reagan appointee, Judge James Parker (D.N.M.).¹⁴⁰ The defendant, Amanda James, left home at fifteen and eventually became romantically involved with her co-defendant, Santisteven. At the time of the offense, she was living with him and taking care of his children while he dealt methamphetamine. She was also an addict most of her adult life. However, Amanda entered treatment while on bond and she made substantial progress in combating her addiction. She also reunited with her mother, who had her own history of substance abuse and who now did addiction counseling for others.¹⁴¹

At sentencing, her attorney moved for a downward departure based upon a combination of factors including extraordinary post-conviction rehabilitation and extraordinary family circumstances. The government opposed the motion. Judge Parker stated that while her efforts had been admirable, her case did not rise to the level required for a downward departure on these grounds. Nevertheless, during the sentencing hearing, Judge Parker asked the government if it would consider a role adjustment that might lower her sentence. The prosecutor refused, and bound by the law, Judge Parker gave her the low end of the Guideline range of 57 months (after application of the safety-valve).

At her sentencing, Amanda apologized for the trouble that would flow from her incarceration to her family. She struggled with her emotions while speaking but was able to tell the judge, "I want you to consider that this is the first time I have even been in a prison. I go to school, I am a mom, I'm just really scared."¹⁴² Judge Parker responded by saying

140. See Profile of Judge James A. Parker (D.N.M.), *supra* note 134. For other cases involving offenses motivated or the result of drug or alcohol dependency, see Profile of Judge Eisele (E.D. Ark.), *supra* note 69; David Zlotnick, Profile of Judge Michael R. Hogan (D. Or.), <http://faculty.rwu.edu/dzlotnick/profiles/hogan.html> (last visited Oct. 8, 2007); David Zlotnick, Profile of Judge Thomas Gray Hull (E.D. Tenn.), <http://faculty.rwu.edu/dzlotnick/profiles/hull.html> (last visited Oct. 8, 2007); David Zlotnick, Profile of Judge Robert E. Jones (D. Or.), <http://faculty.rwu.edu/dzlotnick/profiles/jones.html> (last visited Oct. 8, 2007); David Zlotnick, Profile of Judge Stephen M. Reasoner, <http://faculty.rwu.edu/dzlotnick/profiles/reasoner.html> (last visited Oct. 8, 2007); David Zlotnick, Profile of Judge Frederic N. Smalkin (D. Md.), <http://faculty.rwu.edu/dzlotnick/profiles/smalkin.html> (last visited Oct. 8, 2007); Profile of Judge Sam Sparks (W.D. Tex.), *supra* note 107.

141. Profile of Judge James A. Parker (D.N.M.), *supra* note 134.

142. *Id.*

I think the guideline sentences in [regard to] some of these drug offenses are extreme and draconian and I think this is a sentence that's longer than what is necessary, but it's a sentence that under the law I am required to impose. . . . Ms. James, I think you have definitely changed your life and now you're going to go to prison at a time after having done that. It's not something that's easy for a judge to do.¹⁴³

Judge Parker's view of this "successful treatment case" reflects a theme seen in other Republican appointees with a background, like his, in private legal practice. While these appointees tend to express strong conservative views across a range of issues, a primary feature of their professional identity was as acting as problem solvers. Thus, while they could be hard-nosed litigators when necessary, as good business lawyers they also recognized when there was a win-win situation for all parties. Thus, while they might generally see themselves as tough-on-crime, the "successful treatment cases" in particular tended to confound their problem-solving identities. Moreover, these judges seemed genuinely moved by the efforts of these defendants and the hurdles they overcame to address their addictions, particularly in a system that sees few successes at the time of sentencing.¹⁴⁴ For judges who had little contact with the criminal justice system before their appointment, these defendants may also have seemed more deserving of special consideration because they did not "look" like criminals.

c. *Drug Courier Cases*

The last significant category which most concerned Republican appointees was that of drug courier cases. While all districts had some, these cases were most prevalent along the southern border, as well as in districts with major airports from source countries.¹⁴⁵ Defendants in courier cases were

143. *Id.* Amanda's case could also be categorized as a "girlfriend case" because as the judge noted at sentencing he was "left with the distinct impression that its [sic] really Mr. Santisteven who put Ms. James in this position." *Id.*

144. See *id.*; see also Profile of Judge Eisele (E.D. Ark.), *supra* note 69; Profile of Judge Ideman (C.D. Cal.) <http://faculty.rwu.edu/dzlotnick/profiles/ideman.html> (last visited Oct. 8, 2007).

145. See Stephen Schulhofer, *Sentencing Issues Facing the New Department of Justice*, 5 FED. SENT'G REP. 225, 227 (1993) (discussing different sentencing strategies for drug couriers among high volume border districts); see also Profile of

generally poor, often non-citizens, who were paid small sums of money to transport drugs on their person, or sometimes by orally ingesting them.¹⁴⁶ Couriers arrested in transit were rarely useful to investigators because once the drop was not made at the right time and location, the courier became suspect and higher level operatives would have no dealings with him.¹⁴⁷ In addition, many couriers were minimally connected to the conspiracy, sometimes recruited abroad or allowed contact with only one person by cellular telephone or pager. Even when couriers had more information about the conspiracy, many expressed fear for themselves or loved ones back home if they cooperated.¹⁴⁸

Because the primary sentencing factor under the 1986 Act and the Guidelines was the weight of the drugs, over which the courier has no control, courier sentences could be quite high in comparison to their culpability and their role in the conspiracy.¹⁴⁹ One Republican judge stated that while he did "not condone drugs, I think the guidelines are out of whack."¹⁵⁰ He noted that a drunk driving case in which a defendant caused four deaths had a lesser Guideline sentence than a routine drug courier who could easily receive twenty years.

Lengthy courier sentences did not sit well with other Republican appointees. One border state Republican appointee said that one year in prison would probably be enough for most drug couriers.¹⁵¹ Another from the same district felt that drug couriers required some punishment, several months, but asserted that "more than one half won't do it again, once caught

Judge Eisele (E.D. Ark.), *supra* note 69; Profile of Judge Robert E. Jones (D. Or.), *supra* note 140.

146. See generally Timothy P. Tobin, Comment, *Drug Couriers: A Call for Action by the U.S. Sentencing Commission*, 7 GEO. MASON L. REV. 1055 (1999).

147. See *Symposium: Alternatives to Current Sentencing and Traditional Parole*, 23 S. ILL. U. L.J. 319, 320 (1999) (reporting comments by W. Charles Grace about the inability of couriers to cooperation).

148. See, e.g., *United States v. Contento-Pachon*, 723 F.2d 691 (9th Cir. 1984) (discussing threats made to drug courier from Columbia); Steven B. Wasserman, *Toward Sentencing Reform for Drug Couriers*, 61 BROOK. L. REV. 643 (1995) (discussing drug couriers limited knowledge of and economic stake in larger conspiracies).

149. See David Zlotnick, Profile of Judge David Sam (D. Utah), <http://faculty.rwu.edu/dzlotnick/profiles/sam.html> (last visited Oct. 8, 2007).

150. Interview with Western Judge 2, *supra* note 122.

151. Interview with Western Judge 1, *supra* note 86.

[and] with a good set of supervised release conditions and proper supervision.”¹⁵²

3. “Life” Sentences for Non-violent Offenses and First-time Offenders

A surprising result of my research was the discovery of a class of drug cases which troubled Republican appointees, but which has received virtually no media or scholarly attention. The sentences in these cases were very long, such as life without parole or so many years as to amount to a virtual life term given the defendant's age at sentencing. Without question, these defendants were more serious offenders than the low-level girlfriends, addicts, and couriers discussed above, and sometimes they played supervisory roles in their small-to-medium-size drug operations. But, because none of these defendants had been convicted of a violent offense, for these judges, their sentences felt disproportionate.¹⁵³ In addition, these judges were also disturbed when substantially more culpable co-defendants received huge sentence breaks because of their cooperation with the government, leaving lesser players to serve much longer sentences.¹⁵⁴

This was especially true for judges who had moved over to the federal system after serving as state judges. For these judges, life sentences without parole for drug crimes seemed particularly wrong.¹⁵⁵ Such sentences had always been re-

152. Interview with Western Judge 3, *supra* note 73. For additional profiles that discuss drug courier sentences, see Profile of Judge Eisele (E.D. Ark.), *supra* note 69; David Zlotnick, Profile of Judge Ronald E. Longstaff (S.D. Iowa), <http://faculty.rwu.edu/dzlotnick/profiles/longstaff.html> (last visited Oct. 8, 2007); Profile of Judge James M. Rosenbaum (D. Minn.), *supra* note 107; Profile of Judge David Sam (D. Utah), *supra* note 149.

153. See David Zlotnick, Profile of Judge Donald D. Alsop (D. Minn.), <http://faculty.rwu.edu/dzlotnick/profiles/alsop.html> (last visited Oct. 8, 2007); David Zlotnick, Profile of Judge Fernando J. Gaitan, Jr. (W.D. Mo.), <http://faculty.rwu.edu/dzlotnick/profiles/gaitan.html> (last visited Oct. 8, 2007); David Zlotnick, Profile of Judge J. Phil Gilbert (S.D. Ill.), <http://faculty.rwu.edu/dzlotnick/profiles/gilbert.html> (last visited Oct. 8, 2007); Profile of Judge Phillip Reinhard (N.D. Ill.), *supra* note 107; Profile of Judge Strom (D. Neb.), *supra* note 69; Profile of Judge Clyde Roger Vinson (N.D. Fla.), *supra* note 107.

154. See Profile of Judge Samuel G. Wilson (W.D. Va.), *supra* note 107.

155. See Profile of Judge J. Phil Gilbert (S.D. Ill.), *supra* note 153; Profile of Judge Nickerson (D. Md.), *supra* note 99; Profile of Judge Phillip Reinhard (N.D. Ill.), *supra* note 107.

served for heinous murderers, violent rapists, and other serious and inveterate recidivists deemed beyond any hope of rehabilitation. This was true even for judges who articulated a strong "just desserts" sentencing philosophy and were otherwise considered to be tough sentencers. For the cases involving lengthy sentences short of life without parole, Republican appointees showed the most concern in cases involving first-time offenders.¹⁵⁶

Additionally, some Republican appointees expressed concerns for defendants with prior drug offenses who had been treated very leniently by the state courts.¹⁵⁷ Especially for Republican appointees with prior criminal justice experience, graduated punishment was central to their notions of deterrence and fairness. When a state court had essentially slapped defendants on the wrists before, conservative judges had some sympathy when defendants who got the equivalent of "sticker shock" when they were brought to federal court to face the Guidelines sentencing regime. For these judges, a severe term for a non-violent crime was more palatable only if the defendant had been "put on notice" and had not "learned his lesson."¹⁵⁸ Thus, while no one doubted these defendants had been enmeshed in trafficking, virtual life sentences for these defendants contradicted values imbedded from years of state practice.

Lastly, Republican judges expressed some utilitarian concerns about these sentences. One Republican judge interviewed stated that sentences for non-violent crimes that extended past the age of sixty were "pointless."¹⁵⁹ Moreover, if there is no likelihood of release before death or old age, some judges were troubled that these defendants would have no hope, and therefore, little incentive to be "model prisoners."¹⁶⁰

156. See Profile of Judge Robert E. Jones (D. Or.), *supra* note 140; Profile of Judge Stephen M. Reasoner, *supra* note 140.

157. See *supra* note 155; Interview with Western Judge 1, *supra* note 86; Interview with Western Judge 2, *supra* note 122; Interview with Southern Judge 2 (Nov. 5, 2002) (interviewee wishes to remain anonymous).

158. See sources cited *supra* note 156.

159. He added, "A life sentence is a horrible thing." Interview with Atlantic Judge 1 (Oct. 15, 2002) (interviewee wishes to remain anonymous).

160. See Interview with Southern Judge 1 (Sept. 4, 2002) (interviewee wishes to remain anonymous) (remarking that some defendants become embittered by unfairly long sentences which can create trouble for the institution); see also Profile of Judge James M. Rosenbaum (D. Minn.), *supra* note 107; statement of Judge Sporkin, *Additional Statements by Republican Judicial Appointees About Sentenc-*

A good number also remarked on the financial wastefulness of the sentence. Thirty years when fifteen would accomplish the same goal made no sense to appointees from a party which preaches fiscal conservatism and reduced federal spending.¹⁶¹

However, because these defendants were not themselves particularly sympathetic, judges were not as eager to ally themselves with these men. Thus, in these transcripts, the judges typically first emphasized the harm these defendants had caused to their communities before criticizing the excessiveness of the sentence. One good example is the Robert Riley case from Judge Ronald Longstaff (S.D. Iowa), a Reagan appointee.¹⁶² Robert (a.k.a. "Mushroom Bob") was a devotee of the Grateful Dead who was able to follow the band, in part, by using, sharing, and regularly selling LSD and other drugs to fellow "Deadheads." Before his federal case, he had previously pled guilty to four separate charges involving small amounts of marijuana, hashish, and amphetamines, and had spent short periods in county prisons in California and Wisconsin for these offenses. In Mushroom Bob's first federal case (for conspiracy to distribute more than 10 grams of LSD), the recidivist provision of the 1986 Act required a mandatory life sentence without parole because he had three prior drug felony convictions.

At the sentencing hearing, Judge Longstaff told Bob that "[I]t disturbs me that you're obviously still a strong advocate of the LSD culture, and you will be, I predict, until the day you depart us. And I fear that if you do get out some day, I'm afraid you're still going to be an advocate of that culture; and I think it may lead to further problems unless somehow you reach back and step back from your full support of that culture." On the other hand, Judge Longstaff stated, "The mandatory life sentence as applied to you is not just, it's an unfair sentence, and I find it very distasteful to have to impose it. . . ." ¹⁶³ Some years later, Judge Longstaff wrote about this case:

ing Policy in the Pre-Booker Era, at 19, available at http://faculty.rwu.edu/dzlotnick/Republican_Judicial_%20Appointees_Additional_Statements.pdf (lamenting the use of scarce resources to punish minor actors). Judge Williams stated that "[w]e're building prisons faster than we're building classrooms. And still the crime rates [sic] going up. The whole thing doesn't seem to be very effective." *Id.* at 20.

161. See Profile of Judge James M. Rosenbaum (D. Minn.), *supra* note 107.

162. See Profile of Judge Ronald E. Longstaff (S.D. Iowa), *supra* note 152.

163. *Id.*

Given the circumstances . . . it was difficult for me to impose the required life sentence. To this day it remains the harshest punishment I have imposed as a district court judge. There was no evidence presented in Mr. Riley's case to indicate that he was a violent offender or would be in the future. It gives me no satisfaction that a gentle person such as Mr. Riley will remain in prison the rest of his life.¹⁶⁴

What is also interesting is the gulf between the Guideline or statutory sentence in these cases and what these judges would rather impose. For the street-level crack dealer, one Reagan appointee suggested sentences as low as three to five years (with education and vocational counseling).¹⁶⁵ In an interview, Judge Longstaff commented that for Bob Riley, he believed that a ten to twelve-year sentence would have been sufficient.¹⁶⁶

In 1994, the Sentencing Commission partially addressed judicial concerns in this area by amending the drug quantity table to preclude a life sentence for a first-time offender based solely on drug quantity.¹⁶⁷ However, because of possible enhancements for simple gun possession or a supervisory role, first-time offenders can still reach the top of the Guideline sentencing chart without committing a violent act. Thus, while judges felt this amendment made a lot of sense, it was far short of eliminating Guideline sentences of thirty years or more based on drug quantity and no violent conduct. Moreover, as shown by Judge Longstaff's case, Guidelines amendments have no effect on mandatory life sentences required by the recidivist provisions of the 1986 statute.

4. Gun Cases

It is an axiom among most federal judges that the Sentencing Guideline regime gave prosecutors too much control over sentencing outcomes without necessarily reducing unwarranted disparity.¹⁶⁸ As has been explored at length in aca-

164. *Id.*

165. Interview with Atlantic Judge 3 (Oct. 11, 2002) (interviewee wishes to remain anonymous).

166. Telephone Interview with Judge Ronald E. Longstaff (S.D. Iowa) (Oct. 28, 2002).

167. See *supra* note 81.

168. See Frank O. Bowman, *The Institutional Concerns Inherent in Sentencing Regimes: The Failure of the Federal Sentencing Guidelines*, 105 COLUM. L. REV.

demic and judicial writing on this subject, prosecutors have a myriad of ways to control or influence a defendant's sentence.¹⁶⁹ The most significant decisions involve whether to charge an offense that carries a mandatory minimum penalty or to file recidivist enhancements that exponentially increase a mandatory minimum. Because this kind of prosecutorial discretion has never been regularized across the country, or sometimes even within a single United States Attorneys Office, judges were acutely aware of the transfer of sentencing discretion from judges to prosecutors.¹⁷⁰ Moreover, judges were also acutely aware that the Guidelines regime had driven disparity underground, hidden in the back offices of prosecutors and law enforcement agencies where it was hard to see and virtually unreviewable by judges. Republican appointees were sometimes unhappy with this transfer of power to prosecutors and offended by particular instances of what appeared to be overcharging of petty conduct.¹⁷¹ However, my research found two

1315, 1336) (2005) (explaining the conflict between the fight between justice department and judicial conference); see also KATE SMITH & JOSÉ A. CABRANES, FEAR OF JUDGING: SENTENCING GUIDELINES IN THE FEDERAL COURTS 130-142 (1998); Profile of Judge Sam Sparks (W.D. Tex.), *supra* note 107.

169. See Mark Osler, *This Changes Everything: A Call for a Directive, Goal-Oriented Principle to Guide the Exercise of Discretion by Federal Prosecutors*, 39 VAL. U. L. REV. 625, 626 (2005) ("[P]rosecutors retain the power to guide investigations, accept or decline cases, draft charges, press for convictions through plea negotiation, and seek specific sentences."); Ronald F. Wright, *Sentencing Commissions as Provocateurs of Prosecutorial Self-Regulation*, 105 COLUM. L. REV. 1010, 1011-12 (2005) (highlighting the ability of prosecutors to pick and choose charges as a means of controlling sentencing); Chris Zimmerman, *Prosecutorial Discretion*, 89 GEO. L.J. 1229, 1233 (2001); see also Norman Bay, *Prosecutorial Discretion in the Post-Booker World*, 37 MCGEORGE L. REV. 549, 557 (2006) (stating that prosecutors had the sole authority to file a motion for substantial assistance, and thus prosecutors controlled the key to a sentence below the Guideline range or applicable mandatory minimum in most cases).

170. See John O. Newman, *The New Commission's Opportunity*, 8 FED. SENT'G REP. 8, 8 (1995).

171. In some cases, a mandatory minimum threshold was only reached because agents made multiple purchases of small quantities, which, when aggregated, were sufficient to reach this threshold. One Republican appointee talked about cases in which it was "the agent who tried to get the defendant to convert powder to crack or how they can keep going on with the buys." Interview with Atlantic Judge 2, *supra* note 77. A western Republican appointee battled a similar prosecutorial tactic in "backpacker" courier cases in which unacquainted couriers were recruited to carry narcotics across the border. When these human convoys were arrested together, for a time, the United States Attorney in this district aggregated the amount of drugs and argued that each defendant was responsible for the entire amount. In referring to these cases, the judge noted the temptation for these defendants, stating "[t]hese are kids making \$200 for three hours of work

types of gun cases in which prosecutorial charging discretion particularly seemed to outrage Republican judges: felon-in-possession cases under the Armed Career Criminal Act and “stacking” of mandatory minimums for using or carrying a firearm while committing a drug or violent crime.

a. ACCA “Felon-in-Possession of Firearm” Cases

The federal felon-in-possession statute criminalizes possession of a firearm, or even ammunition, by any convicted felon. The prohibition applies regardless of whether the prior conviction was state or federal, and whether or not the gun was licensed.¹⁷² Many cases brought in federal court during the pre-*Booker* period under this statute involved simple gun possession, meaning the facts did not indicate that the defendant was engaged in any other criminal conduct at the time. As one Western Republican judge put it, many of the defendants he saw were “just quail hunters,” and he could not understand why they were charged in federal court.¹⁷³

In addition, many felon-in-possession cases were brought because federal prosecutors could invoke the penalty provisions of the Armed Career Criminal Act (ACCA), which requires a mandatory fifteen-year sentence if the defendant has three prior “violent felonies” or “serious drug offenses.”¹⁷⁴ This statute makes simple burglary a “crime of violence,” as well as any drug conviction, state or federal, that carries at least a ten-year

when their regular wages are \$20–\$30 a week.” Interview with Western Judge 5, *supra* note 89. More generally though, Republican appointee criticism of the government in most cases tended to be mild. These judges tended to disperse blame for the flaws of the sentencing regime onto the Commission and sometimes to Congress. This should not be surprising, because while a strong libertarian streak might be run through grassroots and academic Republicans, the party’s judges were generally more receptive to claims of executive and legislative power. Support for the conclusion that Republican appointees usually were deferential to prosecutorial power is also found in the pro-government rating for most of these judges in the Federal Almanac of the Judiciary. See, e.g., 2 ALMANAC OF THE FEDERAL JUDICIARY, at 4th Cir. 13 (2007 ed.); 1 ALMANAC OF THE FEDERAL JUDICIARY, at 9th Cir. 232 (2007 ed.) (profile of Judge Coughenour); *id.* at 6th Cir. 109, 116 (profiles of Judges Hull and Higgins); *id.* at 10th Cir. 51 (profile of Judge Cauthron).

172. See Armed Career Criminal Act (“ACCA”), 18 U.S.C. § 924(e), 98 P.L. 473; 98 Stat. 1837 (1986).

173. Interview with Western Judge 1, *supra* note 86; see also Profile of Judge Robert E. Jones (D. Or.), *supra* note 140 (defendant was camping with his family).

174. 18 U.S.C.A. § 924(e) (2000).

maximum sentence.¹⁷⁵ Under many state codes, an unarmed break-in of unoccupied dwellings constitutes burglary and therefore qualifies as a crime of violence for purposes of the ACCA.¹⁷⁶ Similarly, most state drug statutes provide at least a ten-year maximum for the distribution or possession with intent to distribute of any amount of cocaine, heroin, or other serious drugs.¹⁷⁷ Thus, petty offenders, especially drug addicts desperate for a "fix," could easily amass the requisite three convictions to qualify for the fifteen-year mandatory, simply by selling small amounts of drugs or breaking into a store at night.

As a result, some of these alleged "career criminals" had never been to state prison for their crimes, having received either probation or short stints in county facilities.¹⁷⁸ Thus, while Republican judges voiced agreement with the intent of the ACCA, the over-broad definition of a "violent felony" and "serious drug offense" frequently swept up defendants that judges felt did not need a fifteen-year sentence.¹⁷⁹

175. Section 924(e)(2)(b)(i)(ii)(B)'s definition of "violent felony" includes burglary or "otherwise involves conduct that presents a serious potential risk of physical injury to another. . . ." 18 U.S.C. §924(e)(2)(B)(ii).

176. See *Shepard v. United States*, 544 U.S. 13, 26 (2005) (holding that "enquiry under the ACCA to determine whether a plea of guilty to burglary defined by a nongeneric statute necessarily admitted elements of the generic offense is limited to the terms of the charging document, the terms of a plea agreement or transcript of colloquy between judge and defendant in which the factual basis for the plea was confirmed by the defendant, or to some comparable judicial record of this information.").

177. See *Andrews Univ., The MayaTech Corp. and RAND, Illicit Drug Policies: Selected Laws from the 50 States*, Feb. 2002, at 21–22 (copy on file with author).

178. An example of this situation is the case of Jimmy Sluder. A troubled and alcoholic youth, he received probation for three unarmed burglaries early in his life. After completing his probation, he was arrested several years later for possession of an unlicensed firearm. Although the state court saw fit to give him only a thirty-day suspended sentence, the federal government prosecuted him under the ACCA, and he received a fifteen-year sentence in federal prison despite never having served any time in state prison. See David Wagner, *Is There Anyone Guarding the Guardians at Justice?*, INSIGHT, Aug. 4, 1997 at 1; see also Docket Sheet, U.S. District Court for the Eastern District of Tennessee, No.3:94-cr-00005-1 (January 21, 1994) (copy on file with author).

179. For example, the same western Republican judge bothered by the "quail hunter" prosecutions also complained that these defendants were not truly "armed career criminals" the way Congress and the public conceived of that term and felt that prosecutors should give more consideration to the nature of the qualifying convictions before bringing federal charges carrying mandatory time. Interview with Western Judge 1, *supra* note 86.

The William Horne case from Reagan appointee Judge Frederic Smalkin (D.Md.) provides a good example of this phenomenon.¹⁸⁰ In 1999, Horne walked past a Blockbuster Video in Baltimore carrying a rifle. A housing authority officer saw him and ordered him to stop. Although William was drunk, he complied immediately. When asked what he was doing with the gun, he replied that he was taking it to a nearby pawn shop. The gun was unloaded, although William had ammunition on his person.

William was originally charged in state court and was offered a plea bargain which would have resulted in a fifteen month sentence. He decided to opt for a trial, but before the state case commenced, the Maryland U.S. Attorney charged him as a felon-in-possession under the ACCA. Based upon William's long history of burglary and theft convictions, he qualified for the fifteen-year sentence.¹⁸¹ At sentencing, Judge Smalkin stated that if he had "sentencing discretion here for the offense of having a firearm in your possession under the circumstances that this involved, there is no way I would sentence you to 180 months. That is well beyond the pale, but that's what Congress wants."¹⁸² When interviewed about this case, Judge Smalkin elaborated, stating that there was no real criminal intent in this case. He felt that some punishment was in order because the defendant was drunk and carrying a gun, but that if allowed he probably would have given him a year and day.¹⁸³

b. "Stacking" of 924(c) Counts

The second category of gun cases which provoked serious concern from Republican appointees involved the "stacking" of

180. Profile of Judge Frederic N. Smalkin (D. Md.), *supra* note 140; *see also* David Zlotnick, Profile of Judge John C. Coughenour (W.D. Wash.), <http://faculty.rwu.edu/dzlotnick/profiles/coughenour.html> (last visited Oct. 8, 2007) [hereinafter Profile of Judge Coughenour]; David Zlotnick, Profile of Judge Michael R. Hogan (D. Or.), *supra* note 140; Profile of Judge James A. Parker (D.N.M.), *supra* note 134.

181. In addition to a variety of petty offenses, he was convicted of burglary (1990), theft (1991), battery (1993), storehouse breaking (1994), and two more burglaries in 1997. He was also on probation at the time of this crime. *See* Presentence Report, *United States v. William G. Horne*, 00-4645, 4-8 (D. Md. Aug. 30, 2000) (on file with author).

182. Profile of Judge Frederic N. Smalkin (D. Md.), *supra* note 140.

183. *See id.*

mandatory minimums under 18 U.S.C. §924(c)'s penalties for using or carrying a firearm during a drug or violent offense. Under this statute, a first offense carried a five-year consecutive mandatory minimum and for any subsequent offenses, an additional twenty-year consecutive sentence.¹⁸⁴ To the chagrin of many judges, the escalation clause could be invoked even if the defendant had not been convicted under the statute when he committed a second 924(c) violation.¹⁸⁵ This interpretation allowed prosecutors to charge multiple 924(c) counts in a single indictment if the defendant had a gun during more than one drug sale, even if it was the same gun and even though the defendant was not arrested until after the second buy was made.

The 924(c) stacking case that has received the most press, post-*Booker*, is Weldon Angelos' fifty-five-year sentence reluctantly handed down by George W. Bush appointee Judge Paul Cassell (D. Ut).¹⁸⁶ From the pre-*Booker* era, the Michael Prikkakis case from Judge Vinson (N.D. Fla.) provides another paradigmatic example.¹⁸⁷

Michael was born in Greece, and he moved to the United States after marrying an Air Force sergeant. Although both he and his wife were working in 1991, they had more than \$5,000.00 in credit card debts as well as liens against their cars. Foolishly, Michael turned to selling powder cocaine to address their money problems. Over a seven day period, Michael made three sales to a team of undercover officers. In total, he sold eighty-six grams of powder worth approximately \$5,000.00. Under the Guidelines, the sentence for this amount of cocaine would have been fifteen to twenty-one months.¹⁸⁸

However, the undercover agents claimed he had a pistol with him during each sale. Therefore, the prosecutor also charged Michael with three counts of carrying a firearm during a drug trafficking offense. Michael admitted selling the cocaine but contested the gun counts. The jury believed the officers and he was convicted on all counts. Under the escalation clause of 924(c), the first count carried five years and the next two

184. The current formulation of the statute requires a twenty-five year consecutive sentence. See 18 U.S.C. § 924(c).

185. See *Deal v. United States*, 508 U.S. 129, 132–34 (1993).

186. See *infra* note 221.

187. Profile of Judge Clyde Roger Vinson (N.D. Fla.), *supra* note 107; see also David Zlotnick, Profile of Judge Malcolm J. Howard (E.D. N.C.), <http://faculty.rwu.edu/dzlotnick/profiles/howard.html> (last visited Oct. 8, 2007).

188. Profile of Judge Clyde Roger Vinson (N.D. Fla.), *supra* note 107.

counts, an additional twenty years; all counts were required to be consecutive.¹⁸⁹

When Judge Vinson appeared before the Senate Judiciary Committee in 1983 for confirmation, he said that drugs are "the most serious overall crime problem facing this country," and therefore he "would favor maximum sentences in those cases."¹⁹⁰ Nevertheless, Judge Vinson thought that the Prinakakis case was "[t]he most absurd situation I've ever seen, and to me it constitutes an abuse of . . . prosecutorial discretion . . . to impose a forty-five-year mandatory minimum consecutive sentence for this offense."¹⁹¹ Judge Vinson also expressed his concern that because the case involved controlled buys, the government had complete and unfettered discretion to increase the defendant's mandatory time by prolonging the investigation and making more buys. He complained, "[I]t leaves it entirely in the discretion of the law enforcement and the prosecutorial arm to determine the sentence of the defendant, knowing that you've got this [924(c)] statute."¹⁹²

Clearly, the judges in these firearms cases were upset by the harshness and disproportionate nature of the sentences. Moreover, these cases forced judges to recognize that the unchecked power of prosecutors was being used for goals that had nothing to do with just punishment. While the prosecutorial motives in each case cannot be known for certain, in many of the felon-in-possession cases, it may be true that both politics and resource allocation factors were motivators.

Beginning in 1991, the Justice Department vigorously encouraged local United States Attorneys' Offices to increase the number of felon-in-possession indictments under the rubric of "Project Triggerlock."¹⁹³ Most importantly, local U.S. Attor-

189. *Id.*

190. 1 ALMANAC OF THE FEDERAL JUDICIARY, at 11th Cir. 33 (2007).

191. Profile of Judge Clyde Roger Vinson (N.D. Fla.), *supra* note 107.

192. *Id.*

193. "Project Triggerlock" was implemented in April of 1991, and is described as "an effort by DOJ to use federal firearms statutes to target the most dangerous violent criminals." PATRICK WALKER & PRAGATI PATRICK, TRENDS IN FIREARMS CASES FROM FISCAL YEAR 1989 THROUGH 1998, AND THE WORKLOAD IMPLICATIONS FOR THE U.S. DISTRICT COURTS n. 9 (Admin. Office of the United States Courts, 2000), http://www.uscourts.gov/firearms/firearms00.html#N_9 (last visited Oct. 14, 2007). For the government's explanation of "Project Triggerlock," see JOHN SCALIA, U.S. DEPT. OF JUSTICE, BUREAU OF JUSTICE STATISTICS, FEDERAL FIREARM OFFENDERS, 1992-98 4-8 (2000), <http://www.ojp.usdoj.gov/bjs/pub/pdf/ffo98.pdf>. Project Triggerlock continued un-

ney's Offices and federal law enforcement agencies were provided additional funding to pursue these cases. While the Justice Department's literature claimed that "Triggerlock" prosecutions would be targeted at habitual violent offenders such as gang members, drug dealers and gun runners, in reality the funding incentive generated a more indiscriminate sweep of qualifying cases.¹⁹⁴ For example, in some jurisdictions, ATF agents simply combed state court records for gun possession cases describing defendants charged with gun possession.¹⁹⁵ If these defendants had the requisite number of qualifying convictions, a federal indictment under the ACCA was frequently brought. Moreover, if the defendant had already pled guilty in state court, he had no defense at all and these became easy cases, padding the statistics for the program.¹⁹⁶ In this way, Project Triggerlock and its successor programs allowed the local U.S. Attorneys and the Justice Department to proclaim progress in the war against gun crimes and career criminals.

There were also patterns for the prosecutorial motives in the 924(c) stacking cases that were unrelated to proportionate punishment. Most frequently, the threat of multiple and con-

der the George H. Bush Administration. The Clinton administration followed suit with its "Weed and Seed" program, which attempted to allow each jurisdiction to create a firearms prosecution policy suited to local needs and tried to provide funding for social services as well as prosecution. See WALKER & PATRICK, *supra*; Memorandum from Robert S. Mueller, III, Asst. Att'y Gen. to All Federal Prosecutors, Prosecutions Under 922(g) (Nov. 3, 1992), available at http://www.usdoj.gov/usaof/eousa/foia_reading_room/usam/title9/crm01431.htm (also on file with author) ("It is appropriate to charge a defendant who has multiple disqualifying factors with a separate count of unlawful weapons possession under 922(g) for each disqualifying status."). Richmond's highly touted "Project Exile" rekindled interest in federal prosecutions for felons-in-possession and President George W. Bush followed with his Project Safe Neighborhoods, which provided for additional funding and designated prosecutors and agents for these cases. See Project Safe Neighborhoods Homepage: Funding, <http://www.psn.gov/funding/index.html> (last visited Feb. 18, 2008) (touting the approximately two billion dollars the Bush administration has devoted to the Project Safe Neighborhoods since 2001).

194. See H. Scott Wallace, *Compulsive Disorder: Stop Me Before I Federalize Again*, PROSECUTOR, May/June 1994, at 21, 24. Wallace cites Bureau of Alcohol, Tobacco and Firearms statistics to assert that the majority of "armed career criminals" convicted under Project Triggerlock consist of state burglary convictions. *Id.*

195. See *United States v. Odom*, No. 93-2526, 1994 WL 669675, at 1 (6th Cir. Nov. 29, 1994); Daniel C. Richman, "Project Exile" and the Allocation of Federal Law Enforcement Authority, 43 ARIZ. L. REV. 369, 374-75 (2001)

196. See, e.g., Wagner, *supra* note 176.

secutive 924(c) counts was used to try to coerce a plea.¹⁹⁷ In other cases, no explanation appears other than the prosecutor simply piling on because he or she could, in an effort to get the maximum sentence the law would permit.¹⁹⁸ For Republican appointees like Judge Vinson, who generally trusted and deferred to federal prosecutors, these transcripts resonate with rawness and are cause for outrage.¹⁹⁹

IV. REPUBLICAN APPOINTEES AND SENTENCING REFORM IN THE POST-*BOOKER* ERA

There are three significant areas in which Republican appointee dissatisfaction during the mandatory Guideline era is still relevant to the post-*Booker* policy environment. This Part addresses this issue in three parts; mandatory minimums, topless Guidelines, and solutions for the discrete types of cases discussed in Part III.

A. *The Post-Booker World and Mandatory Minimums*

At first blush, the Supreme Court's intervention accomplished much of what many judges and academics had urged throughout the Guidelines Era—sentencing guidelines that are really guidelines rather than mandatory rules, coupled with appellate review to guard against truly idiosyncratic sentencing decisions. Moreover, despite having greater discretion under *Booker*, judicial sentencing practices have changed very little. In fact, the average post-*Booker* sentence is actually about a month longer than before the decision—an outcome few thought possible.²⁰⁰

197. See Paul J. Hofer, *Federal Sentencing for Violent Drug Trafficking Crimes Involving Firearms: Recent Changes and Prospects for Improvement*, 37 AM. CRIM. L. REV. 41, 58 (2000).

198. See *United States v. Angelos*, 345 F. Supp. 2d 1227, 1232 (D. Utah 2004) (Defendant charged with five 924(c) counts).

199. See David Zlotnick, Profile of Judge William Acker, Jr. (N.D. Ala.), <http://faculty.rwu.edu/dzlotnick/profiles/acker.html> (last visited Oct. 12, 2007).

200. U.S. SENTENCING COMM'N, FINAL REPORT ON THE IMPACT OF *UNITED STATES V. BOOKER* ON FEDERAL SENTENCING 46–47 (2006) [hereinafter FINAL *BOOKER* REPORT]. Post-*Booker* Sentencing Commission data also show that when judges have sentenced below the Guidelines range, these downward variances have been a matter of months, not years, suggesting that judges are tinkering rather than abandoning the Guidelines approach to sentencing. *Id.* at 65 (noting that non-government downward departures have been approximately six months).

However, while *Booker* invalidated the Guidelines, the decision left untouched the statutory mandatory minimum penalties for drug and gun offenses. Mandatory minimums were not affected by *Booker* because, unlike Guidelines, which required a series of fact-finding decisions, the statutory mandatory minimums generally have a one-fact trigger which can and have, at least since 2000, easily been submitted to a jury for determination in federal criminal cases.²⁰¹ In addition, because the Sentencing Commission continues to set most drug guidelines using the mandatory minimums at the bottom of the range, and because judges continue to rely heavily on the Guidelines range to satisfy *Booker* reasonableness, mandatory minimums continue to impact most drug cases either directly or indirectly.²⁰²

Thus, the complaints in these cases about inflexible mandatory minimums are as relevant today as they were before *Booker*. These judicial voices are important, but not because anyone believes that Congress is about to repeal the 1986 Act or gun mandatory minimums.²⁰³ Rather, these judges might forestall efforts by conservative members of Congress to try to

Even critics of the Guidelines regime, such as Judge Ronald Longstaff (S.D. Iowa), have stated that post-*Booker*, "I think I'm still letting the guidelines be a very important factor in the sentence, I'm just not letting it be the only factor." More Judges Deviate From Mandatory Sentences, <http://www.jointogether.org/news/headlines/inthenews/2006/more-judges-deviate-from.html> (last visited Nov. 15, 2007).

201. The decision of prosecutors to charge and prove at trial the one-fact triggers was the result of prosecutors attempts not to run afoul of the Supreme Court's opinion in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), the first in the line of Sixth Amendment cases that ultimately led to *Booker*. See Memorandum from Christopher A. Wray, Assistant Att'y Gen., U.S. Dep't of Justice, Criminal Div., to All Federal Prosecutors, regarding Guidance Regarding the Application of *Blakely v. Washington* to Pending Cases 8 (July 6, 2004), available at http://sentencing.typepad.com/sentencing_law_and_policy/files/chris_wray_doj_memo.pdf.

202. This is certainly proved by the resilience of sentences within the Guidelines ranges after *Booker*. Approximately 60% of sentences still fall within the Guideline range. Of the 40% outside the Guideline ranges, the majority are still the result of government requested substantial assistance or fast-track departures. See U.S. SENTENCING COMM'N, 2005 DATA FILE, USSCFY05, POST-*BOOKER* ONLY CASES (2005).

203. However, if the past is prologue, repeal is not a pipe dream. Congress had in fact experimented with less severe mandatory minimums for drug crimes in the 1970s, but this experiment was declared a failure and these penalties were repealed. U.S. SENTENCING COMM'N, MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM 8 (1991), available at http://www.ussc.gov/r_congress/MANMIN.PDF.

legislate more mandatory minimums to replace the constraints of now unconstitutional mandatory Guidelines. In fact, in response to *Booker*, some conservatives favored the mandatory minimum approach because unlike other proposals, it clearly avoids the constitutional issues raised by *Booker*. A number of these bills have been proposed since *Booker*.²⁰⁴ One, "the gang bill," passed the House but not the Senate in 2005.²⁰⁵

B. The Post-Booker World and "Topless" Guidelines

The experience of these judges under the Guidelines is also relevant in assessing proposals to circumvent *Booker* by mimicking the Guidelines' limitations on judicial discretion to lower sentences. As noted in Part II, the most likely such "*Booker* fix" at the moment is the "topless guidelines" proposal, despite real questions about the constitutionality of such a system.²⁰⁶ To

204. See Gang Deterrence and Community Prevention Act of 2005, H.R. 1279, 109th Cong. (2005) (adding new mandatory minimums to crimes, including drug offenses, committed by members of "street gangs," which was very broadly defined and could include first time drug offenders who committed no acts of violence); Defending America's Most Vulnerable: Safe Access to Drug Treatment and Child Protection Act of 2005, H.R. 1528, 109th Cong. (2005) (Rep. Sensenbrenner's "*Booker* fix" bill also containing new mandatory minimums); see also Gang Prevention and Effective Deterrence Act of 2005, S. 155, 109th Cong. (2005) (Senate version of the "gang bill" which also sought to increase first offense penalties under 924(c) from five to seven years and make those guilty of conspiracy to possess a firearm subject to the same sentences as those who actually use or carry the weapons); Children's Safety Act of 2005, H.R. 3132, 109th Cong. (2005) (including a new five year mandatory minimum for sex offenders who fail to register). The latter bill passed House Judiciary Committee in 2005 but went no further. See Secure Access to Justice and Court Protection Act of 2005, H.R. 1751, 109th Cong. (2005) (setting mandatory minimums for courthouse crimes).

205. See Gang Deterrence and Community Prevention Act of 2005, H.R. 1279, 109th Cong. (2005) (setting new mandatory minimums for gang-related crime); Secure Access to Justice and Court Protection Act of 2005, H.R. 1751, 109th Cong. (2005) (setting mandatory minimums for courthouse crimes).

206. See *supra* note 48. Many commentators say this proposal has serious constitutional problems. See A Counsel of Caution: Hearing on the Implications of the Booker/Fanfan Decision for the Federal Sentencing Guidelines Before the Subcomm. on Crime, Terrorism, and Homeland Sec., House Comm. on the Judiciary, 109th Cong. (2005), available at <http://judiciary.house.gov/media/pdfs/Bowman021005.pdf> [hereinafter Hearing on the Implications of the Booker/Fanfan Decision] (testimony of Frank W. Bowman); see also Letter from the Judicial Conference Concerning H.R. 1528, 17 FED. SENT'G REP. 315, 316 (2005) ("converting the floors of the now-advisory sentencing guideline [ranges] to mandatory minimum sentences could be challenged as an unconstitutional evasion of *Blakely* and *Booker*"). It is also worth pointing out that the law professor who conceived of "topless" guidelines now believes that they are a bad idea and may run afoul of the Supreme Court's understanding of the Sixth

the extent conservative judicial voices can be mustered to say that the Guideline minimums were excessive in a significant cross-section of cases, "topless guidelines" would recreate the same concerns. Thus, these cases can be used to show that the Guidelines Era was not a Golden Age of sentencing uniformity and fairness, and that dissatisfaction was not limited to just liberal judges, but in fact, included many Republican appointees with solid conservative credentials. Therefore, re-imposing harsh and inflexible rules to control *Booker*-created disparity would not be worth the cost to the majority of the federal judiciary, which believes that it needs the ability to tailor sentences in the unusual case. In this way, these profiles are still relevant to assessing the judicial response to efforts designed to undo *Booker*.²⁰⁷

C. The Post-Booker World and Issue Oriented Sentencing Reform

Using the cases and judges in this Article only to preserve the status quo would be short-sighted. While the Republican appointees in my study would not support a wholesale abandonment of the Guidelines' goals of greater uniformity and tough sentences, Part III suggests that there are discrete issues on which these judges clearly would favor changes to permit more flexibility and less severity. The advantage of focusing on these issues is that even if these or other Republican appointees are unwilling to actively participate in the policy process, there is sufficient record in these cases to demonstrate their belief that the laws, as written and enforced, are inequitable. Additionally, given that crime policy is so often "story focused," the profiles provide the concrete cases needed to mobilize the judiciary, press, and public opinion.

Amendment. See Hearing on the Implications of the Booker/Fanfan Decision, *supra*.

207. Under the topless Guidelines, judges would once again only have the downward departure method to sentence below a Guideline range, an avenue seriously restricted by the Courts of Appeals and the Feeney Amendment. See Zlotnick, *The War Within the War on Crime*, *supra* note 6, at 212.

1. The Crack/Powder Disparity

On the short list of post-*Booker* affirmative sentencing proposals should be the crack/powder disparity. First, supporting changes to crack cocaine penalties is now politically safe for judges. As noted in Part II, lowering crack penalties has been repeatedly urged by the Sentencing Commission and has been endorsed by the Judicial Conference.²⁰⁸ Moreover, in 2007, the Sentencing Commission proposed a Guideline Amendment which will lower the crack cocaine Guideline drug table by two offenses points.²⁰⁹ At the same time, the Sentencing Commission has again recommended that Congress revisit its prior recommendations to lower the statutory penalties.²¹⁰ Moreover, prominent Republican members of Congress have themselves proposed legislation to remedy partially the disparity.²¹¹ In the short term, the opinions of conservative Republican judges could provide the necessary political cover finally to push this issue forward to at least a partial legislative solution.

208. See U.S. SENTENCING COMM'N, 2007 REPORT TO CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY (2007); The Time is Ripe to Change the Crack/Powder Disparity, Posting of Nkechi Taifa to ACSBblog, <http://www.acsblog.org/criminal-law-guest-blogger-the-time-is-ripe-to-change-the-crackpowder-disparity.html> (June 18, 2007, 9:46 EST) (reporting that this resolution was passed in the fall of 2006).

209. U.S. SENTENCING COMM'N, AMENDMENTS TO THE SENTENCING GUIDELINES (2007), available at <http://www.ussc.gov/2007guid/finalamend07.pdf>. If the crack amendment survives Congressional scrutiny, the Commission will then have to decide whether to make the Amendment retroactive and thereby afford relief to inmates sentenced before the Amendment. Retroactivity is more controversial because it would result in sentence reductions of about sixteen months for many inmates. See Families Against Mandatory Minimums, Attention FAMM Members: Proposed Crack Amendment Is No Guarantee Of Going Home Early (Aug. 8, 2007), http://www.famm.org/Repository/Files/Crack_Retro_warning_to_Members--Final_draft_with_all_edits%5B1%5D.pdf.

210. See U.S. SENTENCING COMM'N, SPECIAL REPORT, *supra* note 64.

211. In July of 2006, Sen. Jeff Sessions, (R. Ala.), introduced the Drug Sentencing Reform Act of 2006, S.B. 3725, 109th Cong. (2006). The bill, co-sponsored by John Cornyn (R. Tex.), seeks to reduce the crack-powder disparity to 20:1. See *New Crack Bill Only Gets It Half Right*, FAMM-GRAM, Fall 2006, at 9. That bill, however, did not receive a roll call vote by the end of the legislative session. *Penalties for Crack Cocaine under Renewed Scrutiny on Capitol Hill*, FAMM-GRAM, Winter 2006, at 9. Earlier efforts at shortening or eliminating the disparity, spearheaded by Republicans, include the Powder-Crack Cocaine Penalty Equalization Act of 2005, H.R. 48, 109th Cong. (2005), sponsored by Rep. Roscoe Bartlett (R. Md.), although that bill sought to equalize the quantities of each that triggers the mandatory minimum, it sought to do so by lowering the amount of powder required. See *Other Federal Bills of Interest*, FAMM-GRAM, Summer 2005, at 7.

I say "partial," because while Republican appointees generally think that crack sentences are too high, there is no consensus on a specific solution or whether crack and powder penalties should be completely equalized.²¹²

2. Low and Mid-Level Drug Offenders

There may also be opportunities for today's Congress to provide additional relief for low-level offenders, especially those who received a mandatory minimum because they were marginally ineligible for the safety-valve.²¹³ This issue would likely be popular with the judiciary, and the press has shown a willingness to give such cases favorable coverage. Moreover, a variety of legislative routes are available to make this possible, although perhaps the simplest would be to expand the safety-valve to cover defendants with minor criminal records or those who cannot give a full accounting of their co-defendant's activities due to a reasonable fear of retribution.²¹⁴

212. Some support simply lowering crack penalties to achieve a 1:1 ratio. Interview with Atlantic Judge 2, *supra* note 77. Some advocate somewhat higher penalties for crack, although it is not clear to what extent this view is because they think that crack is a more dangerous drug, or that 1:1 is politically unfeasible, or that it feels safer and less partisan to endorse the most recent suggestion of the Sentencing Commission and Republican sponsored bills in Congress. Likely, for this group of judges, all three factors may play a role. See U.S. SENTENCING COMM'N, REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY 91 (2002) (recommending 20:1 ratio as reasonable, incremental step to the penalty structure); see also *United States v. Perry*, 389 F. Supp. 2d 278 (D.R.I. 2005) (Judge Smith, a George W. Bush appointee, endorsing the 20:1 ratio as reasonable in a post-*Booker* context), *reversed by United States v. Pho*, 433 F.3d 53 (2006) (which reversed another Rhode Island judge, Ernest Torres, a Ronald Reagan appointee, who had also found the disparity irrational). Crack sentences may also be affected by the Supreme Court's resolution of the *Gall* case during the 2007 term because that case also raises the issue of whether the Guidelines properly balance the sentencing purposes in 3553(a) in the context of the crack cocaine Guidelines. Brief for National Association of Criminal Defense Lawyers as Amicus Curiae Supporting Petitioners, *Gall v. United States*, Nos. 06-7949, 06-6330, 2007 WL 2174652, at *16 (July 26, 2007).

213. This relief might include defendants with enough misdemeanor convictions to place them in Criminal History Category II, or defendants who were unwilling due to fear or out of loyalty to reveal enough facts to qualify under the disclosure requirement. See Telephone Interview with Midwestern Judge 2, *supra* note 128.

214. More creative solutions could be found as well. Defendants who are found to have been "low-wage" employees of drug organizations could be exempt from relevant conduct sentencing, even if they were aware of the scope of the organization. Similar rules could be devised for the "girlfriend" cases.

The reaction of Republican appointees to drug addict rehabilitation suggests that there could be judicial support for special treatment of drug addicts in drug cases. For example, some jurisdictions have experimented with "addict exceptions" from mandatory minimum penalties in drug cases, provided that the defendant successfully completed treatment and a probationary period.²¹⁵ Sentencing outcomes in courier cases could likewise be accomplished by creating a significant statutory or Guidelines adjustment to make culpability, not quantity, the key determinant of sentence length in those cases.

The prospects of relief for those serving very long sentences for mid-level and higher drug dealing is less optimistic. Though many of these defendants can be characterized as non-violent, they are not an appealing constituency for legislators. While making the Commission's crack amendment retroactive would benefit many of those serving enhanced Guidelines sentences, those serving mandatory minimums, statutory life, with sky-high adjusted offense levels, or with a significant criminal history would not benefit much, if at all. One limited proposal which might gain traction with Republican appointees would be legislation that prohibits a life sentence under either statute or Guidelines for non-violent offenders. While there has been no recent federal legislation like this, in Michigan in 2003 a broad coalition used these kinds of arguments to get the legislature to repeal the "650-lifer" law, which required life in prison without parole for less than a kilo of any form of cocaine.²¹⁶

Lastly, the new Congress can use these cases to highlight the failure of the current administration to exercise meaning-

215. See, e.g., Cal. Penal Code § 647d(b) (West 1999); D.C. Code § 48-904.01(e)(1) (2001). There might even be some judicial support for programs similar to state drug courts for drug-addicted defendants who meet certain reasonable criteria for inclusion in a special program that avoids prison time entirely. Nothing, however, in my study suggested Republican appointees favored this kind of solution.

216. A bipartisan majority, including the Republican chair of the Michigan State Senate Judiciary Committee, passed three bills that repealed most mandatory minimum sentences for drug offenses. The package was the culmination of the work of a coalition of groups that included prosecutors, the state Catholic Conference and the NAACP, with organizational support from FAMM. See Press Release, FAMM, Michigan Legislature Repeals Draconian Mandatory Minimum Drug Sentences (Dec. 13, 2002), available at <http://stopthedrugwar.org/chronicle-old/267/michiganrepeal.shtml>.

fully the clemency power.²¹⁷ In particular, Congress could give fresh attention to the seventeen non-violent drug offenders pardoned by President Clinton. Two of these inmates are profiled in my study and both are doing well.²¹⁸ Another, Serena Nunn, graduated from the University of Michigan Law School in 2006. Her clemency petition was aided by the support of her sentencing judge, David Doty (D. Minn.), another Reagan appointee.²¹⁹

While clemency experts do not expect President Bush to increase his use of commutations for this purpose, the fact that a number of Republican appointees have and continue to support these clemency petitions both aids this cause and sets up the possibility for greater use of the pardon power during a subsequent presidency. Republican appointees, especially fiscal conservatives, are also likely to support the expanded use of the "compassionate release" program, which enables elderly or infirm inmates to leave prison before their term has expired.²²⁰

217. See Margaret Colgate Love, *The Debt That Can Never Be Paid: A Report Card on the Collateral Consequences of Conviction*, 21 CRIM. JUST. 16, 16-20 (2006) (explaining how the pardon could play an important role in prisoner re-entry, and that in recent years, it has been underutilized by presidents and governors); see also Margaret Colgate Love, *The Pardon Paradox: Lessons of Clinton's Last Pardons*, 31 CAP. U. L. REV. 185, 191-204 (2003) (discussing President Clinton's use of the pardon power).

218. See Profile of Judge Nickerson (D. Md.), *supra* note 99; David Zlotnick, Profile of Judge David Sam (D. Utah), *supra* note 149.

219. See Mark Sauer, *Then: Federal Convict; Now: Law School Grad*, SAN DIEGO UNION TRIB., May 14, 2006, at J1, available at 2006 WL 8467975 (June 16, 2005), <http://www.naacpldf.org/content.aspx?article=630> (noting further that a conservative lawyer was a significant help in her pursuit of a pardon). Another Clinton commuttee, Kemba Smith, is currently attending Howard University Law School. See *Kemba Smith Receives Early Termination of Supervised Release*, NAACP LEGAL AND EDUC. DEFENSE FUND (June 16, 2007), <http://www.naacpldf.org/content.aspx?article=630> (last visited Nov. 12, 2007).

220. One such proposed bill was H.R. 3072, 109th Cong. (2005). Another was the "Second Chance Act," sponsored by Robert Portman, (R. Ohio), which would have created a program for the early release of non-violent, elderly convicts. Second Chance Act of 2005, H.R. 1704, 109th Cong. (2005); see also *Second Chance Act Moves Ahead*, FAMM-GRAM, Fall 2006, at 9. In 2007, the Sentencing Commission expanded and clarified the existing guideline on compassionate release, which is also known as release for "extraordinary and compelling reasons." The new Guidelines add specific examples that illustrate the Commission's understanding of the enabling statute, including that:

(i) [t]he defendant is suffering from a terminal illness[:]; (ii) [t]he defendant is suffering from a permanent physical or medical condition, or is experiencing deteriorating physical or mental health because of the aging process, that substantially diminishes the ability of the defendant to provide self-care within the environment of a correctional facility and for

3. Gun Cases and the Broader Issue of Prosecutorial Discretion

Topping off the list of sentencing reforms in which Republican appointees opinions might make a difference includes limited aspects of firearms sentencing. Moreover, these cases could be a platform for Congressional committees to examine the misuse of prosecutorial discretion in both forum and charge selection.

Legislation to prevent the stacking of 924(c) counts might be the most realistic goal. A politically palatable legislative solution also would be fairly simple. All that is needed is an amendment to 924(c) that prohibits the consecutive twenty-five-year mandatory minimum without a prior conviction before the offense date in the current indictment.

Certainly, such legislation would have a strong Republican ally in the current Chair of the Judicial Conference Criminal Law Committee, Judge Paul Cassell.²²¹ Judge Cassell received national attention for his reluctant sentencing of first offender Weldon Angelos, a small-time marijuana dealer, to fifty-five years for three "stacked" 924(c) counts that resulted from a series of three undercover buys and a search warrant over the course of less than two weeks.²²²

Judge Cassell wrote a lengthy opinion exploring his options for refusing to impose the consecutive 924(c) sentences,

which conventional treatment promises no substantial improvement[;]
(iii) [t]he death or incapacitation of the defendant's only family member
capable of caring for the defendant's minor child or minor children.

U.S. SENTENCING COMM'N, AMENDMENTS TO THE SENTENCING GUIDELINES 1 (2007), available at <http://www.ussc.gov/2007guid/finalamend07.pdf>. The new provision, however, retains the residual clause that allows the Director of the Bureau of Prisons to grant relief under this section on other grounds. *Id.*

221. Before becoming a judge, Cassell was a conservative academic, best known for his opposition to the *Miranda* decision. See Paul G. Cassell, *The Costs of the Miranda Mandate: A Lesson in the Dangers of Inflexible, "Prophylactic" Supreme Court Inventions*, 28 ARIZ. ST. L.J. 299 (1996). Judge Cassell was nominated to the bench by President G.W. Bush in 2001 and confirmed in 2002. See Federal Judicial Center: Profile of Paul G. Cassell, <http://www.fjc.gov/servlet/tGetInfo?jid=2940> (last visited Nov. 7, 2007).

222. Angelos was not accused of using or brandishing the weapon during the transactions and he had no prior convictions. Eva S. Nilsen, *Indecent Standards: The Case of U.S. Versus Weldon Angelos*, 11 ROGER WILLIAMS U. L. REV. 537, 538 (2006). Apparently, because Weldon refused the initial plea offer of fifteen years, the prosecutor returned to the grand jury and obtained a new indictment charging twenty counts, including five counts under 924(c). *Id.* The government obtained convictions on only three of the gun counts. *Id.*

but ultimately decided he lacked the authority to do so. Because Weldon's sentencing occurred after *Booker*, Judge Cassell was able to use his newly restored discretion to reduce the Guidelines sentence for the drug offenses to just one day, still leaving Weldon with fifty-five years of mandatory time.²²³ In ruling against Weldon's motion for a reduced sentence, Judge Cassell noted "an additional [fifty-five]-year sentence for Mr. Angelos under § 924(c) is unjust, disproportionate to his offense, demeaning to victims of actual criminal violence—but nonetheless constitutional."²²⁴ He also urged the President to commute Angelos' sentence.²²⁵

Although perhaps more politically difficult to achieve, legislative amendments to what constitutes a "crime of violence" for purposes of the ACCA would address judicial concerns about the felon-in-possession cases. These changes could be portrayed as technical adjustments requested by Republican appointees rather than relaxing treatment of career offenders. For example, a crime of violence could be redefined to require an actual use of force against a person, thus eliminating unarmed burglaries of unoccupied dwellings and other non-violent offenses. Second, a statute of limitation provision could be added to the ACCA to disqualify felonies that occurred more than ten years ago, or more than ten years after the defendant was released from prison, parole or probation. The latter change would lower the sentences of older ex-felons who had lived a clean life for a considerable period of time before being caught with a firearm.

223. The Guidelines otherwise recommended a range of seventy-eight to ninety-seven months for the drug charges. See *United States v. Angelos*, 345 F. Supp. 2d 1227, 1232 (D. Utah 2004). On the appeal of this case to the Tenth Circuit, 163 former Justice Department prosecutors signed an amicus brief urging reversal. See *Amici Curiae Brief, United States v. Weldon*, No. 04-4282 (10th Cir. June 22, 2005). The Tenth Circuit, however, denied Angelos' appeal. See *United States v. Angelos*, 433 F.3d 738 (10th Cir. 2006).

224. *Angelos*, 345 F. Supp. 2d at 1261. He added:

By and large, the sentences I have been required to impose [under the Guidelines] have been tough but fair. In a few cases, to be sure, I have felt that either the Guidelines or the mandatory minimums produced excessive punishment. But even in those cases, the sentences seemed to be within the realm of reason. This case is different. It involves a first offender who will receive a life sentence for crimes far less serious than those committed by many other offenders—including violent offenders and even a murderer—who have been before me.

Id.

225. *Id.* at 1230–31.

Reformers interested in broader, structural changes to federal sentencing policy could also use these two types of gun cases to highlight how misuse of prosecutorial charging discretion has created more extreme disparities than judicial variances under *Booker*. While Republican appointees are unlikely to support sharp limits on prosecutorial discretion, these cases can be used as part of a re-education effort for the new Congress to shift scrutiny from judicially created disparity to prosecutorially created disparities.

For example, the cynical use of Triggerlock gun prosecutions to pad the Justice Department's statistics or the use of multiple 924(c) counts to coerce pleas can shed light on the fact that some prosecutorial charging decisions serve prosecutorial needs rather than the SRA's goals of uniformity and proportionate punishments.²²⁶ As one of the judges complained, "Congress has been dishonest with the American people. Discretion can't be destroyed, it can only be dispersed."²²⁷ Thus, committee hearings on prosecutorial disparity might be fruitful to counter the pillorying the judicial branch took on the disparity issue under the Republican Congress.²²⁸

V. REPUBLICAN APPOINTEES AND SENTENCING RHETORIC IN THE POST-*BOOKER* ERA

Nevertheless, sentencing reform, even on the narrow issues outlined above, is still likely to fail if sentencing reformers continue to rely on their rhetoric from the Guidelines Era that sentences are too severe and that judges lack sufficient discretion. Unfortunately, this approach is too vulnerable to being branded as soft-on-crime and as advocating for a power-hungry judiciary. Thus, in this Part, I argue that sentencing reformers also need to borrow Republican appointee rhetoric to craft their post-*Booker* appeals.

226. See Profile of Judge Coughenour (W.D. Wash.), *supra* note 178 (providing an example of where prosecutors did not charge consecutive 924(c) counts but could have).

227. Interview with Atlantic Judge 2, *supra* note 77. One Reagan judge scorned that the "Justice Department is the new emperor with regard to disparity." Interview with Atlantic Judge 3 (Sept. 6, 2002) (interviewee wishes to remain anonymous).

228. See Profile of Judge Thomas Gray Hull (E.D. Tenn.), *supra* note 140 (involving a case where defendant had been released and was successfully reintegrated into society but judge was required to send him back to prison after government won its appeal).

A. *Pre-Booker Sentencing Rhetoric of Confrontation*

There are a variety of related theories about why the pre-*Booker* sentencing regime resulted in excessive sentencing severity and unduly restricted judicial discretion. Most contend that these problems flowed from an imbalance in institutional competition and emerged as a byproduct of the destructive influence of the politicalization of crime.²²⁹

The most politically neutral articulation of the institutional imbalance theory looks at the differences between the paradigmatic offenders and offenses that Congress considered in passing sentencing laws and the defendants and offenses actually indicted by the government under these laws. In passing criminal sanctions, Congress often has in its mind the most heinous version of the offense.²³⁰ When an offender meets the technical requirements of the statute, but nevertheless looks very different from the dangerous archetype that Congress had in mind, judges rebel against the required sentence.

For example, one Republican judge talked about an older defendant whose business was failing. In desperation he robbed a bank, but then paid his creditors with the proceeds. Although the judge felt the defendant's behavior deserved prison time, his desire to make good on legitimate business debts and his otherwise law abiding life suggested, to this judge, a kind of offender that neither Congress nor the Commission had anticipated.²³¹ Dissonance between offenders targeted and offenders prosecuted also captures many of the judicial complaints about quantity based drug sentencing. As one Republican appointee from an East Coast city put it, "I've yet to see a kingpin. It's usually a guy who controls a couple of blocks who gets a 300–400 month sentence. Whoever controls the drugs on a regional or national level is not in this court."²³²

229. See Erik Luna, *The Overcriminalization Phenomenon*, 54 AM. U. L. REV. 703 (2005).

230. See *Testimony of Charles Ogletree: Discriminatory Impact of Mandatory Minimum Sentences in the United States*, 18 FED. SENT'G REP. 273 (2006), available at 2006 WL 2433755, *2–3 (discussing Congress' fears of the societal consequences of crack cocaine use).

231. Interview with Southern Judge 3 (Dec. 18, 2002) (interviewee wishes to remain anonymous).

232. Interview with Atlantic Judge 3 (Sept. 6, 2002) (interviewee wishes to remain anonymous).

However, within this paradigm, some commentators chose to place more of the blame on federal prosecutors who indict these cases and the rigid Justice Department policies that require pleas to counts that carry long sentences under the Guidelines or mandatory minimum statutes.²³³ Thus, it is abusive and politically motivated prosecutorial decision-making that explains the sentences that trouble judges. In other words, if federal prosecutors respected federalism and declined more cases (and offered more realistic plea bargains), most of the judicial complaints about excessive sentences, prosecutorial abuse, and the federalization of crime would disappear.²³⁴

In contrast, Professor William Stuntz has convincingly argued for equal blame, contending that the executive and legislative branches have forged a mutually beneficial alliance because both want to convince the public that criminals will be found guilty and subject to harsh punishment, particularly for offenses that outrage the public or during a period of increasing crime.²³⁵ Both branches, therefore, benefit politically from the broadest definition for each crime, the fewest barriers to conviction, and the more severe sentences.²³⁶ Thus, when either prosecutors or Congress are unhappy with any subset of sentencing decisions, either can easily obtain a legislative remedy in the form of increased penalties or limits on judicial discretion.²³⁷ In the face of this alliance, there is no place at the table for judicial contentions about over-criminalization or excessive punishment.

Many political scientists and sociologists, however, see a broader political agenda at work, attributing overly punitive sentencing policy to conservative forces seeking a cure for their perceptions about disintegration of community and traditional American values.²³⁸ Some describe this social movement as a

233. See, e.g., Bowman, *supra* note 3, at 246.

234. Federal prosecutors have deflected the blame by claiming that harsh sentencing laws must apply to all defendants to coerce cooperation, to send a message of deterrence to the criminal class, and as a bulwark against "liberal judges" who would undermine sentencing uniformity if given the chance. See William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 509-10 (2001).

235. See *id.* at 529-40.

236. See *id.* at 512-23.

237. See generally Zlotnick, *The War Within the War on Crime*, *supra* note 6.

238. See generally Jonathan Simon, *Megan's Law: Crime and Democracy in Late Modern America*, 25 LAW & SOC. INQUIRY 1111, 1113 (2000). I have argued

shift towards a "culture of fear," driven by both real crime in the streets and mass hysteria mutually abetted by politicians and the popular press.²³⁹ Finally, some focus on the most virulent component of the politicization of crime—the racial aspect. It has been said many times that in the United States, criminal justice and race are deeply intertwined, and therefore, the social construction of crime has been closely tied to negative stereotypes of racial minorities.²⁴⁰ Thus, the fact that crack penalties have disproportionately incarcerated African-Americans involved in the cocaine trade is just the most recent example of the tendency to vilify minority participants in criminal activities.²⁴¹ And, as political scientist Naomi Murakawa has shown, the electoral process tends to reward legislators whose sentencing policies overwhelmingly target disfavored minorities.²⁴²

However accurate these various academic theories may be in framing the sentencing debate as a either a battle between the elected branches versus life tenured appointed judges or conservative versus liberal politics, both paradigms will continue to be a losing formulation for effecting legislative reform. As the Guidelines Era showed, conservatives were enormously

that the conservative attack on judicial sentencing discretion cannot be fully understood without recognizing that it has been simply a part of a broader far right campaign against the federal judiciary. Thus, a legacy of conservative hostility to the federal courts may be the high-octane fuel that continues to feed the battle between Congress and the judiciary over sentencing policy. It is only from this perspective that congressmen like former House Majority leader Tom Delay feel free to say that federal "judges need to be intimidated. . . . They need to uphold the Constitution. If they don't behave, we're going to go after them in a big way." Zlotnick, *The War Within the War on Crime*, *supra* note 6, at 250.

239. See BARRY GLASSNER, *THE CULTURE OF FEAR: WHY AMERICANS ARE AFRAID OF THE WRONG THINGS* (1999); Tonya L. Brito, *Paranoid Parents, Phantom Menaces, and the Culture of Fear*, 2000 WIS. L. REV. 519, 519–20; Lawrence M. Friedman & Issachar Rosen-Zvi, *Illegal Fictions: Mystery Novels and the Popular Image of Crime*, 48 UCLA L. REV. 1411, 1426 (2001).

240. See generally Dorothy E. Roberts, *Supreme Court Review: Foreward: Race, Vagueness, and the Social Meaning of Order-Maintenance Policing*, 89 J. CRIM. L. & CRIMINOLOGY 775 (1999); see also Tracey L. Meares & Dan M. Kahan, *Law and (Norms of) Order in the Inner City*, 32 LAW & SOC'Y REV. 805 (1998).

241. While there was some early evidence that crack was more dangerous than powder cocaine, commentators have made powerful arguments that resistance to lowering the 100:1 ratio is still very much a story about stereotyping of dangerous ghetto blacks. See William Spade, Jr., *Beyond the 100:1 Ratio: Towards a Rational Cocaine Sentencing Policy*, 38 ARIZ. L. REV. 1233, 1255 (1996).

242. Naomi Murakawa, *The Racial Antecedents to Federal Sentencing Guidelines: How Congress Judged the Judges from Brown to Booker*, 11 ROGER WILLIAMS U. L. REV. 473, 475 (2006).

successful at making the case for severity, uniformity, and prosecutorial power, while conversely warning that liberal and activist judges had to be constrained to prevent them from undermining the war on crime. Thus, even in a Democratic Congress, sentencing reformers need to shift the rhetorical paradigm of sentencing policy.

B. Post-Booker Sentencing Rhetoric of Public Safety

Listening to Republican judicial appointees talk about sentencing can yield some ideas for a more persuasive post-*Booker* sentencing rhetoric of reform. First, Republican appointees sound like the conservatives they are when they talk about sentencing policy, despite their dissatisfaction with some percentage of the pre-*Booker* outcomes.²⁴³ For example, they frequently stated their unequivocal support for the SRA's "truth in sentencing" provisions which abolished independent parole board discretion.²⁴⁴ They also generally made a point to articulate their high regard for sentencing uniformity,²⁴⁵ and correspondingly, expressed discomfort with sentencing disparities, regardless of the cause.²⁴⁶ With regard to sentencing severity,

243. Republican appointees probably were also dissatisfied with a smaller percentage of the Guidelines sentences on their dockets than their Democratic counterparts, although it is hard to quantify this difference. Only a few interviewees were willing to put a number on the percentage of sentences with which they agreed. One Midwestern Reagan appointee did; saying that 80–90% of sentences he didn't "feel that bad about, but that he had concerns about the remaining ones." Interview with Midwestern Judge 2 (Oct. 28, 2002) (interviewee wishes to remain anonymous). There is one study that suggests that Republican appointees imposed slightly longer Guideline sentences for drug and gun crimes than their Democratic counterparts. Max Schanzenbach & Emerson H. Tiller, *Strategic Judging Under the United States Sentencing Guidelines: Instrument Choice Theory and Evidence*, at 6 (Nov. 11, 2004) (unpublished paper), available at www.law.uchicago.edu/Lawecon/workshop-papers/Schanzenbach.doc.

244. "The major contribution of the Sentencing Reform Act is truth in sentencing. Parole board actions were hidden from the public and very confusing." Interview with Atlantic Judge 1 (Oct. 15, 2002) (interviewee wishes to remain anonymous). Similarly, a western Republican appointee agreed with the "principle of honesty and uniformity of the SRA." Interview with Western Judge 3, *supra* note 73. A southern judge expressed his preference to "give less time but have defendant serve it." Interview with Southern Judge 3 (Nov. 2, 2002) (interviewee wishes to remain anonymous).

245. One southern judge stated that he found the Guidelines helpful because "its hard to reach into the air and pick a number." Interview with Southern Judge 1 (Sept. 4, 2002) (interviewee wishes to remain anonymous).

246. "The concept of the Guidelines is to promote a consistent approach. . . . It is wrong to be in the same courthouse or different part of the country and get pro-

these judges made generalized claims about the importance of law and order and the need for stiff punishment for crime; Republican appointees were also more likely to identify areas in which Guideline sentences were not high enough.²⁴⁷

However, as the profiles in this Article have shown, while these judges care very much about uniformity and just deserts,²⁴⁸ their day-to-day exposure to sentencing actual human beings has yielded a sentencing philosophy that more pragmatically acknowledges that individual cases require a tailored mix of traditional sentencing justifications, including "just deserts," incapacitation, deterrence, and yes, even rehabilitation for some defendants.²⁴⁹ In addition, while deference to the elected branches is important to these judges, they also have learned from hard experience that they need some power to check the executive branch, especially when prosecutorial charging policies threaten the goals of uniformity and proportionate punishment, such as in the 924(c) "stacking" cases. Thus, in contrast to the elected conservative rhetoric which exclusively emphasized severity, uniformity, and restricting judicial discretion, Republican appointee sentencing philosophy can best be characterized as stressing "public safety."

Moreover, Republican appointee rhetoric in these profiles reveals exactly where and how the pre-*Booker* regime missed

bation or jail." Interview with Western Judge 2, *supra* note 122. Another expressed concern that the "typical person questions the credibility of the criminal justice system when sentences vary by judge or region, a crime is a crime wherever it is." Interview with Southern Judge 3 (Nov. 2, 2002) (interviewee wishes to remain anonymous).

247. Some of these areas tended to be localized issues, often in jurisdictions in which federal judges had authority over traditional crimes of violence, such as Indian country. One of these judges felt that sentences for sex crimes, especially child molestation, were not long enough. Interview with Western Judge 1, *supra* note 86.

248. For Republican judges, however, punishment is more closely linked to moral culpability of the offender, not just the Guidelines' blunt quantification of social harm. Thus in cases where the Guidelines failed to account for the lesser culpability of offenders who are motivated, for example, by love, loyalty, desperation, or addiction, rather than profit, the resulting Guidelines sentences seemed to be both morally wrong and practically unnecessary.

249. In fact, the SRA itself directed the Commission and judges to weigh and balance these very same considerations. See 18 U.S.C. § 3553(a) (2003). Nevertheless, Paul Hofer and Mark Allenbaugh convincingly argued that a modified just desserts regime dominated the Guidelines as a result of both the weight given to relevant conduct in computing offense levels and the impact of 1986 mandatory minimums on Guideline sentences for drug offenses. Paul J. Hofer & Mark H. Allenbaugh, *The Reason Behind the Rules: Finding and Using the Philosophy of the Federal Sentencing Guidelines*, 40 AM. CRIM. L. REV. 19, 20-26 (2003).

the opportunity to advance public safety by more carefully calibrating the sentencing goals for particular types of offenses and offenders. For example, for violent offenders, Republican appointees generally stated that punishment and incapacitation should be the key considerations.²⁵⁰ From a public safety perspective, these offenders present a risk of future harm that is so great that there is no other option but a lengthy sentence. But for non-violent crimes, ranging from drug to firearm to white collar offenses, many Republican appointees wished to have greater ability to consider whether the public would be better protected by shorter prison terms and more concrete steps that addressed the offender's problems, such as the possibility of serving some portion of the sentence in inpatient drug treatment, in home confinement, or in a halfway house with work release for those who were supporting a family.²⁵¹ Even for drug defendants with higher levels of culpability, some Republican judges worried that excessively long sentences robbed these defendants of hope and actually undermined public safety by ensuring these men would be unskilled and unemployable when released and would be a danger to other inmates and prison guards while incarcerated.²⁵² Thus, sentencing reformers can argue that Republican appointees do not seek more sentencing discretion for discretion's sake. Rather, because the Guidelines so often botched the punishment calculus, the pre-*Booker* regime's sentences conflicted with outcomes which would have best protected the public.

250. Virtually every Clinton appointee I interviewed also stressed this same point.

251. Thus, Republican appointees do believe that rehabilitation should remain a sentencing objective for some defendants, especially first time offenders. One judge from a medium size city with significant poverty in the African-American population said that he sees "a lot of inner city kids who never had a chance." Interview with Atlantic Judge 1 (Oct. 15, 2002) (interviewee wishes to remain anonymous). He further stated that "if there is a chance to save a young person, I want to do that but not when it's their second or third time through the system." *Id.*

252. A southern Republican judge stated that punishment should be long enough to serve its purposes but not so long as to defeat rehabilitation. Interview with Southern Judge 1 (Sept. 4, 2002) (interviewee wishes to remain anonymous). He said that he hoped that when he sentences someone without a tendency toward violent behavior, they would get out one day and have enough life ahead of them to participate. *Id.* He worries that some defendants become institutionalized and embittered by unduly long sentences which leads to trouble in prison and no hope of gainful employment they when get out. *Id.*

In addition, given their desire for real sentencing uniformity, it is not surprising that the cases that provoked the most anger from Republican appointees were those in which extreme sentences resulted from arbitrary prosecutorial decision-making. Here, judges were faced with a regime that stripped them of discretion in the name of uniformity but then blatantly failed with very real and very troubling results to accomplish that goal. Thus, Republican appointee rhetoric can be used to argue for sentencing policies that do not concentrate too much power in the executive branch.

CONCLUSION

This Article has shown that the lessons of Republican appointees from the mandatory Guidelines are relevant to the pressing issues in sentencing policy today: the role of mandatory minimums, the desirability of a "*Booker* fix" that would again severely curtail judicial discretion, and viable areas for bipartisan sentencing reform legislation. More broadly, the Article encourages sentencing reformers to use Republican appointee experiences from the Guidelines Era to prove that it was not a liberal judiciary, but ideological politicians in Washington who were out of step with mainstream conservative sentencing values during the mandatory Guidelines Era.

Moreover, the lessons of these Republican appointees can help to rehabilitate the role that the federal judiciary should play in sentencing policy. Simple common sense suggests that, as long term residents of their districts, judges understand how and when their community needs the assistance of federal law enforcement. In addition, district court judges have valuable information to add to the sentencing policy debate because it is these judges, not members of Congress, who face the human beings who are being sentenced to prison. Moreover, these profiles show that some measure of judicial discretion is necessary, not to impose the judges' personal preferences, but to counter the real danger of prosecutorial overreaching.

Lastly, this Article encourages reformers to adopt the language of Republican appointees—the language of public safety—as a compelling source of rhetoric with which to break the post-*Booker* stalemate. A new sentencing rhetoric based upon the concept of public safety and real, not false, uniformity, could provide the theoretical foundation for some of the

proposals outlined in Part IV. With this new rhetoric, Congress can break free of the dead-end paradigm that sought severity for severity's sake and uniformity solely through the elimination of judicial discretion and return its eye to the real prize of protecting the public.

Other conservative voices are now also suggesting that a new direction is necessary. For example, James Q. Wilson and John DiIulio²⁵³ now agree that the nation has 'maxed out' on the public safety value of incarceration, and the "pendulum has now swung too far away from traditional judicial discretion."²⁵⁴ Additionally, in some state systems, judges and sentencing commissions are trying to tackle sentencing from a public safety perspective in what might be the third wave of sentencing reform in the modern era.²⁵⁵ Adapting Republican judicial rhetoric can provide political cover for those willing to stand up to reactionary *Booker* fixes as well as the affirmative language necessary to move ahead with meaningful, bipartisan sentencing reform.²⁵⁶

253. DiIulio was the head of the Bush II Administration's Office of Faith-Based and Community Groups. James Q. Wilson is now the Ronald Reagan Professor of Public Policy at Pepperdine University, and previously served as a member of the President's Foreign Intelligence Advisory Board under Reagan and Bush I.

254. Stuart Taylor, Jr., *Ashcroft and Congress are Pandering to Punitive Instincts*, NAT'L J., Jan. 24, 2004, at 215-16.

255. For example, in the Oregon state system, Judge Michael Marcus on the Circuit Court of Multnomah County, Oregon, has championed judicial sentencing based upon "public safety," attempting to more systematically discover what kinds of sentences tend to best protect the public in each case and with each type of offender. See Michael H. Marcus, *Post-Booker Sentencing Issues for a Post-Booker Court*, 18 FED. SENT'G REP. 227 (2006); see also Smart Sentencing: Sentencing for Public Safety and Harm Reduction, <http://ourworld.compuserve.com/homepages/SMMarcus/whatwrks.html> (Judge Marcus' website which promotes his approach to sentencing). While not endorsing Marcus' approach in its entirety, the Multnomah County experiment suggests that a new paradigm of sentencing discourse, promoted and championed by judges, is possible.

256. In the past, it is true that Congressional conservatives have turned on federal judges when they have made unpopular decisions or spoken out against the Guidelines regime, such as in the case of Judge Rosenbaum. See Zlotnick, *The War Within the War on Crime*, *supra* note 6, at 227-28 (discussing the treatment of Judge Rosenbaum). Hopefully, safety in numbers and the fact that these judges did not volunteer for this Report will insulate these judges from that treatment.