94 Different Countries? Time, Place, and Variations in Federal Criminal Justice

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I. INTRODUCTION

Frank Zimring and Gordon Hawkins's 1991 book, *The Scale of Imprisonment*, was a pioneering intellectual effort to explain what was then just coming into view to social scientists and legal scholars: the massive growth and transformation of American criminal justice, particularly as manifested in what soon came to be called mass incarceration.[1] Zimring and Hawkins endeavored to disentangle multiple

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[1] *See generally* FRANKLIN E. ZIMRING & GORDON J. HAWKINS, THE SCALE OF

forces in play, ranging from formal law, to local and regional legal norms, to a series of broader social and political transformations. They took a skeptical view of prevailing macro-level theories' explanatory power and dismantled those explanations for rising incarceration (or, in their words, "5 theories in search of the facts"[2]) by pointing out their logical and empirical deficits. They then set out what was, for me, the most influential chapter of the book, on the "fifty-one different countries"[3]—the state and federal jurisdictions that make up the American criminal justice system. In order to drill down to the actual production of punishment in the U.S., which is not a singular national process, the authors examine whether those 51 different countries are "a single organism having diverse organs…. or a group of autonomous units functioning independently but marching together."[4] Put simply, Zimring and Hawkins set out to disentangle the complex, multi-jurisdictional political and legal structures that govern imprisonment policy in the U.S. The "single organism" metaphor would suggest a top-down process, whereby diverse localities were governed by a centralized structure that nonetheless allowed for variations in practice, whereas the "autonomous units" analog suggests powerful outside influences operating on independent jurisdictions in a similar manner.

In this Article, I apply Zimring's insights about locale-based variations in criminal justice operations over time to the case of federal sentencing. Specifically, I look at variations in how the "criminal history" provision of the federal sentencing guidelines is applied, as a function of both time and place, to demonstrate the limits of formal law in accounting for punishment outcomes. In doing so, I hope to shed additional light on how vast differences in legal practices and outcomes are produced, especially in response to top-down legal change.

In Section II, I sketch out a "Zimring hypothesis" about local variation in criminal justice over time before turning to my case study. In Section III, I provide a brief overview of the federal adjudication process,

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IMPRISONMENT (1991).

2 *See id.* at 119. In the chapter by this name, Zimring's sharp humor is also on display in the memorable critique launched against generic theories that rising public punitiveness drives incarceration rate increases: "Just as no one remarks that 'only the good die young' when a good man dies at a great age or a bad man dies at a young age, the only context in which 'crackdown' explanations are put forward is one in which prison populations are increasing." *Id.* at 128.

3 *See id.* at 137.

4 *See id.*

including various major policy changes that have impacted its operation, including on how those changes have impacted sentencing practices. I then present some preliminary analyses in Section IV, using the application of the "criminal history" sentencing metric as a key independent variable. I conclude in Section V with some thoughts about what I think Frank might say about these findings in light of his "51 different countries" thesis.

II. A ZIMRING HYPOTHESIS

As is made evident by the variety of papers in this symposium, Frank Zimring has covered a wide swath of intellectual ground in his illustrious career. Few aspects of criminal law and criminology have not been touched by Zimring: deterrence, incapacitation, rehabilitation; gun laws and gun violence; juvenile justice and juvenile sex offending; pornography, domestic violence, corruption, auto theft, and armed robbery; police as both crime reducers and as killers; the politics of crime, the politics of punishment; and the death penalty as an exceptional practice both in the U.S. and as a global matter. A crosscutting analytic theme in a subset of his work addresses variation in criminal justice practices and outcomes across time and place. For Zimring, place is sometimes, but not always, jurisdictional, in that he asks whether different legal structures, cross-nationally, or different substantive criminal codes, sub-nationally, explain differences in practices and outcomes.

The subnational "place" theme as an interaction with time is a key analytic focus in *The Scale of Imprisonment*, and it animates much of his work on the American death penalty as well.[5] In *The Scale of Imprisonment*, in particular, Zimring and Hawkins were at the forefront of what became a wave of critical studies that both empirically and conceptually challenged the assumptions underlying much macro-level punishment theory about the contours of the American penal explosion.[6]

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[5] *See generally* FRANKLIN ZIMRING, THE CONTRADICTIONS OF AMERICAN CAPITAL PUNISHMENT (2003); Franklin E. Zimring, *Path Dependence, Culture and State-Level Execution Policy: A Reply to David Garland*, 7 PUNISHMENT & SOC'Y 377 (2005); *see also* FRANKLIN E. ZIMRING & GORDON HAWKINS, CAPITAL PUNISHMENT AND THE AMERICAN AGENDA (1986).

[6] For single-jurisdiction, book-length empirical studies have complicated macro-theoretical approaches to explaining the penal explosion, *see, e.g.,* RUTH WILSON GILMORE, GOLDEN GULAG: PRISONS, SURPLUS, CRISIS, AND OPPOSITION IN GLOBALIZING CALIFORNIA (2007); LISA MILLER, THE PERILS OF FEDERALISM: RACE, POVERTY AND THE POLITICS OF CRIME CONTROL (2008); MONA LYNCH, SUNBELT JUSTICE: ARIZONA AND

Zimring's insights about the American puzzle have also influenced my research agenda for a good number of years.[7]

So what do Zimring and Hawkins do in this work? In the "Fifty-one Countries" chapter, the authors document two co-occurring phenomena. First, they demonstrate a regional effect of criminal justice practices (as reflected in incarceration rates), identifying the South as the most punitive region and the Northeast the least. They then examine whether those place-based differences persist over time and whether rates of change will converge over time. Finding a relatively robust regional effect that seems to hold up over time, Zimring and Hawkins suggest that since regions are more than just single legal jurisdictions (they are not legal entities at all), social and cultural forces play a notable role in criminal justice outcomes. They acknowledge that their test is somewhat imprecise, given that regions may have shared features among their component states that are more directly related to crime incidence, such as population demographics; or criminal justice operations, such as institutional capacity, that produce the effect.

Nonetheless, the chapter argues for a dual, contemporaneous set of processes at work. That is because the pattern of imprisonment growth across those fifty-one jurisdictions acted "in consort,"[8] beginning in 1973. This theme was expanded on by Zimring upon in two subsequent law review articles,[9] where he made clear that at least through the first third of the incarceration explosion, from 1973-1985, formal legislative change could not account for the dramatic growth. Indeed, he chalked the change up to a (seemingly coordinated) change "in the behavior of legal actors,"[10] primarily county-level prosecutors, that essentially resulted in more people going to prison per capita (as opposed to longer sentences being

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THE TRANSFORMATION OF AMERICAN PUNISHMENT (2009); ROBERT PERKINSON, TEXAS TOUGH: THE RISE OF AMERICA'S PRISON EMPIRE (2010); HEATHER SCHOENFELD, BUILDING THE PRISON STATE: RACE AND THE POLITICS OF MASS INCARCERATION (2018).

[7] Indeed, his insights helped me frame analysis in my state-level study of Arizona, where I endeavored to better account for on-the-ground, proximate political and legal drivers of massive penal infrastructure expansion and skyrocketing incarceration growth in the state. *See generally* MONA LYNCH, SUNBELT JUSTICE: ARIZONA AND THE TRANSFORMATION OF AMERICAN PUNISHMENT (2009).

[8] *See* Franklin E. Zimring, *Penal Policy and Penal Legislation in Recent American Experience,* 58 STAN. L. REV. 323, 327 (2005).

[9] *See id.*; Franklin E. Zimring, *The Scale of Imprisonment in the United States: Twentieth Century Patterns and Twenty-First Century Prospects,* 100 J. CRIM. L. & CRIMINOLOGY 1225 (2010).

[10] *See* Zimring, *supra* note 8, at 331.

meted out).[11]

Thus, the answer to the question of whether American criminal justice is "a single organism having diverse organs. . . or a group of autonomous units functioning independently but marching together"[12] is both. States were "marching together" over time in regard to rates of penal growth at the start of the imprisonment boom in such a way that unites them through a shared politics that made the U.S. imprisonment explosion possible. But there were enduring and meaningful differences as a function of locale with regard to policies, practices, and outcomes that confirmed states' ultimate independence culturally and jurisdictionally.[13] And neither the autonomy of the single units, nor the synchronized march, could simply or even primarily be explained by formal legal change. Rather, politics, culture, and transformation in executive branch commitments at all levels of governance helped produce changing practice.

Zimring and Hawkins concluded *The Scale of Imprisonment* with a call for more research on variations in punishment, both cross-sectionally and over time, and they implored researchers to move away from singular national studies to jurisdiction-specific or regional "microlevel" analyses, including comparative studies that better isolate the effects of formal policy and other forces at work.[14] Ultimately, their

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[11] *See* Zimring, *supra* note 8, at 330-33. Even after this period, Zimring gives only modest credit to the notion that concurrent legal changes at the state level accounted for incarceration increases. It was only the growth in the last third of the imprisonment explosion, between 1993-2003, that could be directly tied to a wave of penal legislation across the states and the federal jurisdiction that mandated longer prison sentences. He gives some credit to federal legislation that incentivized "Truth-in-Sentencing" laws at the state level, although that contribution has been demonstrated to be quite modest. *See* Susan Turner, Peter Greenwood, Terry Fain, & James Chiesa, *An Evaluation of the Federal Government's Violent Offender Incarceration and Truth-in-Sentencing Incentive Grants,* 86 THE PRISON J. 364, 382 (2006) (concluding that most states that passed Truth-in-Sentencing laws would have done so even without the federal incentives, and that the federal Truth-in-Sentencing funding was a key factor in only four states' passage).

[12] *See* ZIMRING & HAWKINS, *supra* note 1, at 137.

[13] *See id.*; *although see* Zimring (2010), *supra* note 9, at 1236-1237 (suggesting that the longer pattern from 1972-2007 appears to be more of a unitary, national process of imprisonment growth).

[14] Due to limited space here, I cannot elaborate on another important contribution to the time x locale puzzle that Zimring has made, which animates his analysis of capital punishment patterns over time, particularly his deployment of a "path dependence" explanation for contemporary regional patterns of death penalty usage. His is not a strict path dependence argument, but a more loosely cultural one, in that patterns of racial

work was a pioneering corrective on singular, macro-theoretical explanations of punishment, making clear that it is a fool's folly to ignore the local, proximate, messy forces that produce national phenomena.

III. THE FEDERAL SYSTEM AS EXEMPLARY CASE

No jurisdiction in the nation has attempted to regulate and standardize punishment outcomes across diverse locales more than the federal system. Beginning in the 1970s, Congress has expended significant energy on legislative efforts to reign in judicial sentencing discretion that was characterized as unregulated and prone to bias.[15] Not only did Congress aim to tackle a perceived "94 different countries"[16] problem of between-district sentencing disparities, but also the perceived problem of federal judges being wildly out of sync with each other, and even with themselves, in terms of how different kinds of defendants were punished.[17] This effort culminated in the 1984 passage of the Sentencing Reform Act (SRA), which established the United States Sentencing Commission and tasked it with developing a system that would "rationalize the federal sentencing system."[18] Specifically, the Commission was to develop, promulgate, and maintain a set of binding guidelines that would provide "certainty and fairness in meeting the purposes of sentencing, [while] avoiding unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar conduct."[19]

In response to its charge, the Sentencing Commission set about to devise a numerically-based guidelines system that would quantify and scale all sentencing considerations that it deemed relevant, then articulate the rules for determining values on those relevant factors. Through this process, the Commission essentially reduced the sentencing calculus to two sets of considerations: the present criminal acts that brought the

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subjugation realized in early-20th century through lynching predict contemporary use of capital punishment. *See* ZIMRING, *supra* note 5.

[15] *See* Kate Stith & Steve Y. Koh, *The Politics of Sentencing Reform: The Legislative History of the Federal Sentencing Guidelines*, 28 WAKE FOREST L. REV. 223 (1993); *see generally* MARVIN E. FRANKEL, CRIMINAL SENTENCES: LAW WITHOUT ORDER (1973).

[16] The federal jurisdiction is composed of 94 districts, none larger than a single state or territory.

[17] *See generally* FRANKEL, *supra* note 15.

[18] U.S. SENTENCING COMMISSION, UNITED STATES SENTENCING COMMISSION GUIDELINES MANUAL, 1.1 (1987).

[19] Pub. L. 98-473, October 12, 1984 at 98 Stat. (2018).

defendant to court (i.e., offense characteristics), and the defendant's prior criminal record.[20] Under the adopted guideline scheme, these factors are converted into numeric values that result in an "Offense Level" score ranging from 1-43 and a "Criminal History Category" ranging from 1-6. The "Sentencing Table" prescribes sentence ranges at every junction of these two axes (see Appendix). The rules and procedures for calculating the two numeric values are promulgated in the multi-chapter Federal Sentencing Guidelines Manual, a 2200+-page tome (including the appendices) that is relied upon by courts for calculating convicted defendants' guideline sentence ranges.

In its effort to control for variations in sentence outcomes, the Commission omitted most traditional, individualizing sentencing factors from the sentencing formulation. The defendant's background and experiences only mattered with respect to prior criminal acts; otherwise, they were considered to be irrelevant to sentence determinations unless exceptional circumstances existed. The Commission also built in controls to constrain legal actors, especially judges, by specifying in great detail how culpability levels are to be determined and what the appropriate sentence range is for each of the 258 possibilities that exist on the table. Application of the guidelines was, until 2005, mandatory, allowing only limited exceptions for judicial deviations from the prescribed sentencing ranges. While this changed when the U.S. Supreme Court in *United States v. Booker*[21] rendered the Guidelines advisory,[22] they must still be calculated and considered in determining all sentences. They remain a focal point in the sentencing process, in effect anchoring the final

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[20] *See also* Mona Lynch & Alyse Bertenthal, *The Calculus of the Record: Criminal History in the Making of U.S. Federal Sentencing Guidelines,* 20 THEORETICAL CRIMINOLOGY 145, 155-156 (2016).

[21] United States v. Booker, 543 U.S. 220 (2005).

[22] First, in *Booker*, the United States Supreme Court rendered the Guidelines "effectively advisory," giving federal judges the discretion to impose a non-Guidelines sentence as long as it is consistent with the broad purposes of punishment. *Id.* at 245. Two years later, the Court ruled in *Kimbrough v. United States* that judges are free to sentence outside of the prescribed Guidelines' range on the grounds of policy disagreements with the Guidelines. 522 U.S. 85 (2007). In *Gall v. United States*, decided at the same time as *Kimbrough,* the Court mandated deference to sentencing judges' decisions and authorized judges to use individualized assessments of cases and offenders in deciding whether and how to depart from the Guidelines. Mandatory minimums are still in force, though, so in cases in which both Guidelines and mandatory minimums apply, the mandatory minimum "trumps." 552 U.S. 38 (2007).

determination.[23]

The Commission also tried to stop-gap prosecutorial circumventions around the Guidelines by adopting a modified "real offense" sentencing structure. Under this scheme, the defendant's criminal conduct, even if not part of the crime of conviction, was to be calculated into sentence determinations as part of the Offense Level scoring. The Commission did this "precisely because it wanted judges to be able to account for prosecutorial charging decisions that failed to represent a defendant's actual conduct."[24] Finally, the SRA authorized a back-end control on sentencing discretion, by giving appellate courts jurisdiction to review imposed sentences upon appeal by either the prosecution or defense.[25]

Thus, the federal guideline system, by design, attempts to minimize sentence variation within and between districts (and within and between legal actors) via multiple regulatory provisions. And since its inception, the Commission has been a well-resourced institutional force in policing sentence disparity. The research division maintains extensive data on sentencing, and regularly issues reports on sentencing patterns and disparities in outcomes. The Commission has also been quite proactive in devising more extensive and intricate regulations in its effort to achieve sentencing uniformity across the federal system. In short, it arguably represents the most formidable organizational effort to do away with actor-based and locale-based variations in sentencing outcomes.

Of course, despite the Commission's intentions, sentences were not completely regularized even during the most imposingly restrictive periods of the mandatory Guidelines era. Sentencing disparities persisted

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[23] *See* Mark W. Bennett, *Confronting Cognitive "Anchoring Effect" and "Blind Spot" Biases in Federal Sentencing: A Modest Solution for Reforming a Fundamental Flaw,* 104 J. CRIM. L. & CRIMINOLOGY 489, 524-525 (2014).

[24] Glenn R. Schmitt, Louis Reedt & Kevin Blackwell, *Why Judges Matter at Sentencing: A Reply to Starr and Rehavi*, 123 YALE L.J. ONLINE 251, 257 (2013).

[25] *See* Stith & Koh, *supra* note 15, at 269-270.

as a function of place,[26] legal actors,[27] and defendants' demographic characteristics.[28] Scholars have endeavored to pinpoint where such disparities are produced, finding that the differential exercise of prosecutorial discretion in pre-sentencing processes like charging and plea offers plays an important role.[29]

Research also indicates that some variation has been the result of guidelines' manipulation in regard to offense level, where, for example, the relevant conduct to be calculated is limited through plea agreements.[30]

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[26] For studies that examine the impact of jurisdiction on variations in sentencing outcomes, *see generally, e.g.*, Paula Kautt, *Location, Location, Location: Interdistrict and Intercircuit Variation in Sentencing Outcomes for Federal Drug-Trafficking Offenses*, 19 J. Q. 633 (2002); Cassia Spohn, *Sentencing Decisions in Three US District Courts: Testing the Assumption of Uniformity in the Federal Sentencing Process,* 7 JUST. RES. & POL'Y 1, (2005); JawJeong Wu & Cassia Spohn, *Interdistrict Disparity in Sentencing in Three U.S. District Courts*, 56 CRIME & DELINQ. 290 (2010).

[27] For studies that examine the role of legal actors on variations in sentencing outcomes, *see generally, e.g.*, Byungbae, Kim, Cassia Spohn, & E. C. Hedberg, *Federal Sentencing as a Complex Collaborative Process: Judges, Prosecutors, Judge–Prosecutor Dyads, and Disparity in Sentencing*, 53 CRIMINOLOGY 597 (2015); Spohn, Cassia & Robert Fornango, *US Attorneys and Substantial Assistance Departures: Testing for Interprosecutor Disparity,* 47 CRIMINOLOGY 813 (2009).

[28] For studies that examine the role of defendant demographic characteristics on variations in sentencing outcomes, *see generally, e.g.*, Jill K. Doerner & Stephen Demuth, *The Independent and Joint Effects of Race/Ethnicity, Gender, and Age on Sentencing Outcomes in U.S. Federal Courts*, 27 JUST. Q. 1 (2010); Darrell Steffensmeier & Stephen DeMuth, *Ethnicity and Sentencing Outcomes in U.S. Federal Courts: Who is Punished More Harshly?* 65 AM. SOC. REV. 705 (2000).

[29] This was particularly true pre-*Booker,* when sentencing power functionally resided in the prosecutorial role. *See generally* Rachel E. Barkow, *Institutional Design and the Policing of Prosecutors: Lessons from Administrative Law,* 61 STAN. L. REV., 869 (2008). For empirical examinations, *see, e.g.*, Joshua B. Fischman & Max M. Schanzenbach, *Racial Disparities under the Federal Sentencing Guidelines: The Role of Judicial Discretion and Mandatory Minimums*, 9 J. EMPIRICAL LEGAL STUD. 729 (2012); Marit Rehavi & Sonja Starr, *Racial Disparity in Federal Criminal Sentences,* 122 J. POL. ECON. 1320 (2014); Lauren Shermer & Brian D. Johnson, *Criminal Prosecutions: Examining Prosecutorial Discretion and Charging Decisions in U.S. Federal District Courts,* 27 JUST. Q. 394 (2010).

[30] *See generally* Brian D. Johnson, Jeffery T. Ulmer, & John Kramer, *The Social Context of Guidelines Circumvention: The Case of Federal District Courts*, 46 CRIMINOLOGY 737 (2008); Ilene H. Nagel & Stephen J. Schulhofer, *A Tale of Three Cities: An Empirical Study of Charging and Bargaining Practices under the Federal Sentencing Guidelines.* 66 S. CAL. L. REV. 501 (1992); Stephen J. Schulhofer & Ilene H. Nagel, *Plea Negotiations under the Federal Sentencing Guidelines: Guideline Circumvention and its Dynamics in the Post*-Mistretta *Period,* 91 NW. L. REV. 1284, 1288 (1997); Stephen J. Schulhofer & Ilene H. Nagel, *Negotiated Pleas under the Federal Sentencing Guidelines: The First*

On the other hand, the criminal history calculation is generally viewed as much more difficult to manipulate, as it typically involves only minimal interpretation in setting values.[31] Prior conviction records are usually unambiguous as to the temporal relation to the current conviction (which goes to whether they still "count") and as to the sentence imposed (which goes to their numeric value).[32] Unlike the offense level scoring, criminal history is also largely invulnerable to manipulation through plea bargaining.[33] Therefore, it should be the least pervious to biases in application.

Moreover, prior criminal convictions have long held a place in sentencing determinations, and under a variety of criminal justice regimes. Defendants' criminal history can be used to provide insight into defendants' selves under rehabilitative systems; as an indicator of deterrent value (or lack thereof) in deterrence-based schemes; and as a predictor of recidivism risk in sentencing regimes that aim for incapacitation.[34] Indeed, criminal history holds a hegemonic place in modern sentencing, and is broadly viewed by many policy-makers and commentators as both a legitimate consideration and straightforward to objectively apply.[35] Put simply, the use of prior criminal convictions at sentencing is well-established, relatively uncontroversial, and widely accepted.[36] Therefore, if any provision of the federal sentencing scheme should be applied uniformly over time and across locales, it would be the criminal history provision.

Fifteen Months, 27 AM. CRIM. L. REV. 231 (1989).

[31] *See* Mona Lynch, *The Narrative of the Number: Quantification in Criminal Court*, LAW & SOC. INQUIRY 1, 11 (2017), https://onlinelibrary.wiley.com/doi/pdf/10.1111/lsi.12334.

[32] *Id.,* at 10.

[33] *Id.,* at 11. *See also* MONA LYNCH, HARD BARGAINS: THE COERCIVE POWER OF DRUG LAWS IN FEDERAL COURT (2016) (illustrating how guideline sentencing factors played a role in plea bargaining).

[34] *But see* Michael Tonry, *Legal and Ethical Issues in the Prediction of Recidivism,* 26 FED. SENT'G REP. 167, 172-173 (2014) (laying out the ethical arguments against using criminal history as a predictor of risk).

[35] *See* Lynch and Bertenthal, *supra* note 20, at 147-148; *see* Julian V. Roberts & Orhun H. Yalincak, *Revisiting Prior Record Enhancement Provisions in State Sentencing Guidelines,* 26 FED. SENT'G REP. 177 (2014) for a critique.

[36] *See generally* JULIAN V. ROBERT & ANDREW VON HIRSCH, PREVIOUS CONVICTIONS AT SENTENCING (2014); JAMES B. JACOBS, THE ETERNAL CRIMINAL RECORD (2015).

IV. THE LYNCH TEST OF THE ZIMRING HYPOTHESIS

A. Overview

The federal system affords an excellent test ground for the Zimring hypothesis that criminal justice outcomes are jointly produced by both local and national forces that extend beyond formal law. It eliminates several confounding variables that come with amalgamating, or comparing, across legal jurisdictional lines. First, the applicable laws and policies are uniform across all 94 disparate districts,[37] thus eliminating that complication. Second, the institutional capacity to punish in the federal system is also centralized, so limits on prison space do not differ across jurisdictions. And while there are notable variations in criminal caseload rates by district, as a whole, the federal system is well-resourced and does not face pressing upper limits on its capacity to prosecute.[38] It has also operated with much more centralized oversight of district-level prosecutors than exists in the states,[39] where prosecutors are typically elected at the county level and answer to no one at the state level. Most intriguingly, though, is the intense effort, especially by the U.S. Sentencing Commission, to control for all "unwarranted" differences in punishment outcomes across time and place through their elaborate, rigorous sentencing guidelines system.

To reiterate, under the idealized model of the federal sentencing guidelines, the calculated Offense Level (OL) and Criminal History Category (CHC) should largely determine final sentence, adjusted only by documented departures (and variances) that are granted in court at time of sentencing. Everything that is supposed to matter for sentencing, at least in the Commission's vision, is calculated into the values on the two axes of the Sentencing Table. The offense-level calculation includes all aspects of the offense itself, both conviction characteristics and any additional "relevant conduct" as determined by the pretrial probation officer who derives the guideline calculation. It also includes "role" adjustments, as well as any reductions for "acceptance of responsibility,"

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[37] I recognize that there are both "local rules" that govern at the district level, and more importantly, differences between circuits on some key issues at different periods of time. But these are all derived from and in furtherance of the same codes and regulations.

[38] *See* LYNCH, *supra* note 33, at 113.

[39] *See id.* This has varied some by administration, with increasing centralized oversight during Republican administrations beginning with Reagan, and more district-level autonomy under both the Clinton and Obama DOJs.

and, in drug cases, adjustments for the "safety valve" which reduces the offense level by two for qualifying drug defendants who fall in CHC I. The criminal history calculation includes the sum of all applicable criminal history points, as well as adjustments to the category for the "career offender" guideline, which pushes the criminal history category to CHC VI.

Despite the prevailing assumption that criminal history should be the least pervious to bias in influencing sentence outcomes, it appears that even this factor operates differentially as a function of time, place, and defendant characteristics. While few empirical sentencing scholars have focused on criminal history as a variable of analytic interest, established practice in quantitative federal sentencing research implicitly (and uncritically) hints at its less-than-uniform impact on sentences. Specifically, researchers using the federal outcome data have developed a widespread convention of over-controlling for criminal history in statistical models to remove its "noise" value on sentence outcomes, without actually acknowledging its influence as a telling finding in and of itself.[40] As I demonstrate in the following sub-sections, it turns out that criminal history does more than its intended work on sentence outcomes.

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[40] To provide just one recent example of this uncritical use, sociologists Light, Massoglia, & King justify it in a note: "Previous research shows that defendant criminal history has an independent effect beyond that captured by the presumptive sentence measure (*internal cites omitted*). Its inclusion did not result in problematic collinearity. Moreover, this method is consistent with previous analyses of federal sentencing decisions." *See* Michael T. Light, Michael Massoglia, & Ryan T. King, *Citizenship and Punishment: The Salience of National Membership in U.S. Criminal Courts,* 79 AM. SOC. REV. 825, 844 (2014). I myself have uncritically followed this convention in a previous analysis of these data. *See* Mona Lynch & Marisa Omori, *Legal Change and Sentencing Norms in the Wake of Booker: The Impact of Time and Place on Drug Trafficking Cases in Federal Court*, 48 LAW & SOC'Y REV. 411, 425 (2014). Worse, though, some researchers categorize the use of criminal history as a control above and beyond its role in calculating presumptive sentence—as a "legal" variable rather than as an "extra-legal" one in models that aim to explain "unwarranted" sentence disparities. *See* Jeffery S. Nowacki, *An Intersectional Approach to Race/Ethnicity, Sex, and Age Disparity in Federal Sentencing Outcomes: An Examination of Policy Across Time Periods*, 17 CRIMINOLOGY & CRIM. JUST. 97, 103 (2016). Above and beyond the logic problem with that categorization, even the Commission's own research has lamented the way that racial disparities and injustices work through criminal history. *See, e.g.*, Amy Baron-Evans & Kate Stith, *Booker Rules,* 160 U. PENN. L. REV. 1631, 1688 (2012) (discussing the "career offender" guideline provision's racially unequal impact).

B. Data & Methods

I use an amalgamated dataset of federal sentencing outcomes from 1992-2012 that I have used in prior research on the impact of legal change on federal sentencing outcomes in drug cases.[41] The data are collected, cleaned, and coded by the United States Sentencing Commission and include information pertaining to every criminal defendant sentenced in federal court, other than those convicted of petty misdemeanors. This dataset is among the most extensive and complete sentencing databases available on American criminal courts, and includes a wealth of case-related and defendant-related variables.

As I have done in previous research, I isolate my analyses here to drug trafficking cases.[42] This is for two reasons. First, in order to provide the most stringent test of my claims, it is important to control for as much extraneous variation as possible. It is common sense that different kinds of criminal defendants (i.e., those convicted of white-collar offenses, drug trafficking, immigration violations, or child pornography) can and may well produce differential sanctioning responses even from single legal actors. Therefore, limiting to one category of offense mitigates that potential covariance. Second, from the inception of the guidelines up until 2010, drug-trafficking offenses have constituted the single largest offense category of federal convictions in the federal criminal caseload every year.[43] Therefore, this category provides for a robust number of cases each year.[44]

For the analyses I present here, I conduct a set of analyses of covariance (ANCOVAs) to quantitatively demonstrate how the use of criminal history varies over time, across place, and across category itself. I utilize ANCOVA, which is a variant of linear regression, because it is a better intuitive fit for the research questions I pose for these analyses,

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[41] *See* LYNCH, *supra* note 33, at 153-156; Lynch & Omori, *supra* note 40, at 421-422 (using years 1993-2009); *see generally* Mona Lynch & Marisa Omori, *NIJ Final Report: Legal Change and Sentencing Norms in Federal Court: An Examination of the Impact of the Booker, Gall, and Kimbrough Decisions* (2013) (providing prior research and details about the dataset). Our dataset is supplemented with data from various available sources related to a number of locale-based contextual variables.

[42] I exclude cases from the U.S. territories and the District of Columbia.

[43] Since then, drug trafficking has been either the first- or second-largest category, with immigration crimes surpassing it in some years.

[44] Immigration cases might be an alternative but those cases, by design have had large inter-district differences in adjudication procedures, mainly due to "fast-track" programs that exclusively existed in select districts for many years.

specified below.[45] The total number of cases included in the present analyses is 446,969, of which 58% were sentenced before the *Booker* case (which rendered the Guidelines advisory), and 42% were sentenced subsequent to the case.

Because I am interested in observing adherence to the Guidelines in sentencing outcomes, I primarily use a *percent sentence difference* outcome measure that represents the gap between the calculated minimum guideline sentence and the actual sentence imposed. The Guideline minimum accounts for the conviction and all other "specific offense characteristics;" criminal history category; enhancements for weapons, priors, and other aggravators; and minimal role and acceptance of responsibility mitigators, as calculated by the probation officer and presented in the presentence report. A value of 100 means that the guideline minimum sentence and the actual sentence were the same (i.e., the actual sentence was 100% of the guideline minimum). Values less than 100 indicate a smaller actual sentence compared to the guideline minimum sentence. Values greater than 100 represent defendants sentenced for longer periods of time than the guideline minimum sentence.

My primary independent variable is Criminal History Category, which ranges in value from 1 (lowest level of applicable criminal history) to 6 (highest level of applicable criminal history). I also incorporate two different "time" variables. First, I created a dummy variable for guideline period that distinguishes the cases between those sentenced pre-*Booker* and those sentenced post-*Booker*. This way I can examine whether the differential effects of criminal history are simply the product of increased sentencing discretion in the advisory guidelines era. I also use sentencing year in one analysis (represented in Figure 5) to illustrate changes in sentence outcomes over time. To capture locale, I use a set of dummy variables representing four regions within the United States: Northeast, South, Midwest, and West.[46] Finally, I use three defendant race/ethnicity dummy variables, representing defendants identified as Black, White, or

[45] To control for lack of homogeneity in variance by criminal history category, which was produced by outlier cases at the extreme ends of offense level, I constrained the sample to all drug-trafficking defendants with final offense levels falling between Offense Levels 11-35. Approximately 9.2% of drug-trafficking cases in total were removed on the two ends.

[46] Region was defined using the U.S. Census categorizations. The South had the largest number of cases, followed by the West, the Midwest, and finally the Northeast.

Latino/Hispanic[47] to examine how criminal history differentially plays a role in sentencing as a function of defendant race, both pre- and post-*Booker*.

In all of the analyses, I controlled for offense level on the logic that variations in offense seriousness could potentially interact with criminal history to impact the relative punitiveness of sentence outcome. I also control for several key legal variables in the analysis represented in Figure 3: whether a mandatory minimum applied, and whether prosecutor-initiated or judge-initiated departures were applied. While I did test for significance in all of the analyses, my goal here is more descriptive than explanatory, to further the Zimring conversation about the complicated puzzle of time, place, and punishment.

I explore several questions here: does criminal history category generally predict relative punitiveness of the sentence imposed, above and beyond what is specified by the Guidelines? Does criminal history differentially impact sentence outcomes as a function of policy period (pre- and post-*Booker*)? Does criminal history differentially impact sentence outcomes as a function of defendants' race or ethnicity, and does that change as a function of policy period? And finally, does criminal history differentially impact sentence outcomes as a function of locale? If so, are these differences stable over time? To be clear, while my questions are inspired by Zimring's work on variation over time and across place, they are not a direct attempt to replicate his specific focus on imprisonment growth in the federal system.[48]

In the next three sections, I answer these questions by unpacking the role that criminal history plays in sentence outcomes, above and beyond its authorized role in the Commission's guidelines regime. Specifically, I measure the distance between the bottom of the prescribed Guideline sentence for a given defendant (the final, court-accepted version of what the probation officer has calculated) and the actual sentence imposed as a function of criminal history category. At the aggregate level, drug-trafficking sentences have consistently been below

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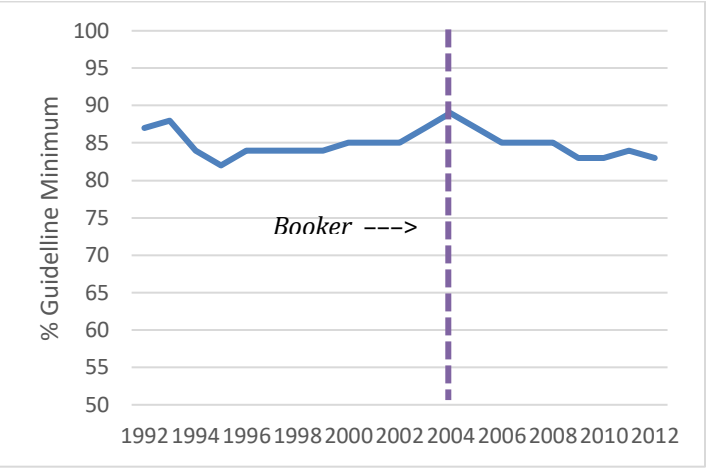
[47] In this dataset, 40.5% of the defendants are Latino/a, 30.6% are Black, 26.6% are White, and 2.4% are in other racial or ethnic categories.

[48] I offer an explanation of imprisonment growth within the federal system in LYNCH, *supra* note 33, at Chapters 1-2, and trace the capacity-building, including jurisdictional expansion in the 20th century. Here, I limit to changes after the federal sentencing guidelines were fully implemented, and primarily use the *Booker* decision as the key legal change to examine.

the Guideline minimum sentence. Across the two decades (1992-2012), the average drug sentence was about 85% of the Guideline minimum sentence.[49] This has been relatively consistent over time, so even before the Supreme Court's 2005 *Booker* decision rendered the Guidelines advisory, actual drug sentences were on average shorter than the minimum indicated by the calculated Guidelines (see Figure 1).

[49] Again, I used a created variable that is simply a given defendant's imposed sentence in months (coded as "senttot" in USSC dataset) divided by the Guideline minimum sentence as indicated on the Sentencing Table for a given defendant's final offense level and criminal history category (coded as "glmin" in USSC dataset) x 100.

Figure 1: Mean Percentage of Guidelines Minimum Sentence for Drug Trafficking, by Year[50]



This consistency, though, belies (and masks) considerable variation in how sentence outcomes have actually been achieved. Before the Guidelines became advisory, prosecutor-sponsored departures, especially for providing substantial assistance to the government, accounted for much of the below-Guideline sentences. This was because judges had few legal ways to grant departures except in unusual cases. Since the Guidelines have become advisory, the reductions are more often a combination of judicial and government-sponsored departures.[51] Nonetheless, as is indicated in Figure 1, the norm both before and after the *Booker* decision was for sentences below the minimum, grouped around 85% of the minimum.

C. Varied Impact of Criminal History Category

In regard to my first question, whether sentences are differentially impacted by criminal history category, it appears that they are. In regard to drug defendants, the analyses demonstrate an added punitive effect above and beyond the guidelines' sanctions as defendants' criminal history increases. That increase then reverses at the highest level, CHC

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[50] The *Booker* decision occurred in early January 2005, but the sentenced cases from mid-year 2004 onward were impacted by the precedent case, *Blakely v. Washington,* so the USSC treated cases after this decision was in flux as to the mandatory nature of the Guidelines.

[51] *See also* Lynch & Omori, *supra* note 40, at 439.

VI, where sentences fall further below the calculated guideline minimum sentence.

To examine whether and how much the degree to which sentencing is impacted by CHC, I tested the null hypothesis that assignment to CHC would not affect the percentage of Guideline Minimum Sentence imposed. In the ideal version, all post-Guideline calculation adjustments to sentencing would be equal across criminal history categories since the Guideline calculation is supposed to capture all legally relevant considerations. Departures should not be correlated with criminal history category or offense level, since they are not, as defined, contingent upon those elements. Nonetheless, in the first analysis, I included Final Offense Level as a covariate, just to control for the qualitative differences between more and less serious drug cases across the spectrum. Since the Guidelines became less determinative of final sentence after the *Booker* decision, I also included a dichotomous variable for sentencing period (pre- or post-*Booker*) as a second independent variable.

Figure 2: Percent of Guideline Minimum in Drug Cases by Criminal History Category (Overall, Pre- & Post-*Booker*)[52]

[52] Global mean is 85%, so one should expect a flat line across at 85%. This figure reflects unadjusted means. I show the unadjusted means in Figure 2 because CHC VI contains a large share of defendants whose offense levels are inflated by the career offender guideline (which is essentially a recidivist enhancement) rather than by facts of the case per se. In subsequent figures, I use the adjusted means after entering the covariates.

Figure 2 illustrates the relative loss of leniency as a function of criminal history. If CHC did not matter, the mean percentage of actual sentence to Guideline sentence would be 85% across the categories. Overall, CHC did matter. Relative to the lowest criminal history category (which includes defendants with no criminal history or, at most, a single low-level conviction in the past 10 years, punished by no more than 6 months in custody) and the highest category, CHC VI, CHC decreased the degree of sentence break by as much as 7 percentage points, with those in CHC IV the most disadvantaged.[53] Although it may seem counterintuitive that those in the highest category, CHC VI, were beneficiaries of the largest relative discounts, this makes sense in light of the "career offender" guideline.[54] All defendants with requisite prior offenses are pushed into this category, so the prescribed sentence often stands out as unduly long, especially for those whose qualifying priors and/or crimes of conviction are relatively low-level offenses. In that sense, they may be perceived as sympathetic defendants who face overly-harsh punishment for their prior record.

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[53] All of the CHCs significantly differed from CHC 1 ($p < .0001$) in the model that controlled for OL, although with a total N of over 400,000 cases this is not *necessarily* substantively meaningful. The relative swing in proportion of breaks is substantively meaningful, especially as the CHCs increase since the actual incarceration term significantly increases. Differences for policy period overall were also highly significant, as were differences for policy period x CHC.

[54] From 1992-2012, approximately 62% of drug defendants in CHC VI were "career offenders."

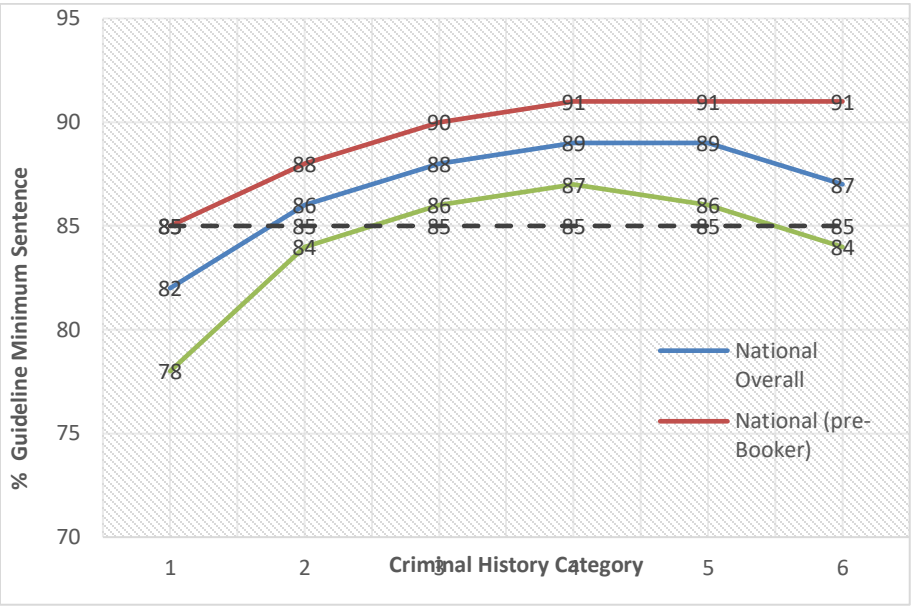
What is also evident in this analysis is that *Booker,* in essence, benefitted defendants in the lowest and highest criminal history categories. Courts did not punish drug defendants more harshly (relative to the Guideline minimum) once the Guidelines became advisory, so the relative break for those in Categories II-V did not change from the pre-*Booker* period. It was just in the two anchoring categories—both of which are likely to contain sympathetic defendants (albeit for very different reasons)—where the rigid and punitive Guidelines sentences were repudiated to a greater degree once courts had the discretion to do so.

I next examined whether controlling for the legal sentencing adjustments that occur during the sentencing proceeding, after the Guideline calculation has been determined, reduces or eliminates the differential impact of criminal history. I included, as covariates, all recorded departures, including for substantial assistance to the government, other government-sponsored departures, judicially initiated downward departures, and all upward departures. These were dichotomous variables, with 1 indicating that a departure in a given category had been granted. Finally, I included whether the defendant was subject to a mandatory minimum, since this functions as a floor on sentences, absent a motion from the prosecutor.

As illustrated in Figure 3, these controls do not account for the differential impact of criminal history. Overall, relative to CHC I, defendants lose up to 7 percentage points in reduction from the Guideline minimum, again with those in CHC IV most disadvantaged. These controls do bring to light the differences between the pre- and post-*Booker* period, to reveal that the legal mechanisms account for differential amounts of sentencing outcome as a function of period. While drug defendants overall seemed to receive more sentencing breaks in the post-*Booker* period, the degree of change as a function of criminal history category is also greater in this period, after controlling for the officially accounted for sentencing breaks.

Figure 3: Effect of Criminal History Category on Drug Sentences, Controlling for Departures and Mandatory Minimums[55]

[55] Offense level, substantial assistance departure, other downward departure, upward departure, and whether subject to mandatory minimum were all included as covariates. All global F-tests of differences were highly significant (effect of CHC, effect of Booker, and Booker x CHC). Several pairwise comparisons between several CHCs (i.e., between CHC IV and V) were not significant.



D. Criminal History and Race

Not only does criminal history deviate from its intended impact on sentences as a function of CHC assignment, but it works differently across defendants, grouped by racial or ethnic identity. Figure 4 illustrates how criminal history category impacts sentence as a function of racial group in the two time periods. Several patterns are notable here. Consistent with prior research,[56] black drug defendants as a group deviate least from the guideline minimum, and so appear to get the fewest sentencing breaks post-guideline calculation (i.e., at the sentencing hearing), whereas white drug defendants, as a group, receive the most discounted sentences relative to the guideline sentence.[57] Nonetheless,

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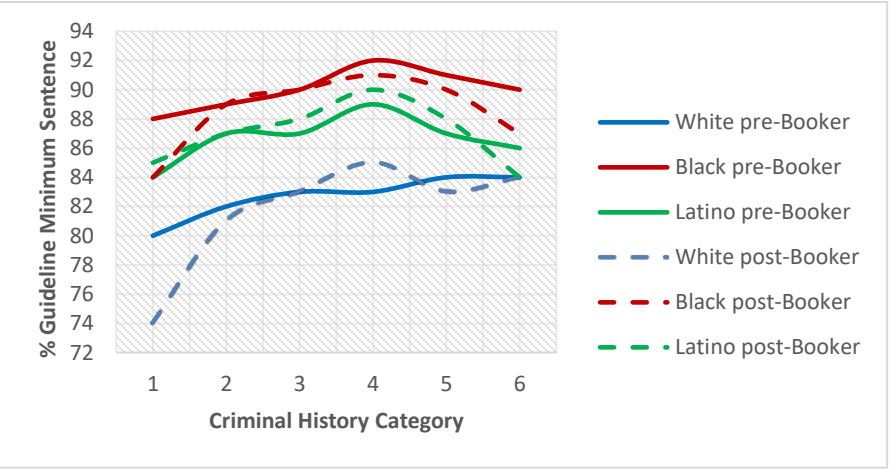
[56] *See* Lynch & Omori, *supra* note 40, at 436.

[57] It is important to note here, that this does not mean judges are solely responsible for these changes post-*Booker*. Sentencing is a joint act of multiple legal actors. *See* Jeffery T. Ulmer, *The Localized Uses of Federal Sentencing Guidelines in Four U.S. District Courts: Evidence of Processual Order,* 28 SYMBOLIC INTERACTION 255, 272-273 (2005) (concluding that local legal actors function as "communities" in crafting sentences). In this context, judges are sometimes constrained not only by mandatory minimums, but by binding or highly restrictive plea deals which did increase after *Booker*. *See* Mona Lynch, *Booker Circumvention? Adjudication Strategies in the Advisory Sentencing Guidelines Era,* 43 N.Y.U. REV. L & SOC. CHANGE (forthcoming 2019) (describing use of plea terms to lock in judges); *see also* LYNCH, *supra* note 33, at 123 (describing use of mandatory enhancement after *Booker* to lock in judges).

each group's overall pattern in relation to CHC was relatively similar.[58]

Figure 4: Criminal History Category & Race/Ethnicity, Pre- and Post-*Booker*



When these were disaggregated by time period, as reflected in Figure 4, several differences emerge. Most notably, white drug defendants in CHC I appear to have benefitted the most from changes to sentencing practices post-*Booker*, compared to black and Latino defendants, but white drug defendants in CHC VI did not benefit at all from the changes brought by *Booker*. Defendants in both other racial groups, then, account for the CHC VI leniency effect of *Booker*. Thus, it appears that the mandatory guideline regime constrained sentences at both ends of the criminal history continuum, but they did so differentially as a function of defendant race. For all three groups, the sentence relative to the calculated guideline varied more as a function of CHC post-*Booker* when compared to the pre-*Booker* period. Overall, sentencing of Latino defendants demonstrated the most consistency over time and across criminal history categories. On the other hand, white defendants experienced the greatest amount of change between the two periods in how CHC impacted sentence, moving from having the least variation across categories in the pre-*Booker* period to having the most variation across CHC in the post-*Booker* period.[59]

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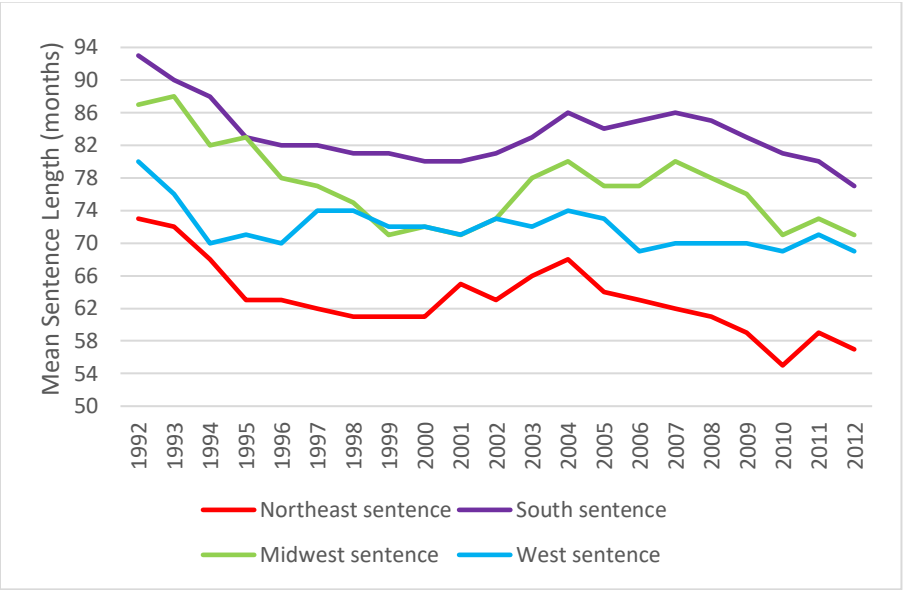
[58] This is confirmed by the F-tests of the interaction of racial group x CHC, which were non-significant.

[59] Pre-*Booker*, it was equal to the variation across CHH with black defendants, at 4%, and less than Latino defendants, at 5%. Post-*Booker*, the range for white defendants was 11%, compared to 7% for black defendants, and 6% for white defendants.

E. A Closer Look at Criminal History over Time and Across Place

As Figure 5 illustrates, there are large and consistent differences, by region, in actual sentences meted out. The mean overall drug sentence, controlling for offense level and criminal history, varied considerably by region, with sentences in the South averaging 83 months, at the high end, and sentences in the Northeast at 63 months, at the low end. Mean overall sentence length in the Midwest was 77 months and in the West was 72 months.

Figure 5: Mean Sentence Length over Time x Region[60]



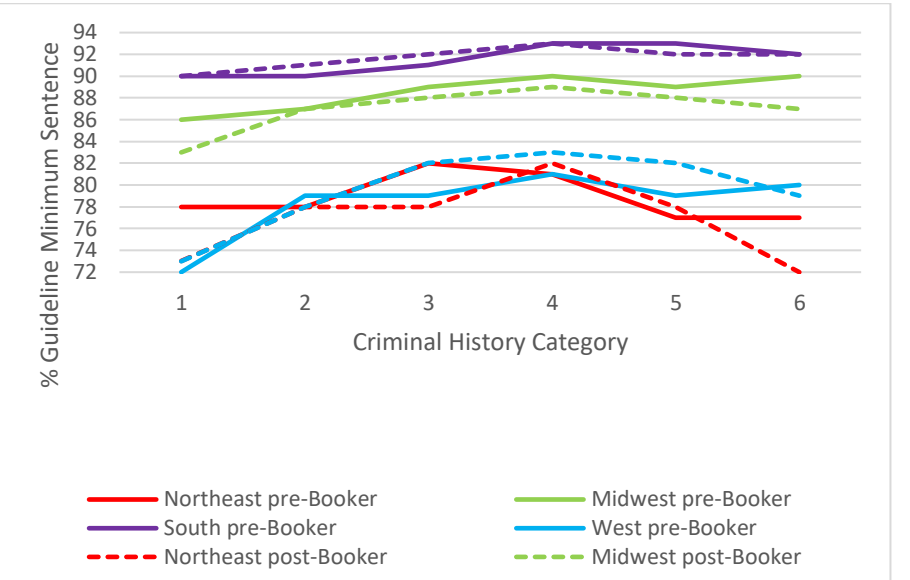
Despite the large gaps between regions, it also appears that they "march together" to some degree over time. All regions demonstrate the longest sentences at the beginning of the period, followed by steady decreases that take slightly different shape in each region. Another spike is evident directly prior to the *Booker* decision, during what was a notably restrictive and punitive period in the federal system,[61] followed again by a general trend downward in each region. In addition, the mean difference in sentence lengths was essentially the same in each region from the pre-*Booker* time period to the post-*Booker* time period. Sentences dropped by an average of two months in each region, post-*Booker*.[62]

[60] Overall F-tests for region and region x year are highly significant. The pairwise comparisons between all region pairs indicate all the differences are highly significant.

[61] *See* Stephanos Bibas, *The Feeney Amendment and the Continuing Rise of Prosecutorial Power to Plea Bargain*, 94 J. CRIM. L. & CRIMINOLOGY 295, 296–302 (2004).

[62] Specifically, sentences dropped from approximately 84 to 82 months in the South, 77.5 to 75.5 in the Midwest, 72.5 to 70.5 in the West, and 64 to 62 in the Northeast.

Figure 6: Criminal History Category & Region, Pre- and Post-*Booker*



The regional differences in sentence lengths appear to be largely, although not fully, produced by deviations from the guidelines. As Figure 6 illustrates, the general regional pattern of leniency holds when we examine sentences as a percentage of the calculated guideline minimum. In terms of actual sentence lengths, the West and Midwest were generally the closest to each other, with an overall mean difference of five months in sentence length, and both the South, on the high end and the Northeast, on the low end, are more akin to outliers. In terms of deviations from the guideline sentence, there is a slightly different grouping, in that the West and Northeast look more like each other and the Midwest and South are more closely aligned. Indeed, the West and Northeast have identical percentages, post-*Booker,* for the lowest two CHC categories (73% and 78% respectively).

Figure 6 also reveals two other important regional differences: How defendants' CHC Category played differing roles in sentencing as a function of region, and how *Booker* differentially impacted the role of defendants' CHC. In both time periods, the South has the most consistent sentencing across the Criminal History Categories, demonstrating substantively little variation (three percentage points) among the criminal history categories, and evidencing no meaningful change after the *Booker*

decision.[63] In both the pre- and post-*Booker* periods, drug sentences were, on average, 91.4% of the guideline minimum sentence.[64] A similar pattern exists in the West, where the patterns did not significantly change from the pre-*Booker* to the post-*Booker* period (there was, however, much more variation in how CHC impacted sentence).[65] The mean percent difference dropped less than a half-percent in the post-*Booker* period, from 81% to 80.6%. The Midwest demonstrated somewhat more variance across periods, in that sentences fell from 87% of the guideline minimum to 85.2%, although the pattern of influence of CHC did not change as a function of time period.[66] The Northeast demonstrates the most within-region variance, both across time periods and in how the Criminal History Category impacts sentence. Imposed sentences here fell from 78.8% of the guideline minimum to 76.3% of the minimum, post-*Booker*, and the percentage drops were more dramatic for defendants in CHC I and CHC VI. In both of those categories, defendants benefitted by decreases of more than five percentage points in their sentences relative to the guideline minimum.[67]

Thus, in the two largest regions, the South and the West, there was little substantive change across the two time periods, nor was there measurable difference across the two periods in how the specific criminal history guideline provision was used. Conversely, it appears that districts in the Northeast region noticeably responded to the *Booker* sentencing policy change. Sentences were significantly reduced as a share of the guideline minimum, post-*Booker*, and defendants with both the least and most serious prior records (as calculated by the guidelines) seemed to be especially favorably impacted by the *Booker* changes. Nonetheless, it is important to reiterate that the actual drop in sentence lengths across all

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[63] This was confirmed when I partitioned the data by region and tested the impact of *Booker* and CHC on the percent guideline minimum sentence outcome measure on each region separately. Time period had no significant impact, nor did the interaction of time period x CHC in the South.

[64] Because I partitioned the data, the means may look different for these analyses, since the Offense Level controls are only controlling for drug cases within the region, not across the entire dataset.

[65] This was again confirmed when I partitioned the data by region and tested the impact of *Booker* and CHC on the percent guideline minimum sentence outcome measure. Time period had no significant impact, nor did the interaction of time period x CHC in the West.

[66] In the Midwest analysis, the difference in sentence percentage between periods was significant, but the interaction between time period x CHC was not.

[67] In the Northeast analysis, the difference in sentence percentage between periods was significant, as was the interaction between time period and CHC.

four regions was both modest and identical—two months. This suggests that the variations in the sentence percentage outcome variable may reflect changing modes of sentencing adjudication by key legal actors to maintain sentence outcome norms at the local level.[68]

V. CONCLUSION: WHAT WOULD FRANK SAY?

These data have been sliced and diced in multiple ways; taken together, the analyses confirm that law matters, but not as much as some law professors may think! The transformation of the guidelines regime that resulted from the *Booker, Gall,* and *Kimbrough* cases impacted punishment, but that impact was substantively modest (at least for drug cases) and variable by both demographics of defendants and by region. By removing many confounding variations from the picture, these analyses make clear that local and regional factors exert a strong influence on sanctioning practices, and that influence significantly moderated the impact of major legal change. Only the Northeast region demonstrated a notable amount of change in response to *Booker* in these analyses, which likely reflects the release of quite a bit of pent-up pressure to reduce sentences, at least for some groups of defendants, that had been kept in check by the mandatory guidelines regime.

The analyses also showed that districts (at least as grouped into regions) also marched together in sentencing trends over time, peaking and dipping in some degree of sync over the twenty-one-year period. This is likely in part due to changes to sentencing policy—either produced by Congress, courts or the sentencing commission—but it also likely captures larger social and political forces that themselves prompt policy reform. Surely, in the tail-end of the time period (and beyond), bottom-up populist pressure and considerable political concern with draconian drug sentences prompted some of the Commission's adjustments to the drug guidelines.[69] It also exerted pressure on Congress[70] which finally, after many aborted attempts, legislatively addressed the crack-powder punishment disparity built into the drug statute when it passed the Fair

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[68] This was a key finding in Lynch & Omori, *supra* note 40, where larger districts in particular maintained outcome norms over time despite major policy change.

[69] *See 2007 Crack Cocaine Guideline Amendments*, THE DEFENDER SERVS. OFFICE TRAINING DIV., (last viewed November 9, 2018, 10:30AM), https://www.fd.org/crack-cocaine-sentencing/2007-crack-cocaine-guideline-amendments (explaining the 2007 crack guideline reduction and its application); *see generally Annual Report, Fiscal Year 2014*, 28 FED. SENT'G REP. 211 (2016) (reporting on reductions in drug guidelines).

[70] *See* Carol Steiker, *Lessons from Two Failures: Sentencing for Cocaine and Child Pornography Under the Federal Sentencing Guidelines in the United States,* 76 LAW & CONTEMP. PROBS. 27, 35-36 (2013).

Sentencing Act in 2010.[71] Thus, the shrinking sentence lengths in the last several years presented in these data were likely jointly produced by socio-political pressures that: 1) helped transform legal practice at the local level, with the drug war mentality giving way to a more treatment-oriented ethos; and 2) allowed the Commission and Congress to finally act to reduce the punitive sting of the federal drug laws through formal legal and policy change.

Frank might conclude by taking the enduring lessons of *The Scale of Imprisonment*, coupled with this confirmatory data on the messiness of identifying single explanations for the production of punishment, to comment on the growing commitment (at least in many states) to stem mass incarceration. Zimring and Hawkins grapple with the question of decarceration in the 1991 book, assuming that the astounding growth in incarceration by that time was unsustainable. While they were realistic in their expectations that large-scale decarceration was unlikely given the political climate at the time, they could not have anticipated the continued, unabated growth in imprisonment in the U.S. that would not even begin to level out for another decade. But today is a different moment. Still, Frank the Realist would likely remind us that all that "goes up" does not necessarily "come down," and we should not expect more than modest reductions from our high watermark.[72] He would also remind us that there will be no singular route to changing punishment practices, given significant local variations in policies, practices, and values, coupled with the multiple causal forces that produce punishment norms and actual outcomes. In that sense, Frank and the analyses I presented would agree. Despite major legal change that opened up the opportunity for more lenient drug sentences, in a context of widespread condemnation of the punitive "war on drugs," sentences have remained remarkably stable, as have regional patterns of sentencing norms.

It is also clear that the patterns I demonstrated are not simply produced by strict allegiance to the guidelines or other formal policy mandates. I deployed the Criminal History Category because it offers a robust test of whether and how a legal provision is differentially influential on a penal outcome. As I noted, the CHC should be highly resistant to variation above and beyond its valuation in the guidelines' scheme. But the findings I presented here show that criminal history lives a varied life in federal sentencing. It matters differently for black, white and Latino defendants, and it matters differently in different parts of the country. And even when the mandatory guidelines were at their most

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[71] Fair Sentencing Act of 2010, Pub. L. No. 111– 220, §§ 2, 3, 124 Stat. 2372 (2010).

[72] *See* Zimring, *supra* note 8, at 336.

imposing in the federal sentencing process, criminal history did not behave as the Commission wished.

This confirms my qualitative observational findings that elucidate how the criminal history calculation is "biographized" and given meaning in federal sentencing proceedings.[73] The CHC provides fodder for adversaries' arguments about a given defendant's culpability and morality, inhering meaning through those narratives. The data presented here put an exclamation point on the observation that sentencing judgments cannot be "contained by the quantitative system that was to regulate the power to punish, nor reduc[ed] to the numerical representations that the system imposes."[74] This should also serve as a reminder that attempts to fully regulate and control social relations through laws, rules, and mandates, as Congress and the Commission has endeavored to do with federal sentencing, will always come up short since they ignore the very essence of social and political life.

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[73] *See* Lynch, *supra* note 31, at 16.

[74] *See id.* at 22.

APPENDIX: FEDERAL SENTENCING TABLE

SENTENCING TABLE
(in months of imprisonment)

	Offense Level	Criminal History Category (Criminal History Points) I (0 or 1)	II (2 or 3)	III (4, 5, 6)	IV (7, 8, 9)	V (10, 11, 12)	VI (13 or more)
	1	0-6	0-6	0-6	0-6	0-6	0-6
	2	0-6	0-6	0-6	0-6	0-6	1-7
	3	0-6	0-6	0-6	0-6	2-8	3-9
	4	0-6	0-6	0-6	2-8	4-10	6-12
Zone A	**5**	0-6	0-6	1-7	4-10	6-12	9-15
	6	0-6	1-7	2-8	6-12	9-15	12-18
	7	0-6	2-8	4-10	8-14	12-18	15-21
	8	0-6	4-10	6-12	10-16	15-21	18-24
	9	4-10	6-12	8-14	12-18	18-24	21-27
Zone B	**10**	6-12	8-14	10-16	15-21	21-27	24-30
	11	8-14	10-16	12-18	18-24	24-30	27-33
	12	10-16	12-18	15-21	21-27	27-33	30-37
Zone C	**13**	12-18	15-21	18-24	24-30	30-37	33-41
	14	15-21	18-24	21-27	27-33	33-41	37-46
	15	18-24	21-27	24-30	30-37	37-46	41-51
	16	21-27	24-30	27-33	33-41	41-51	46-57
	17	24-30	27-33	30-37	37-46	46-57	51-63
	18	27-33	30-37	33-41	41-51	51-63	57-71
	19	30-37	33-41	37-46	46-57	57-71	63-78
	20	33-41	37-46	41-51	51-63	63-78	70-87
	21	37-46	41-51	46-57	57-71	70-87	77-96
	22	41-51	46-57	51-63	63-78	77-96	84-105
	23	46-57	51-63	57-71	70-87	84-105	92-115
	24	51-63	57-71	63-78	77-96	92-115	100-125
	25	57-71	63-78	70-87	84-105	100-125	110-137
	26	63-78	70-87	78-97	92-115	110-137	120-150
	27	70-87	78-97	87-108	100-125	120-150	130-162
Zone D	**28**	78-97	87-108	97-121	110-137	130-162	140-175
	29	87-108	97-121	108-135	121-151	140-175	151-188
	30	97-121	108-135	121-151	135-168	151-188	168-210
	31	108-135	121-151	135-168	151-188	168-210	188-235
	32	121-151	135-168	151-188	168-210	188-235	210-262
	33	135-168	151-188	168-210	188-235	210-262	235-293
	34	151-188	168-210	188-235	210-262	235-293	262-327
	35	168-210	188-235	210-262	235-293	262-327	292-365
	36	188-235	210-262	235-293	262-327	292-365	324-405
	37	210-262	235-293	262-327	292-365	324-405	360-life
	38	235-293	262-327	292-365	324-405	360-life	360-life
	39	262-327	292-365	324-405	360-life	360-life	360-life
	40	292-365	324-405	360-life	360-life	360-life	360-life
	41	324-405	360-life	360-life	360-life	360-life	360-life
	42	360-life	360-life	360-life	360-life	360-life	360-life
	43	life	life	life	life	life	life