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In Their Words: The Sentencing Decisions of Federal District Court Judges According to Judges and Attorneys

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ABSTRACT AND ARTICLE INFORMATION

In the United States, federal criminal sentencing outcomes differ starkly across time and space. Recent quantitative studies have identified certain causes for these differences, but there remains unexplained variation. In this paper, it is argued that disparate subnational social and political contexts help explain differences in district judges' sentencing preferences. As a preliminary test of this theory, and to gain a deeper understanding of how district judges make sentencing decisions, this study consists of 19 semi-structured interviews with district court judges, former district court judges, and experienced criminal attorneys in four selected districts. Results were mixed, and there was a lack of consensus among subjects as to whether district judges' sentencing behavior is shaped by contextual factors. Findings also underscore strong differences among district judges and describe how the influence of distinct contextual factors on sentencing behavior is heavily dependent on the individual judge. Overall, this preliminary research suggests that social context can indeed shape judges' sentencing behavior, but further study is needed to better estimate the magnitude and breadth of contextual factors relative to alternative sources of influence.

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As trial judges of the United States federal judiciary, district court judges are a unique type of policymaker. Under Article III of the U.S. Constitution, district judges are appointed by the President, confirmed by the U.S. Senate, and legally bound by the rulings of the U.S. Supreme Court. Yet, despite these “national” qualities, each district judge has jurisdiction over only one of 90¹ geographically defined districts. Thus, district judges exercise subnational jurisdiction within a national political system. A particularly important duty of these district judges is to preside over criminal cases within their district brought by the U.S. government. If convicted, district judges are then responsible for sentencing individual offenders in accordance with federal law.

But how are these sentencing decisions made? Doubtless, district judges take into account the particular facts of each individual case, the circumstances of each individual offender, and the legal framework of the U.S. Sentencing Guidelines (hereafter, *the Guidelines*). Yet, sentencing outcomes can still vary irrespective of these case-specific and legally relevant facts.

Recent research efforts attempt to model and explain sentencing disparities among similarly situated offenders within the federal system (Johnson, Ulmer, & Kramer, 2008; Kautt, 2002; Lynch & Omori, 2014; Mustard, 2001; Ulmer, 2005; Wu & Spohn, 2010; Yang, 2014). These studies provide strong evidence that the partisan preferences of individual district judges, the differing practices of federal prosecutors, and the assignment pairings between judges and prosecutors, can all produce disparate sentences for similar offenders. Related research has demonstrated how recent legal developments allow district judges to exercise greater discretion to arrive at their preferred sentence (Epstein, Landes, & Posner, 2013; Fischman & Schanzenbach, 2011; Kim, Spohn, & Hedberg, 2015).

While these contributions advance understandings of federal sentencing policy, I argue that this research underemphasizes an important element of sentencing decisions: the differing sociopolitical contexts in the different federal districts. Specifically, I claim that district judges are sensitive to district-specific factors related to their environment such as 1) the punitive preferences of the legal community, 2) the punitive preferences of the public, 3) the prevalence of crime, and 4) the prevalence of incarceration.

The theoretical basis for why each of these factors may impact judges’ sentencing decisions is explained in greater detail below. But the broader theory of contextual influence is based upon the connection between district judges and the district in which they sit. More precisely, I argue that district judges seek to

foster strong professional reputations and desirable policy consequences in their districts. Thus, to the extent that punitive preferences and relevant sociopolitical conditions differ across time and space, these differences will partially explain differences in district judges’ decisions.

While much of the past scholarship examining federal sentencing employs quantitative methods, this research takes a different approach: phone-interviews with experienced legal actors in federal sentencing. This interview-based methodology is a well-suited complement to quantitative research, as it can provide a more rich understanding of the extent to which district judges incorporate their environment into their sentencing decisions. Interview subjects include current and former district judges, current and former U.S. attorneys, federal public defenders, and private practice criminal defense attorneys. Though this research involves interviews with only a small subset of actors in a few federal districts, it serves as a preliminary inquiry into whether district judges’ decisions are informed by sociopolitical conditions in their district.

Literature Review

Federal Sentencing Background

Before building the theoretical case for contextual influence on judicial sentencing, some background on federal sentencing is warranted. The 1984 Sentencing Reform Act was intended to reduce sentencing disparities throughout the country. The Act established a U.S. Sentencing Commission to promulgate uniform guidelines for district judges to follow in issuing sentences. As written, the Guidelines set forth relatively tight ranges of sentences for criminal defendants based on the type of offense committed and the offenders’ criminal history.

Yet, despite Congress’s intentions for uniformity in sentencing, judicial application of the Guidelines has changed drastically over time. During the first few years after the Guidelines were implemented in 1987, district judges sentenced fewer than 20% of offenders to sentences shorter than the range recommended by the Guidelines (U.S. Sentencing Commission, 1995-2017).² However, by Fiscal Year (FY) 2017, nearly 50% of federal offenders were sentenced below the recommended range (U.S. Sentencing Commission, 1995-2017).³ The more recent figures are even more striking when considering that a substantial minority of federal offenders (approximately 20-30% depending on the year) are convicted of crimes that carry a “mandatory minimum” penalty, in which district judges are unable to unilaterally sentence criminals to shorter sentences than the proscribed

statutory period (U.S. Sentencing Commission, 2011).⁴

Part of the explanation for this marked change is assuredly the 2005 U.S. Supreme Court case of *United States v. Booker*. In *Booker*, the Court clarified that the Guidelines were not mandatory but rather “advisory” on district judges. Since 2005, the Sentencing Commission, along with several scholars, have provided strong evidence that *Booker* prompted district judges to sentence below the Guideline-recommended range at increasing rates (Epstein et al., 2013; Fischman & Schanzenbach, 2011; U.S. Sentencing Commission, 2011; Yang, 2014). However, while *Booker* was clearly a watershed moment that increased district judges’ sentencing discretion, downward departures also increased during the 1990s and continued to increase years after *Booker* was decided.⁵ Thus, the increased district judge discretion granted by *Booker* cannot fully explain why judicial adherence to the Guidelines has eroded over time.

In addition to the national decrease in Guideline sentences over time, another intriguing characteristic of federal sentencing is the marked interdistrict variation in Guideline application. Several researchers have noted this phenomenon and conducted empirical tests to explain this variation (Fischman & Schanzenbach, 2011; Kautt, 2002; Kim et al., 2015; Lynch & Omori, 2014; Ulmer, 2005; Wu & Spohn, 2010). A central finding of many of these studies is that differences in sentences across districts are partially explained by prosecution practices, including charging decisions and the policy and/or personality of individual prosecutors. But with respect to differences in individual judges’ sentencing behavior, recent studies tend to limit their focus to partisanship (Epstein et al., 2013; Fischman & Schanzenbach, 2011). Yet, partisan effects are often small (Yang, 2014) and explain fairly little gross interdistrict variation in sentencing outcomes (Fischman & Schanzenbach, 2011). Thus, there are doubtless many other factors aside from party affecting judges’ different sentencing preferences across districts.

Time & Space: District Judges & the Importance of Context

I argue that contextual influence helps explain both the marked decrease in Guideline adherence over time and the high levels of regional variation in district judges’ sentencing decisions. Despite the fact district judges are unelected and enjoy life tenure, there is a wealth of evidence that they both care about their reputations in their districts and hold views somewhat representative of the people in their communities (Cook, 1977, 1973; Kritzer, 1978; Peltason, 1971; Rowland & Carp, 1996; Vines, 1964). Relatedly,

there is further evidence that many judges gain utility from arriving at what they believe to be good public policy (Posner, 2009; Segal & Spaeth, 2002; Sisk & Heise, 2005; Songer, 1979). From these two premises, it is plausible that different social and political environments related to crime and punishment shape district judges’ criminal sentencing decisions.

But to what specific conditions might district judges be sensitive? More precisely, what contextual factors help explain both the apparent change in district judges’ sentencing preferences over time and the regional differences among judges’ sentencing decisions? First, I posit that differing punitive attitudes of legal communities and the public in different districts are likely associated with varying sentencing behavior by district judges. In addition, I submit that sociopolitical community conditions pertinent to crime and punishment, such as general trends in crime and incarceration rates, also affect district judges’ sentencing decisions. To support these claims, I examine prior scholarship on the connection between judges and their environment.

Legal community & public influence. Courts are not simply a collection of individual decision makers. They are communities of attorneys and judges who interact with one another (Eisenstein & Jacob, 1977; Nardulli, 1986). Even in federal criminal court, district judges often have a close working relationship with a fairly small subset of attorneys who practice in their courts (Ulmer, 1997, 2005). A strong reputation among these attorneys is something that many judges likely derive utility from (Miceli & Cosgell, 1998; Posner, 1993). This desire can be instrumental for district judges, as they may seek to increase their chances of promotion to higher levels of the judiciary (Choi, Gulati, & Posner, 2012; Schauer, 2000). However, fostering a strong reputation among attorneys might also be an ends in and of itself. In other words, like all people, many district judges simply desire the respect and esteem of the people with whom they work (Baum, 2006; Posner, 2010).

Accordingly, in any given district, if the sentencing preferences of the legal community diverge from the sentencing behavior of certain district judges, we might expect those judges to garner a poor reputation. Indeed, there is some recent evidence that attorney evaluations of judges are based on the content of their decisions (Miles, 2015; Singer, 2014). There is also some direct evidence that social pressures from the legal community impact state-court judges’ criminal sentences (Huck & Lee, 2014). At the federal level, Ulmer (2005) finds different court communities in different federal districts develop different interpretations for identical criminal sentencing standards (e.g., “acceptance of responsibility”). This finding regarding the power of local legal norms in

federal sentencing practice, despite identical standards, indirectly suggests legal communities' sentencing preferences may hold some influence over district judges.

In addition to the impact of the legal community, there is also evidence that district judges' criminal sentencing behavior is associated with the views of the broader public (Cook, 1973, 1977; Kim, Cano, Kim, & Spohn, 2016; Kritzer, 1978). The extent to which the U.S. Supreme Court takes on a "representational role" and responds to public opinion has been the subject of much debate in the judicial behavior sub-field (Casillas, Enns, & Wohlfarth, 2011; Mishler & Sheehan, 1996; Segal & Spaeth, 2002). Yet, because district judges are usually long-time residents of their districts who regularly associate with members of their community, it is likely these trial judges are more representative of the public in their jurisdiction than appellate judges (Silver & Shapiro, 1984). As stated by two prominent scholars of district judges, "the sociological impact of the community, in combination with an appointment process that tends to ensure that judges are representative of the local political culture, causes us to believe district judges are (at least somewhat) representative of their respective communities." (Rowland & Carp, 1996, p. 74-75)

Sociopolitical Conditions: Crime & Incarceration. Aside from the sentencing preferences of different constituencies, district judges may also be influenced by the prevalence of crime and incarceration in their districts. The reasoning for why these conditions might influence judges is based on the assumption that judges seek to make their own view of good public policy (Epstein et al., 2013; Posner, 2009, 2010; Segal & Spaeth, 2002; Songer, 1979). Undoubtedly, district judges' views of good policy are shaped by individual factors, such as partisanship, political ideology, and personal background (Epstein et al., 2013; Sisk & Heise, 2005). However, I argue that these individual-level explanations are necessary but insufficient to understand differences in district judges' behavior. Given district judges' social connections with their geographic constituency, their views of good policy are likely supplemented by salient conditions in their community.

There is some recent evidence in support of sociopolitical influence in the federal sentencing context. For instance, Kim and colleagues (2016) found that certain district characteristics, such as racial composition, ideology, and poverty, can affect sentence severity for offenders. I focus on two other potential sociopolitical conditions: the prevalence of crime and incarceration. As to crime, it is plausible that higher crime rates will prod judges to punish and deter criminal offenders through longer sentences. Both Gibson (1980) and Ulmer and Bradley (2006)

found that state-elected judges sentenced criminals more harshly in higher crime rate areas. However, the question is not settled as Johnson and colleagues (2008) found no relationship between crime rates and sentence length for certain federal crimes at a given point in time. Still, the state-court findings support further inquiry into the question of whether judges' sentencing behavior is sensitive to the prevalence of crime in a particular area.

The reasoning for why incarceration may influence district judges' sentencing preferences is slightly different. Here, the logic is that district judges are becoming aware of the high costs, both fiscal and societal, of long sentences for offenders. By 2018, there is fairly broad consensus among academics and policymakers that the United States policy of mass federal incarceration has been a failure (Clear & Frost, 2015). In conjunction with other policymakers, such as U.S. attorneys (Kim et al., 2015), district judges have the opportunity to mitigate the federal policy of relatively long sentences absent congressional action. If district judges truly seek to make the best policy, it is likely that they would be influenced by the surge in federal incarcerations and respond accordingly with more below-Guideline sentences.

Doubtless, the effect that the social problem of incarceration has on district judges might depend on whether individual judges see their role in government as active or passive (Scheb, Bowen, & Anderson, 1993). Some district judges might see the incarceration problem as a policy issue best left to the elected branches of government. Still, just as some argue it is implausible to assume judges divorce their ideological preferences from their decisions, I similarly argue it would be unreasonable to believe judges ignore pertinent social facts relevant to a policy over which they exercise some control.

To be clear, I do not suggest that the sources of contextual influence outlined above are the only factors that might influence judges' sentencing decisions. Sentencing outcomes are certainly influenced by facts related to the individual offender and crime. Further, there is strong evidence that prosecution policies (Kim et al., 2015; Lynch & Omori, 2014; Wu & Spohn, 2010), district judge partisanship (Epstein et al., 2013; Yang, 2014), and different levels of judicial discretion (Fischman & Schanzenbach, 2011) all shape sentencing outcomes. However, the four contextual determinants probed herein (legal community preferences, public preferences, crime, and incarceration) are additional theoretically plausible factors yet to be sufficiently examined.

Interview-Based Research

To provide a preliminary test of the theoretical perspective of contextual influence, I employ phone interviews with experienced actors in federal criminal sentencing.⁶ One justification for this method is that targeted interviews of elites can provide new insights into the thought processes of how politically important decisions are made (Beckmann & Hall, 2013). Regardless of any observed strength of various determinants of judicial influence in quantitative models, probing interviews can provide insight into the mechanism by which those determinants are important to district judges. Stated differently, experienced interview subjects will be able to opine as to *why* judges' criminal sentencing decisions are (or are not) affected by certain factors.

Another reason to conduct interview-based research is that it can help assess the relative value of competing theoretical perspectives by soliciting the opinions of actors who possess first-hand experience with district judges' sentencing decisions. Importantly, the interview method has proved valuable to political scientists studying the behavior of other policymakers, such as members of Congress (MacDonald, 2007; Zegart, 2013). In the context of the sentencing behavior of district judges, the present research will assist in determining the relative importance of subnational contextual influences, compared to alternative factors identified in prior research, such as judicial partisanship (Epstein et al., 2013; Fischman & Schanzenbach, 2011; Schanzenbach & Tiller, 2007).

Yet another reason to utilize the elite interviewing method is the dynamic nature of federal sentencing. Regardless of geographic differences, a central question of this research is to determine why rates of below-Guideline sentences continued to increase several years after *Booker* was decided. This type of inquiry, often referred to as "process tracing," attempts to determine the causal chain of how certain events led to a particular policy outcome (George & Bennett, 2005). Interviews with elite policymakers have been identified as an important tool in the process tracing method, as they allow for researchers to gain first-hand perspectives of how a policy output evolved in the fashion that it did (Tansey, 2007).

Despite the research value of elite interviewing, some of the factors hypothesized to influence district judge sentencing (such as crime and incarceration rates) are measurable. Thus, one might reasonably inquire as to why a quantitative approach is not preferable. One shortcoming of a quantitative approach is that it can be very difficult to untangle causal inputs from variables that may be correlated for reasons inconsistent with contextual influence. For

instance, local crime rates, incarceration rates, and caseloads are all related to each other and may shape or be shaped by sentencing outcomes irrespective of judges' social responsiveness. Relatedly, there is the more fundamental problem that district judges' decisions are likely not immediately and proportionately responsive to the crime and incarceration problems. It is much more likely these sociopolitical effects are incorporated into judges' decisions in a gradual and nonlinear fashion. Finally, and perhaps most importantly, district-level sentencing data are extremely noisy with substantial year-to-year variation in caseload, offender characteristics, and case-composition mix.⁷

None of the above is meant to undermine the important quantitative research conducted on federal sentencing. These efforts use case-level models, focus on a single offense type, and/or use stable dichotomous variables (e.g., party), to overcome some of the above issues (Epstein et al., 2013; Fischman & Schanzenbach, 2011; Kim et al., 2015; Lynch & Omori, 2014; Wu & Spohn, 2010; Yang, 2014). Indeed, this research has been invaluable in demonstrating how prosecution policies, partisanship, and standards of review all impact federal sentencing. But when assessing the holistic impact of the district-level environment on sentencing, it is valuable to understand what district judges themselves are thinking and saying about their sentencing decisions. Assuredly, the interview-based research is not without difficulties. Opinions of interview subjects should be assessed critically for both veracity and reliability. Further, given the necessarily small proportion of perspectives an interview-based approach can accommodate, this approach cannot be used to make strong generalizations. Still, there are also clear limitations of relying solely on quantitative methods to fully explain district judge decisionmaking. At a minimum, interviews with a subset of actors with years of experience in federal sentencing gives a more nuanced understanding of how certain district judges approach sentencing decisions.

Method

District Selection

Due to time and resource constraints, I chose to limit this research to four selected districts. A random sampling of all 90 districts, while perhaps best to generalize about district judge behavior, would likely have led to only a single interview subject for each district studied. This is not ideal for a research effort seeking to gain a deeper understanding of local contexts. On the other hand, a case study of a single district would provide the most depth but would also

be the least generalizable (George & Bennett, 2005). Thus, this research opts for a compromise approach between random sampling and a single case-study by selecting four districts intended to be as representative

as possible of all federal districts. Though the selected districts are not identified in order to protect subject confidentiality, Table 1 provides aggregate information on the selected districts.

Table 1: District Traits

District Trait	Traits Represented by at Least One Selected District	Traits not Represented by Selected Districts
Region	-Mid-Atlantic -Southern -Midwestern	- Northeastern - Western
Population	-large (> 5 million residents) -medium (>2 million but < 5 million residents)	-small (<2 million residents)
Urban/Rural	-majority urban -majority rural	n/a
Partisan Composition of Judges Last Decade	-majority Republican -majority Democrat	n/a
Racial/Ethnic Demographics	-10-20% African American population -greater than 20% African American population -10-20% Hispanic population -less than 10% Hispanic population	-less than 10% African American population -greater than 20% Hispanic population
Political Ideology of Citizens in Districts	-conservative -liberal	n/a

As can be seen from the center column of Table 1, many different areas of the United States are represented by the district pool. However, the right hand column of Table 1 also highlights certain districts in the country not represented by the four district sample. Due to the limited number of districts, the design was unable to include a small, rural district. There is also a lack of representation in this research of any Western districts, and relatedly, districts with relatively large populations of Hispanic-Americans. Thus, to the extent that district judges from small/rural districts, Western districts, or districts with large Hispanic populations have unique approaches to criminal sentencing, the present research will not be able to account for those differences. The foregoing is certainly a limitation of this research, but future expansion of this preliminary project will seek to address this issue through the inclusion of additional districts.

Identification of Subjects

Given that the present research is focused on the sentencing behavior of district judges, the judges themselves are obviously an apt target for interviews. This tactic of interviewing judges has been used before to test influences of judicial behavior (Hilbink, 2007; Levin, 1972; Ulmer, 2005). On the other hand, there

are several reasons not to limit the inquiry to the response of district judges alone.

First, there are reasons to suspect district judges, especially sitting judges, would not be completely candid regarding their sentencing practices. Scholars of judicial behavior have pointed out that judges are loath to admit that any “extralegal” considerations influence their decisions in individual cases (Carp & Stidham, 1998; Segal & Spaeth, 2011). Additionally, limiting interviews to only judges would do greater damage to the generalizability of the study. Recall that a central aim of this research is to achieve a deeper understanding of the sentencing behavior of district judges who operate in different contexts. Yet, because district judges decide cases individually and do not directly observe the sentencing behavior of other judges, interviews with a small proportion of judges or former judges from each district would not be appropriate for inferring conclusions regarding the district generally. On the other hand, including perspectives from persons with experience appearing before multiple judges within the district could more easily generalize regarding “typical judges” in that district.

Accordingly, it is necessary to supplement district judge interviews with interviews of non-judges. The non-judicial actors best situated to address judges’

sentencing behavior are almost certainly attorneys with experience in federal criminal sentencing. As argued recently by a prominent trial-court scholar, researchers seeking to better understand trial court behavior would do well to incorporate studies of attorneys into their approaches (Kritzer, 2012). Indeed, as attorneys are often professionally invested in the outcome of sentences, it seems as they would have some insight into what factors affect district judges' decisions.

Attorneys targeted for this research include 1) attorneys working for U.S. attorneys' offices who prosecute offenders, 2) attorneys working for federal public defenders' offices, and 3) experienced private-practice federal criminal defense attorneys. Because of the potential for interested parties to have differing views on sentencing policy and judicial behavior (Ulmer, 2005), it is important to gain a broad perspective from both attorneys representing the government and those representing the offenders. This tactic helps ensure results are not biased towards a particular source of judicial influence based upon the experiences or incentives of a subset of actors (Bleich & Pekkanen, 2013).

In order for attorneys to qualify as a potential interview subject, they must have experience working in federal criminal sentencing within their district for over 10 years. Ten years of experience assures that subjects will have worked with enough judges in the district to be able to make credible generalizations regarding district judge sentencing behavior. The ten year time period is also not arbitrary. All interviews were conducted in 2015 and early 2016, and 2005 marks the year of the *United States v. Booker* decision. As one primary goal of this research effort is to gain a better understanding of the gradual decline in judicial adherence to the Guidelines since 2005, it was prudent to find subjects who could speak to federal sentencing in the initial aftermath of *Booker* through the time of the interviews.

Contacting the Subjects

Several different techniques were employed to contact as many potential interview subjects as possible.⁸ First, individuals with clear knowledge and experience in federal sentencing were contacted. In addition to being potential interview subjects, these persons are also "toehold" subjects who can lead to additional subjects (Beckmann & Hall, 2013). The toehold subjects contacted were 1) the U.S. attorney's office for each district, 2) the federal public defender's office for each district, and 3) every living retired U.S. district judge in each district.⁹ These subjects certainly meet the criterion of substantial experience in federal sentencing. In all, 21 subjects were contacted via this method. From these 21 potential

subjects, I scheduled six interviews with willing participants for a response rate of 29%.¹⁰

In order to recruit additional qualified subjects, I used a second method: I contacted all officers of the Federal Bar Association (FBA) chapters of each selected district by e-mail correspondence and requested referrals. FBA officers may or may not be involved in criminal law themselves, but they likely will have served actively in their districts for long periods of time and thus be able to refer potential subjects. After making these contacts to 16 officers, I received eight responses and five referrals. Of these five referrals, two subjects agreed to interviews, for a response rate of 40%.

At the conclusion of each interview, I asked all subjects if there was any other person in their district that they believed could answer the interview questions or otherwise be beneficial to this research effort. This strategy, known as "snowball sampling," is predicated on the notion that persons with knowledge regarding a particular subject will be able to refer researchers to other knowledgeable persons on the subject (Suchman & Cahill, 1996).¹¹ The snowball sampling method led to 16 referrals, and ultimately 11 subjects, with an expectedly higher response rate of 69%. The overall response rate for all three methods of contact was 45%.

Conducting the Interview & Coding Responses

When speaking with subjects, I used semi-structured interview techniques. I thus began with a list of prepared questions but left many questions open-ended for subjects to answer as they saw fit.¹² Subjects were asked general questions on why judges choose to apply or depart from Guideline-recommended sentences. They were also asked yes/no questions regarding the potential impact of specific factors.¹³ For example, "in general, do you believe the punitive preferences of the general public affect district judges' sentencing decisions? If so, in what way?" It is the responses to these questions that were used for compiling descriptive statistics and exploring competing theoretical perspectives of judicial sentencing behavior.

When coding results for specific areas of inquiry, I divided responses into three categories: "agreement," "qualified agreement," or "qualified disagreement/disagreement." This procedure became necessary as many subjects believed that certain factors were influential on judicial sentencing decisions, but this influence was either secondary or conditional. Some examples of responses coded as qualified agreement statements were answers such as, "yes, for some judges that matters," or "yes, in certain cases," or "yes, I think that plays some role." Once the

“qualified agreement” category was added, responses typically fit very well into one of the three categories.

As to manner of presentation, I employ both descriptive statistics and quotations from individual subjects. Unfortunately, due largely to space constraints, not every area of inquiry is presented and analyzed below¹⁴. However, throughout the results, I include discussion of additional themes that emerged from multiple subjects throughout the interview process. This is done to ensure the topics that subjects emphasized most are included in the presentation.

As to organization, I first profile the subjects themselves. I then discuss subjects’ responses to questions regarding the sources of contextual influence hypothesized above. Finally, in order to avoid biasing results towards my own perspective, I analyze subjects’ responses to alternative sources of influences.

Results

The Subjects

In total, the above methodology produced 19 approximately hour-long interviews with subjects. Each district yielded at least four subjects, and no

district yielded more than six subjects. Some general information regarding the subjects is set forth in Table 2 below.

As can be gleaned from Table 2, subjects were extremely experienced. The median subject had 24 years of experience in federal sentencing practice in the district, and no subject had less than 13 years of experience. In addition, qualitatively, all 19 interview subjects characterized themselves as “very familiar” with federal sentencing practice in their district. As shown in the second row of Table 2, the interview subjects included six district judges/former judges and 13 attorneys.

Also of note, there were seven subjects who practiced only criminal-defense, two subjects working a U.S. attorney’s office, and four “hybrid” attorneys who formerly worked in a U.S. attorney’s office but were private practice defense attorneys at the time of the interview.¹⁵ Finally, the last two rows of Table 2 illustrate a caveat to the results of this research. The subject pool is disproportionately White and male. The pool is particularly disproportionate as to gender, when considering the legal profession as a whole.¹⁶ These demographic disparities are certainly a limitation of this research, and we should interpret the results with some caution, as they will over represent a White/male perspectives.

Table 2: Aggregate Subject Characteristics

District Trait	Traits Represented by at Least One Selected District
Experience	<i>Median Subject Experience: 24 years</i> <i>Minimum Subject Experience: 13 years</i> <i>Maximum Subject Experience: 43 years</i> <i>Total Years Experience: 460 years</i>
Profession	4 former federal district court judges; 2 federal district court judges; 3 federal public defenders; 4 private practice criminal defense attorneys; 2 assistant U.S. attorneys; 4 “hybrid” former U.S. attorneys & current private practice criminal defense attorneys.
Gender	16 Males 3 Females
Race/Ethnicity	17 White 2 African Americans 0 Hispanics

Contextual Influence

Before analyzing the subjects’ responses¹⁷ regarding specific contextual influences studied, it is prudent to get a sense of whether subjects agreed in

general that district judges were influenced by their local environment. Responses to this general question serve as a test of facial validity of contextual influence. If a strong majority of experienced actors do not

believe that district judges respond to community influences in sentencing decisions, it would be difficult to sustain support for the argument that these factors are important.

However, subjects were generally supportive of the notion that contextual influence affect sentencing decisions. Of 19 subjects, 15 (79%) expressed agreement or qualified agreement that the local environment impacted district court sentencing decisions. As will be discussed in greater detail below, there was much greater disagreement among subjects regarding the source(s) or reasons for this influence. But it is noteworthy that several subjects believed that judges' sentencing decisions were shaped by the local environment in some way.

Obviously, the general question on the influence of "local environment" is vague. Thus, Table 3 presents descriptive statistics of subject agreement/disagreement with the four specific sources of local contextual influence. As can be gleaned from Table 3, there was little agreement among subjects as to whether these individual factors influence

sentencing decisions. None of the potential sources of influence was broadly supported by a large majority of subjects. On the other hand, each variable had its fair share of proponents.

Table 3 shows fairly little difference in the levels of support among the factors. Subjects were generally more likely to express unqualified agreement that judges were influenced by the legal community and the public than by crime rates and incarceration rates. But in general, each potential source of influence was split roughly even between supporters and detractors.

This leads to the pertinent question of whether it was all the same subjects supporting the importance of the various community influences. This was not the case. In addition to the aforementioned result of 79% of subjects supporting the notion of general environmental influences, 89% of subjects (17 of 19) agreed that at least one of the above four factors was affecting judges. Thus, only 2 of 19 subjects believed none of the hypothesized sources of contextual influence had any impact on district judges' sentencing decisions.

Table 3: Percentages of Subjects Agreeing that Contextual Variables Impact Federal District Court Judges Sentencing Decisions

Contextual Source of Influence	Unqualified Agreement	Qualified Agreement	Total Agreement
Local Legal Community Opinion	37%	26%	63%
Local Public Opinion¹⁸	33%	11%	44%
Incarceration Rates¹⁹	12%	41%	53%
Crime Rates²⁰	21%	32%	53%

Local legal community opinion. Turning now to the specific factors, Table 3 shows that subjects disagreed whether district judges' ultimate sentencing decisions were impacted by the punitive preferences of the local legal community.²¹ On the one hand, some subjects expressed strong agreement that judges' in their district were very much involved with and influenced by the local legal community. One such subject stated as follows:

[This district] has one of the most active federal bar organizations in the country. The Federal Bar consistently has the judges participate in events, come to lunches, head discussion groups, host book conferences. [Judges] are very in tune of what is going on in the legal community.²²

When asked a further follow-up question regarding the substance of these events with respect to federal criminal sentencing, the subject explained that while there was a diversity of opinions among the Bar,

most sentencing-themed events advocated for shorter sentences. When queried further whether judicial participation in these events might impact actual sentencing decisions, the subject stated, "I do think judges take into consideration what is happening in [our district] when actually imposing sentences. It seeps in."²³

Another subject noted the impact of the local legal community on judges' decisions by contrasting the legal community to the broader public: "Judges are less influenced by the culture of the city or state. They are more influenced by the courthouse community. [This district] is pretty progressive on criminal justice issues, but the courthouse community is pretty dogmatic."²⁴ Two other subjects reported that differences in legal cultures were likely driving interdistrict variation in sentencing outcomes. One of said subjects argued that there were "cultures of practice" related to sentencing within each district's legal community, and judges were a part of these cultures.²⁵ The other subject stated that to the extent there was disparity in sentences across districts, this

was probably due to the different punitive preferences of legal communities.²⁶ Together, these perspectives are generally supportive of contextual influence. They are also consistent with the findings of Ulmer (2005) that different legal cultures ultimately lead to different sentencing outcomes in different districts in similar cases.

It should be emphasized, however, that not all subjects agreed that attorney opinions affect judicial sentencing behavior. One subject stated, "I think judges are actually more sensitive to other judges in other jurisdictions. They don't care what the local Bar thinks."²⁷ One former district judge acknowledged that judges are concerned about their reputation among attorneys, but denied that this concern had a tangible impact on their sentencing decisions.²⁸ This subject elaborated that judicial reputations in the legal community were linked to perceptions of fairness and collegiality rather than the substance of the judges' decisions. Notably, however, many attorney subjects belied this opinion and made normative judgments on the quality of judges in their district based solely on their punitive tendencies in sentencing.²⁹

Taken together, these results suggest that there is little consensus among actors experienced in federal sentencing on the impact of the legal community on judges' decisions. Certain subjects explained how the views and practices of attorneys affected judges' decisions, while other subjects were more prone to view judges as unmoved by attorney opinions.

Public opinion. As shown by Table 3, there was even less agreement among subjects regarding the impact of the public. This is possibly due to the fact that the majority of district judges' sentencing decisions are unlikely to be known by the vast majority of the general public. Despite this fact, one former judge explained how the public's view impacted his decisions in certain cases:

I agree [that public views regarding crime influence judges]. Judges are part of the community. We hear things and are very sensitive of the public. We read the news. When we feel the public is outraged, we understand that. At the same time, if there is perception that someone has been done an injustice, we are also mindful of that.³⁰

This statement perhaps reflects the strongest anecdote in this research on the effect the public can have on district judges. The quote also implies that public influence on judges' sentencing decisions may be most prominent when crime is covered by the media. Interestingly, this subject was not alone in citing the importance media coverage of crime might have on judges' sentencing. Another attorney subject,

when asked the question on public opinion influence, agreed that it was influential and then gave an anecdote of how a certain district judge justified his sentence:

Yes [the public influences judges' sentencing], because [judges] live in the community, most often. They read the papers, and they watch the news, and they see the pain in the community. I just did a case that involved a weapon in federal court and the judge slammed him. He went on a little speech and said 'all you have to do is listen to the news or read the paper to know that guns are illness in our society, and you have to figure out a way to stop it.'³¹

While this anecdote may be more indicative of media influence on judges than direct public influence, it clearly shows how judges' connection to the public can be important in shaping their sentencing behavior. Yet another subject conditioned public influence on district judge sentencing decisions to "high profile cases involving public corruption."³² In these high-profile cases, the subject suggested that judges were very cautious against being "overly-lenient."

Finally, notwithstanding the views of several subjects, it is worth reiterating that a slight majority of subjects (10 of 18) did not agree that public views impact judges' sentencing decisions in general. The lack of consensus among subject also perhaps reflects differences among judges. According to one subject, while some judges are concerned with their reputation in the community, some judges "don't give a shit" about what anybody else thinks.³³

Incarceration rates. As shown by Table 3, results related to the incarceration rate were also mixed. One subject acknowledged that attorneys consistently bring up the problems of rising incarceration and overcrowded jails. As an assistant U.S. attorney, this subject lamented the fact that district judges seemed to be sensitive to this extralegal argument. The subject explained that defense attorneys raise the issue of high incarceration "all the time" at sentencing hearings and that some judges have agreed with these attorneys and have justified lower sentences by stating "the jails are overcrowded."³⁴

The relatively high number of "qualified agreement" responses for the effect of incarceration rates also suggests that many subjects believed the impact incarceration has on district judges is conditional on other factors. One such condition might relate to judges' ideological preferences. One subject stated,

It's becoming more and more obvious we incarcerate more people in this country than anywhere in the world, and it's not accomplishing anything. But [the effect of the incarceration rate on judges] depends

on the ideological spectrum. More conservative judges, still think ‘lock em up.’³⁵

Whether district judges consider the societal problem of incarceration when making individual sentencing decisions might also be temporally dependent. Many subjects described how only recently did they notice judges becoming sensitive to the incarceration issue. One subject stated, “more recently, judges have become sensitive to [incarceration rates]. Historically, I don’t think they have. I don’t think judges cared about this at all.”³⁶ This sentiment was echoed by another subject stating, “A number of judges have been increasingly sensitive to [incarceration rates]. They are seeing that locking these people up for a long time is not doing a thing.”³⁷

The increasing importance of incarceration on sentencing decisions is further exemplified by the comments of one district judge describing his evolving views:

The longer I’ve been a judge, the more hostile I am to the system. My attitude towards long sentences has significantly changed over time. I’m more conscious of the lack of social utility of long sentences. If you want to really teach [offenders] a lesson, you should do public shaming or lashes. That has social utility....not just sending them to prison and forgetting about them. There is no deterrent effect.³⁸

This statement is notable in that it evidences a federal district judge critiquing a principle of the federal sentencing system: longer sentences to deter crime. But the point more relevant to the present research is that this judge is suggesting he engaged in some form of policy evaluation that altered his sentencing preferences. This judge’s self-described change was apparently not anomalous. Another attorney interview subject from a different district described a judge who had previously been an “unsympathetic former prosecutor who put a lot of people in jail for a really long time.”³⁹ However, the judge “has now seen the drug war is unwinnable” and “has become a much more lenient sentencer.” These findings are supportive of the argument that judges’ views of good policy, and thus their behavior, can change over time due to changing conditions. Based upon the above two quotations, it appears that some district judges used to believe that long sentences were “good policy,” but over the course of their years on the bench, they changed courses and began to sentence offenders more leniently.

However, it should not be overlooked that many subjects believed that district court judges were not concerned with the broader social problem of incarceration. One former district judge explained the lack of influence of incarceration rates based on his view on the role of judges: “Judges have an obligation to impose a sentence within a framework, in which the

definition of crime and sentencing range are dictated by the legislative branch of the government.”⁴⁰ Another subject suggested that increased incarceration would likely influence judges in the future if judges became “part of the conversation” in the legal community, but in his view, that had not yet occurred in his district.

Overall, the mixed and conditional results regarding the effect of incarceration on sentencing behavior likely reflects differences in judges. While many judges might see incarceration as a social problem they can alleviate, some judges might restrain themselves from exercising this role (Gibson, 1978). Relatedly, more conservative judges may not see incarceration, in and of itself, as a problem at all and might be pre-disposed to agree with higher, Guideline-level sentences (Epstein et al., 2013). Still, the responses overall suggest that some judges under certain conditions pay heed to the social impact of incarceration when making individual sentencing decisions.

Crime rates. The results from the subjects’ responses on crime rate influence were similarly mixed. As shown in Table 3, the same percentage of subjects (53%) who believed that incarceration rates were impacting sentencing decisions agreed that crime rates were influential.⁴¹ One notable difference in the responses to the two sociopolitical variables is that more subjects were willing to give unqualified support for the notion that crime rates affect sentencing decisions. Curiously, however, the relatively unconditional support for the impact of crime rates on sentencing decisions manifested itself in different ways.

One assistant U.S. attorney agreed wholeheartedly that high crime rates resulted in harsher sentences by judges and cheerfully attributed judicial attention to the crime rate as the result of the U.S. attorney’s office “pushing” the issue of societal crime into the judicial focus.⁴² One defense attorney similarly agreed that judges seek to address problems of higher crime through longer sentences. Not surprisingly, however, this defense attorney had a different view on whether judges should be doing this, stating, “Some judges foolishly believe the general deterrence argument has some value.”⁴³

On the other hand, one unexpected finding was that some subjects expressed opinions that higher crime rates might actually influence judges in a *less* punitive direction. One former district judge acknowledged this possibility with the following paraphrased⁴⁴ statement related to drug crime in particular:

There is so much drug crime, it must have an influence on judges. But it could work either way. One way of looking at it would be judges in high crime

areas don't see the point of incarcerating harshly, because the drug war is unwinnable. But another way of looking at it is judges in these areas might sentence criminals more harshly, because drugs are driving out business, and they want to punish and deter perpetrators.⁴⁵

Thus, this former district judge suggested that high crime might pull judges in opposite directions. This subject was not alone in proposing this alternative theory of higher crime being associated with more lenient sentences. Indeed, two other subjects went further and argued that judges living in low-crime rural areas were more prone to treat offenders as deviants and punish them harshly.⁴⁶ Notably, while these alternative theories for crime rate influence differ from expectations, they are consistent with the broader theoretical perspective of contextual influence. In other words, regardless of the direction of the effect, it seems that the crime conditions in judges' communities can shape their sentencing behavior.

In summary, the crime-rate results were the very definition of mixed. While a majority of subjects agreed that crime rates were influential on sentences in some circumstances, a substantial minority of subjects saw no impact. Moreover, those who did see an influence of the crime rate disagreed about the direction of the effect.

Alternative Sources of Influences: Case-Facts, Race, Habit, & Partisanship

In addition to probing potential contextual influences on district court sentencing decisions, subjects were also questioned on alternative sources of influence. First and foremost, most subjects cited individual case facts as the most important, or one of the most important, factors influencing a judge's sentencing decision. Indeed, when asked the general question of why judges choose to issue sentences below the Guideline-recommended range, 89% of subjects cited factors specific to individual cases. Examples of these case-specific facts include the criminal history of the offender, whether violence was involved in the offense, and whether the offender had familial responsibilities. This finding that individual, case-specific factors are crucial to determining sentencing outcomes is not at all surprising and is consistent with past sentencing research (Fischman & Schanzenbach, 2011; Mustard, 2001).

Other case-specific characteristics, such as the race of the offenders, should be irrelevant for sentencing purposes. Unfortunately, there is strong evidence that African Americans and Hispanic offenders receive harsher sentences than similarly situated White offenders (Mustard, 2001; U.S.

Sentencing Commission, 2012). To the extent that district court judges hold these racial and ethnic biases, and levels of bias vary throughout the country, it is possible these biases help explain differing sentencing behavior among district judges. Despite this possibility, recent research has largely rejected this theory and found that racial disparities in sentencing outcomes are largely driven by prosecutorial behavior rather than district judge sentencing decisions (Fischman & Schanzenbach, 2012; Hofer, 2013; Rehavi & Starr, 2014).

This finding was supported by the interview subjects. When asked whether racial biases impacted district court judges' sentencing decisions in the aggregate, 74% disagreed. A subset of the subjects who agreed disparities existed argued that some district court judges were subject to unconscious biases⁴⁷ that resulted in fewer below-Guideline sentences for African Americans in the aggregate. However, the subjects'⁴⁸ responses in total are consistent with recent findings that district judges' sentencing decisions are not the primary cause of the clear racial disparities that exist in federal sentencing outcomes (*See* Fischman & Schanzenbach, 2012; Hofer, 2013; Mustard, 2001; Rehavi & Starr, 2014).⁴⁹

As to decreasing Guideline adherence over time, an alternative explanation to the contextual factors examined above (such as increasing incarceration) is that district judges were "getting used to" the authority granted to them under *Booker* and were slow to realize their own authority (Epstein et al., 2013). By this logic, as judges began realizing their sentences would not be overturned on appeal, they gradually imposed more below-Guideline sentences.

I was initially skeptical district judges would take such a long time to react to the *Booker* decision. However, contrary to these expectations, many subjects also expressed support for this "habit" theory. One subject described the post-*Booker* landscape as follows: "*Booker* began the revolution, but it took a little while for it to kick in. Humans are creatures of habit. It's also very judge dependent. Judges have different attitudes about sentencing. Some see it as part of their job to use their discretion. Others are more rule-bound and creatures of habit.⁵⁰" Another subject described the gradual increase in below-Guideline sentences after *Booker* as follows: "*Booker* was significant. It would be wrong to underestimate *Booker*. But judges felt more constrained [immediately] after *Booker*. As they became more experienced and other cases came down, the judges recognized their own authority.⁵¹" Thus, contrary to expectations, many subjects opined that the incremental increase in proportions of below-Guideline sentences was due to a gradual recognition

by district judges that they had the power to issue these types of sentences.

A final alternative theory probed in the interviews is whether district judges' personal partisanship or ideology affects whether they tend to issue relatively more or less punitive sentences (Epstein et al., 2013; Fischman & Schanzenbach, 2012; Yang 2014). However, the pool of subjects generally disagreed that district court judges' partisan or ideological preferences impacted their sentencing. More precisely, the percentages of subjects who expressed qualified or unqualified agreement that district court judges' party or ideology influenced their sentences were only 26% and 37% respectively.

In their follow-up responses to these questions, many subjects volunteered specific examples. One defense attorney stated, "probably the judge you want the most in my district is a Republican appointee."⁵² A district judge subject stated, "political philosophy doesn't always translate to criminal sentencing" and explained that fiscal conservatives are now probably less supportive of longer sentences.⁵³ Similarly, other subjects described personal partisan or ideological factors as "not accounting for a whole lot" of why judges approach sentencing differently.⁵⁴

Indeed, somewhat surprisingly, a lower proportion of subjects expressed overall agreement that either judges' individual partisanship or ideology impacted sentencing outcomes than *any* of the four contextual factors discussed above. Given the legal community's reluctance to admit the impact of partisan/ideological factors on outcomes even in the face of clear evidence to the contrary (Spaeth & Segal, 1999), perhaps we should view subjects' general lack of agreement on the impact of partisan or ideologically factors with some skepticism. Still, it is certainly noteworthy that subjects found partisan/ideological factors to be relatively less important than contextual factors.

Discussion

Overall, several themes emerged from these interviews. First, the interviews suggest that some district judges are sensitive to certain conditions in their community when making sentencing decisions. Four such conditions were studied as part of this research: local legal community opinion, local public opinion, the incarceration rate, and the crime rate. The results as to all four factors were clearly mixed. For each of the variables studied, more than one-third of subjects but less than two-thirds of subjects agreed that the factor affects district judges' sentencing. However, and importantly, only two of the 19 interview subjects believed that these contextual

factors were *all* irrelevant to judges' ultimate sentencing decisions.

This general finding is important, as it supports the notion that where/when judges make decisions can matter. While this general point might seem uncontroversial, contextual influence on judges' sentencing behavior has been underdeveloped in past federal criminal sentencing research. There is no doubt, however, based on the responses of some former and current district court judges themselves, that certain judges take certain social and political community-based factors into account when sentencing individual offenders. This important finding is consistent with recent conclusions from Kim and colleagues (2016), Lynch and Omori (2014), and Ulmer (2005) that district judges, while operating in a national level system, cannot necessarily be compelled into behaving uniformly by legal changes at the national level.

Not to overstate the results, the subjects' general acknowledgement of the importance of contextual factors, but their lack of consensus on the importance of each individual factor, suggests that further empirical testing (both quantitative and qualitative) is needed regarding contextual influence. It is quite possible that some inputs, such as the crime rates and public opinion, are contingent on other factors, such as media attention. Future studies could address many of these possible conditions to help determine when contextual factors are likely to be most important.

The lack of consensus among interview subjects on specific sources of influence is likely also the product of the second important theme that emerged from this study: differences in judges. Nearly all of the subjects went out of their way to emphasize the variation in how judges approached sentencing, even within the same district. In the words of one subject, "every judge is a unique individual. Their personal attitudes will always inform their sentencing decisions."⁵⁵

These findings imply that scholars of judicial behavior should pay more attention to differences in judges. While parsimony is valuable for any theoretical perspective, results from these interviews suggest that broad claims about how "district judges" behave in general can potentially be counterproductive. Stated differently, how judges behave depends on what they care about, and there is little doubt that different district judges care about vastly different things (Baum, 2006).

Thirdly, results also provide little support for the notion that differences in district judges' punitiveness were accounted for by differences in their partisan or ideological preferences. Indeed, on balance, subjects were more likely to cite contextual factors than partisan/ideological ones as determinants of

sentencing decisions. Given past findings on the significance of district judge partisanship (Fischman & Schanzenbach, 2011; Yang, 2014), it should be acknowledged that party almost surely plays some role. Still, these results do suggest that future studies of inter-judge sentencing disparity should examine how local context may mitigate the effect of party and/or how partisanship and environment potentially interact.

The final point worthy of discussion relates to the extent to which the results shed light on 1) the gradual increase in below-Guideline sentences after 2005 and 2) inter-district variation in sentencing behavior. As to the continued increase in the proportion of below-Guideline sentences, the results both provide support for contextual influences and for alternative “habitual” explanations. While many subjects suggested that judges were altering their punitive preferences in the face of changing facts and attitudes regarding crime and incarceration, other subjects suggested that judges were simply getting used to the authority to sentence below the Guidelines. Of course, these theories are not mutually exclusive, and both explanations likely have some merit. Even if not solely resolving this question, evidence that at least some judges are softening policy preferences in the face of the incarceration problem is important. This implies that certain district judges will change policy in response to changing conditions, even in the absence of changes to legal rules.

As to variation in sentencing between districts, the interviews produced few satisfying conclusions. In general, many subjects agreed that the local environment explained district differences in sentencing outcomes. However, it was difficult to detect any patterns of responses or clear differences between subjects in one district versus subjects in other districts. Part of the difficulty was that the small subset of subjects within each district rendered it impossible to make strong claims regarding district differences. Another difficulty is that many subjects had themselves only practiced in their home district, which prohibited them from opining on how their district was (or was not) different. Future interview projects could include more subjects from single districts and/or target attorneys who practice in multiple districts so that better comparisons could be made between districts.

Conclusion

Despite the above limitations, these interviews provide evidence that some district judges are sensitive to social context when making sentencing decisions. This conclusion, while certainly conditional and not entirely satisfying, is nevertheless extremely important. Federal district court judges,

even if unelected, remain members of communities. A subset of these judges clearly care about their reputations and the policy consequences of their decisions in these communities. Further research is necessary to obtain more precise estimates of how large this group is and to what extent environment drives decisionmaking. Still, so long as this group of socially sensitive district judges exist, sentencing behavior is unlikely to be fully explained by either partisan/ideological factors or national-level changes to legal rules.

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Appendix

Question Bank

Thank you for taking the time to speak with me today and answer some questions. The interview should take 45 minutes to 1 hour. Please remember that your participation in this research is entirely voluntary and you can cease your participation at any time. Please also feel free to add any thoughts and/or impressions you may have.

First, I have some general questions about you and your experience in [Name of Federal District Court]

- 1) Please state your name, job title, business address, and business telephone number.
- 2) What is your experience in criminal law in [Name of Federal District Court]?
- 3) What job titles or positions have you held that give you this experience, and what years were you in each position?
- 4) How familiar are you with general federal sentencing practice in [Name of Federal District Court]?
- 5) How familiar are you with the application of the United States Sentencing Guidelines in [Name of Federal District Court]?
- 6) Which judges, if any, in [Name of Federal District Court] do you have experience appearing in front of, and/or working with?

Now I have some general questions regarding your opinion of sentencing practice in [Name of Federal District Court]

- 7) What is your overall opinion of sentencing practice in [Name of Federal District Court]?
- 8) What is your overall opinion of the US Sentencing Guidelines [Name of Federal District Court]?
- 9) In general, would you say criminals are treated fairly or unfairly under the US Sentencing Guidelines in [Name of Federal District Court]? Please explain.
- 10) In general, would you say that federal district court judges have too much discretion, not enough discretion, or about the right amount of discretion in making sentencing decisions?
- 11) How familiar are you with the procedure of “departures” from the US Sentencing Guidelines?
- 12) Based on your experience in [Name of Federal District Court], do you generally think there should be more departures from the Guidelines, less departures from the Guidelines, or about right?
- 13) In your opinion, why do you think a given judge in [Name of Federal District Court] may depart from the Guidelines in the case of some offenders, but not other offenders?
- 14) What are some reasons you believe that some judges in [Name of Federal District Court] might grant departures from the Guidelines more often than other judges?
- 15) Do you believe that the local environment impacts district judges’ departure decisions? If yes, how so?

Now I’m going to list some possible explanations for why a judge may depart from the Guidelines. For each, please tell me whether or not you believe the potential explanations to be valid, and if so to what extent.

- 16) In general, do you believe the race of the offender affects departure decisions? If so, in what way?
- 17) In general, do you believe the gender of the offender affects departure decisions? If so, in what way?
- 18) In general, do you believe the punitive preferences of the local legal community impact district court judges in their departure decisions? If so, in what way?
- 19) In general, do you believe the punitive preferences of the general public impact district court judges in their departure decisions? If so, in what way?
- 20) In general, do you believe the type of crime the offender committed (drug trafficking, firearms, etc.) affects departure decisions? If so, in what way?
- 21) In general, do you believe that whether the conviction is reached by plea agreement or jury conviction affects departure decisions? If so, in what way?
- 22) In general, do you believe the U.S. Attorney's Office prevalence of charging crimes that carry mandatory minimum sentences affects departure decisions? If so in what ways?
- 23) In general, do you believe the U.S. Attorney's Office prevalence of using "substantial assistance" departures, or other government-sponsored departures affects departure decisions? If so in what ways?
- 24) In general, do you believe the political party of the sentencing judge (based upon the political party of the appointing US President) affects departure decisions? If so, in what way?
- 25) In general, do you believe the personal ideology of the sentencing judge affects departure decisions? If so, in what way?
- 26) In general, do you believe the prevalence of crime, or the crime rate in the local area affect departure decisions? If so, in what way?
- 27) In general, do you believe the incarceration rate in the local area affect departure decisions? If so, in what way?
- 28) Is there anything I haven't mentioned that you believe impacts departure decisions?

Now I have some specific questions regarding your opinion of sentencing practice in [Name of Federal District Court]

- 29) Do you believe [Name of Federal District Court] is more punitive or less punitive than average?
- 30) Why would you suspect this is the case?

Now I'm going to ask you some questions regarding how you think sentencing practice has changed in [Name of Federal District Court] sine your experience began.

- 31) In your opinion, how, if at all, did the 2005 US Supreme Court case of *US v. Booker* alter sentencing practice in your district?
- 32) Do you think judges in your district sentence criminals the same today as they did right after *Booker* was decided? If not, how is it different and why do you think that is?

Finally, I'm going to conclude by asking you some general questions.

- 33) Is there anything you would like to add that we have not covered that you think is particularly relevant to this subject-matter?
- 34) Is there any other person with experience in [Name of Federal District Court] that you believe could answer some of these questions or otherwise be beneficial to this research effort?

Thank you for your time. I truly appreciate your participation in this research

Endnotes

¹ Not including the districts of the U.S. Territories (Guam, Puerto Rico, US Virgin Islands, and the North Mariana Islands).

² Below-Guideline sentences are also called “downward departures” in federal sentencing parlance.

³ Judges may also sentence offenders above the Guideline-recommended range. However, these above-Guideline sentences are very rare, occurring on average in 1.8% of cases from FY 1988-2017.

⁴ However, for some of these cases, offenders can be sentenced below mandatory minimum sentences with the agreement of the U.S. Attorney in certain circumstances, such as providing “substantial assistance” to law enforcement.

⁵ It should be noted that although the proportion of offenders sentenced within the Guideline range increased slightly in FY 2016 and FY 2017, this is likely due to more selective prosecution and declining caseloads, and the *number* of offenders sentenced within the range is stable (U.S. Sentencing Commission, 1995-2017).

⁶ This interview-based approach was also used by Ulmer (2005) as part of his mixed-method approach to understanding district differences in federal sentencing. While Ulmer’s (2005) study clearly demonstrated the value of interviewing actors involved in sentencing, the present study differs in important ways. Ulmer (2005) uses interviews largely to determine how legal actors interpreted certain terms in sentencing parlance (e.g., “substantial assistance”) and how these different interpretations could result in disparate sentences. The present area of inquiry is distinct, as I seek to probe exactly what factors judges look to in their general sentencing behavior.

⁷ For example, in the post-*Booker* years from FY 2006 to 2017, in the Eastern district of Kentucky (a medium sized district), the number of offenders sentenced varied from a low of 476 to a high of 703; the percentage of offenders sentenced for drug trafficking offenses vacillated between 39.9% and 66.7%; and the percentage of offenders who were African American increased or decreased annually in an unpredictable fashion between a range of 12.6% and 23.8%. Notably, there were no clear patterns over time for any of these metrics. With data this noisy, there will be validity problems with quantitative modeling using district-level data.

⁸ This research design was approved and categorized as “exempt” by the West Virginia University Institutional Review Board.

⁹ Active district court judges in the four districts were not contacted directly due to their shared professional addresses and concerns over subject confidentiality. In addition, active judges might be less likely to be candid, as they are instructed by law to ignore many extralegal considerations that the interviews would probe (e.g., personal partisanship or public opinion). However, as shown by Table 2, below, two active judges were eventually included as interview subjects after being referred directly by other subjects.

¹⁰ As an initial means of contact, I sent written requests to all of the above persons, stating the nature of the project, the purposes of the research, and a request for a 45 minute-1 hour phone interview. The written letters also informed potential subjects that their confidentiality would be protected and that I would be following up within one-two weeks by contacting recipients via phone. After scheduling the interview, I provided all subjects with both written and oral informed consent for their participation.

¹¹ One critique of snowball sampling is that it might lead to overrepresentation of a single network of contacts, who share the same perspective (Bleich & Pekkanen, 2013). Thus, I made clear to all subjects in the referral requests that I sought to get a wide range of interview subjects and that I would welcome opposing or different perspectives from themselves.

¹² See Appendix A for a list of prepared questions. Due to time constraints and the semi-structured nature of the interviews, not every question was able to be asked to every subject.

¹³ Notably, some interview researchers have critiqued questions intended to uncover the general influences on policymaker behavior as too abstract and not necessarily likely to lead to valid and reliable results (Hall & Beckman, 2013; Kingdon, 1981). The nature of the critique levied is that people do poorly at explaining why they do the things they do or whether certain factors influence behavior, and it is better to ask subjects concrete questions about specific results. However, as exemplified by the interview research for MacDonald (2007) and Baumgartner et al. (2009), when the substance of responses includes specific descriptions and examples of the issue being probed, there is strong evidence that subjects' yes/no responses to sources of influence have some facial validity. As will be shown in the results below, subjects' responses in the present study generally included this high level of specificity.

¹⁴ Aside from space constraints, other reasons several of the responses to questions enumerated in Appendix A are omitted from the analysis (such as subjects' opinions on federal sentencing, "trial penalties," or the effect of prosecution policies) include broad consensus that confirmed prior research, a lack of data for all subjects, and/or the subject-matter simply being less relevant to the primary research inquiry.

¹⁵ Although unfortunate, the disproportionate share of defense attorneys was expected, as U.S. attorneys and assistant U.S. attorneys were expected to be more reticent about expressing personal opinions that may diverge from official positions. A mitigating factor that helps alleviate any concern of a defense-biased perspective is the four hybrid subjects who are former assistant U.S. attorneys. Thus, six of the 13 attorney subjects had at least some experience prosecuting cases for the government.

¹⁶ As of 2014, 34% of all lawyers and 33% of federal district court judges are female (American Bar Association, 2014). Yet, as shown in Table 2, only three out of nine subjects (16%) were female with zero female judges or former judges.

¹⁷ All results reported below reflect the personal opinion of the interview subject and the interview subject alone. These opinions do not to reflect the official position or opinion of any other person, office, institution, or other entity.

¹⁸ Due to time constraints, one interview subject was unable to answer questions regarding local public opinion.

¹⁹ Due to time constraints, two interview subjects were unable to answer questions regarding the incarceration rates.

²⁰ One interview subject insisted that while the actual crime rates were probably not important, judges' "perceptions of the crime rate" were influential. This subject was coded as "Qualified Agreement" as it is consistent with the theory that judges are sensitive to local criminal issues, even if that concern is based on perception, rather than reality.

²¹ The term "local legal community" can certainly be interpreted in many different ways. To some subjects, this may simply mean the attorneys who regularly appear and argue before a judge in criminal matters. To others, the "local" term may mean a more personal circle of attorneys and judges who meet formally or informally to discuss policy in a given town or city. Finally, some subjects may interpret this as a broader group throughout the entire district or state, such as state or federal bar associations. Though I conceived of this term in the latter sense, the term was left open for subjects to interpret it as they saw fit. More detailed follow-up discussion with subjects on the impact of the local legal community was generally consistent with this broader understanding of the term. However, as discussed below, some subjects did give anecdotes about the "courthouse community," and others noted the different punitive attitudes that exist in different parts of their district.

²² Interview No. 3, August 6, 2015.

²³ Interview No. 3, August 6, 2015.

²⁴ Interview No. 1, August 4, 2015.

²⁵ Interview No. 7, October 20, 2015.

²⁶ Interview No. 10, November 11, 2015.

²⁷ Interview No. 9, November 6, 2015.

²⁸ Interview No. 12, January 21, 2016.

²⁹ Interview No. 1, August 4, 2015; Interview No. 3, August 6, 2015; Interview No. 19, January 26, 2015.

³⁰ Interview No. 17, December 18, 2015.

³¹ Interview No. 2, August 19, 2015.

³² Interview No. 15, December 21, 2015.

³³ Interview No. 11, December 7, 2015.

³⁴ Interview No. 3, August 6, 2015.

³⁵ Interview No. 2, August 19, 2015.

³⁶ Interview No. 9, November 6, 2015.

³⁷ Interview No. 11, December 7, 2015.

³⁸ Interview No. 14, August 6, 2015.

³⁹ Interview No. 11, December 7, 2015.

⁴⁰ Interview No. 13, December 11, 2015.

⁴¹ However, as noted above, these subjects were not all overlapping. Certain subjects believed the crime rate was influential but not the incarceration rate, and *vice versa*.

⁴² Interview No. 3, August 6, 2015.

⁴³ Interview No. 19, January 20, 2016.

⁴⁴ This subject declined to be recorded, so the paraphrased statement is reproduced from the researcher's notes.

⁴⁵ Interview No. 13, December 11, 2015.

⁴⁶ Interview No. 16, January 20, 2016; Interview No. 17, December 18, 2015.

⁴⁷ Interview No. 4, August 20, 2015; Interview No. 19, January 20, 2016.

⁴⁸ We should bear in mind, however, that 17 of 19 subjects were White, which could help explain hesitance to acknowledge racial biases in judges' sentences.

⁴⁹ On the other hand, subjects were much more willing to agree that the gender of the offender affected judges' sentencing decisions. Seventy-nine percent of all subjects and 80% of judges/former judges admitted that, in the aggregate, women were more likely to receive a below-Guideline departure. Taken together, the subjects' responses suggest possibly that gender but not race is a component of district court judges sentencing decisions. Another possibility, however, is that subjects' responses merely reflect the psychological propensity for people to be more willing to accept and admit gender biases as opposed to racial biases (*See Czopp & Monteith, 2003*).

⁵⁰ Interview No. 5, September 21, 2015.

⁵¹ Interview No. 9, November 6, 2015.

⁵² Interview No. 4, August 20, 2015.

⁵³ Interview No. 8, November 6, 2015.

⁵⁴ Interview No. 11, December 7, 2015.

⁵⁵ Interview No. 9, November 6, 2015.