

Booker and Beyond: Analyzing Sentencing Reform and Exploring New Research Directions

December 7, 2021 | 1:00 PM ET

The webinar will begin shortly

Important Notification

The opinions, findings, and conclusions or recommendations expressed here are those of the presenters and do not necessarily reflect the positions or policies of the National Institute of Justice of the U.S. Department of Justice.



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Studies of Federal Guidelines, Judicial Discretion, and Disparity

- **Ulmer, Light, and Kramer (2011)**; Problematizing the narrative on advisory guidelines and racial disparity
- **Ulmer and Johnson (2017)**; judges' perceptions of Guidelines legitimacy and constraint tied to departures.
- **Ulmer, Painter-Davis, and Tinik (2016)**; much of racial/ethnic differences come from factors determined *before* sentencing.
- **Ulmer and Parker (2020)**; **Ulmer and Bradley (2018)**; disparity is complicated and bound up in *local district contexts*.

Ulmer, Light, Kramer (2011): Problematizing the simple narrative on advisory guidelines and racial disparity

The *Booker/Fanfan*, *Gall* expanded judicial sentencing discretion. Many feared this would cause an increase in disparity. A 2010 USSC report found racial disparity increased post-*Booker* and *Gall*.

We provided an alternative to the USSC report, finding:

- Race/ethnic/gender disparity in sentence length decisions was generally comparable with pre-2003 levels
- African American males' odds of imprisonment increased significantly post-*Gall*
- Immigration cases accounted for a significant proportion of sentence length disparity affecting Black males
- "Government-sponsored" below Guidelines sentences were a greater source of racial disparities than judge-initiated deviations.

We argued that the findings raised questions about whether the decisions caused increased disparity; whether guidelines must be mandatory in order to limit racial/ethnic/gender disparities.

Ulmer and Johnson (2017); Judicial guideline departures and perceptions of guidelines legitimacy and constraint

- 2005-2007 federal sentencing data, 2005 survey of federal judges, qualitative interviews.
- Time period captures a period of uncertainty after *Booker* rendered the Guidelines advisory, but before Gall, etc. clarified what “advisory” meant.
 - Potentially a time of variation among judges in the perceived constraint and normative authority of Guidelines.
- Guideline conformity/judge-initiated departures were strongly influenced by judges’ perceptions of guidelines as normatively legitimate, perceptions of the constraint of their circuit courts, and perceptions of U.S. Attorney’s offices.

Ulmer and Johnson (2017); cont.

- Post-Booker/Gall, Guidelines do not primarily exert influence through regulatory constraint, but through normative influence, and making sentencing easier, reducing uncertainty.
- *Perceived legitimacy and appropriateness of the Guidelines very important.*

Ulmer, Painter-Davis, and Tinik (2016); much of racial/ethnic differences come from factors determined *before* sentencing

- Is disproportional incarceration of black and Hispanic/Latino men due to sentencing decisions by local courts (Type A discretion), or differential impact of sentencing policies and case processing factors that differentially impact minority men (Type B discretion)?
- To what extent are racial/ethnic sentencing differences mediated by guideline factors (criminal history, guideline recommendations, departures) mandatorics, case-processing (trial conviction, presentence detention) and extralegal factors (citizenship, education)
- 2005–2009 federal court (and Pennsylvania state data)
- Thus, most disproportionality was determined by factors that occur prior to sentencing

Disparity is complicated and bound up in local district contexts

Ulmer and Bradley (2018): Tribal-federal justice organizational coupling (2010 TLOA funding, traditional Major Crimes Act federal jurisdiction) increased sentencing severity for Native Americans;

but increased 5K1 and govt. sponsored departures for Native Americans

Ulmer and Parker (2020): Hispanic/Latinx sentencing disadvantage in changing immigration destinations, 2000-2002 and 2010-2012

- No disparity in traditional destinations in either time period
- Hispanic citizens and non-citizens both received longer sentences in new destinations and in non-immigrant destinations circa 2000.
- By the early 2010s, no disparity in traditional destination and emerging destinations
- However, in 2010s new destinations (of 2000), and especially non-immigrant destinations, sentenced Hispanic non-citizens more harshly, especially the undocumented

Thus, Hispanic/Latinx immigration (or lack thereof) notably affected the sentencing of Hispanic non-citizens *before and after Booker*.

Federal sentencing disparity existed before Booker, and existed after, defying simplistic explanations relying on legal/guideline changes affecting *judicial* discretion.



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Motivating Questions

- How are policy changes responded to—and resisted—in varied, creative ways by legal actors?
- How do those variations manifest as local norms and practices that transcend policy change?



Quantitative *Booker* Study:

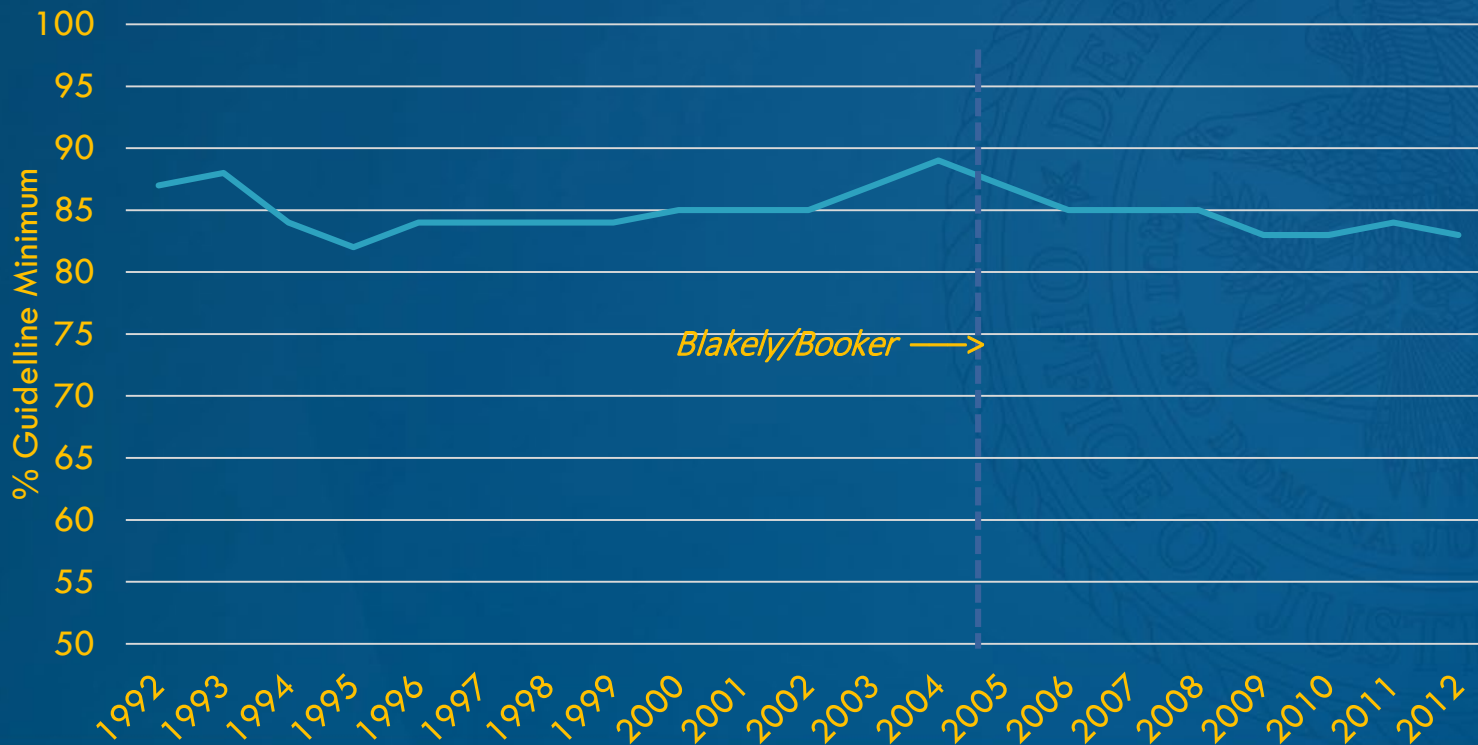
- Do within-district drug case sentencing patterns demonstrate stability across different policy periods, indicating the influence of local norms?
- Are the mechanisms for getting to sentence outcomes changing in response to policy reforms?
- Are cases that are not subject to mandatory minimums more likely to vary from the guidelines compared to those that are subject to them?

Lynch, M. & Omori, M. (2014). Legal change and sentencing norms in the wake of Booker: The impact of time and place on drug trafficking cases in federal court. *Law & Society Review*, 48, 411-445

Quantitative *Booker* Study:

- Do within-district drug case sentencing patterns demonstrate stability across different policy periods, indicating the influence of local norms? **YES**
- Are the mechanisms for getting to sentence outcomes changing in response to policy reforms? **SOME INDICATION, YES**
- Are cases that are not subject to mandatory minimums more likely to vary from the guidelines compared to those that are subject to them? **NO**

Drug Sentences as % of Guideline Minimum, 1992-2012



Booker Interview Study

- What were court actors' perceptions of how *Booker* changed local criminal practices in 4 distinct districts?
- What specific legal strategies changed at three stages of criminal process: Charging, plea negotiations, & sentencing?

Lynch, M. (2019). *Booker* circumvention? Adjudication strategies in the advisory sentencing guidelines era. *N.Y.U. Review of Law & Social Change*, 43, 59-108

Multiple Effects, with Local Variation

- Increased charging of mandatory minimum charges (and enhancements), especially in drug and child porn. cases, to set bottom on sentencing.
- More threats to use MMs and mandatory enhancements in plea bargaining.
- Bargaining in the shadow of assigned judge; including use of binding pleas to tie judge's hands if plea accepted.
- Defense forgoing plea agreements, with the right judge; more robust sentencing hearings.



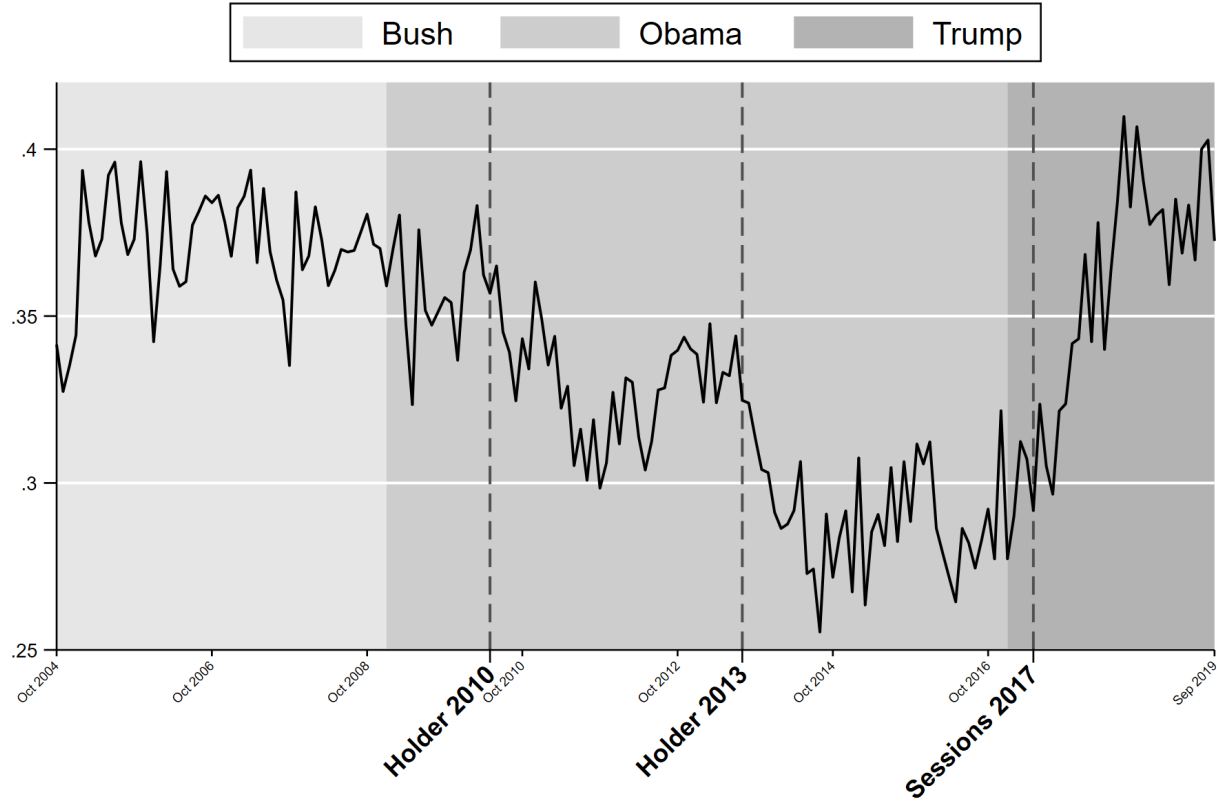
Implications for Internal Policy Change

How do internal DOJ policy changes, delineated in the 2017 Sessions memo, impact prosecutorial practices & case outcomes in drug cases?

- The use of drug mandatory minimums shot up.
- Likelihood of prison increased; drug sentence lengths increased.
- Effects were significantly driven by the appointment of a Trump-appointed US Attorney to impose new policy in local office.

Lynch, M., Barno, M., and Omori, M. (2021). Prosecutors, court communities, and policy change: The impact of internal DOJ reforms on federal prosecutorial practices. *Criminology*, 52, 480-519

Proportion Sentenced to Binding Mandatory Minimum



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Federal Sentencing after *Booker*

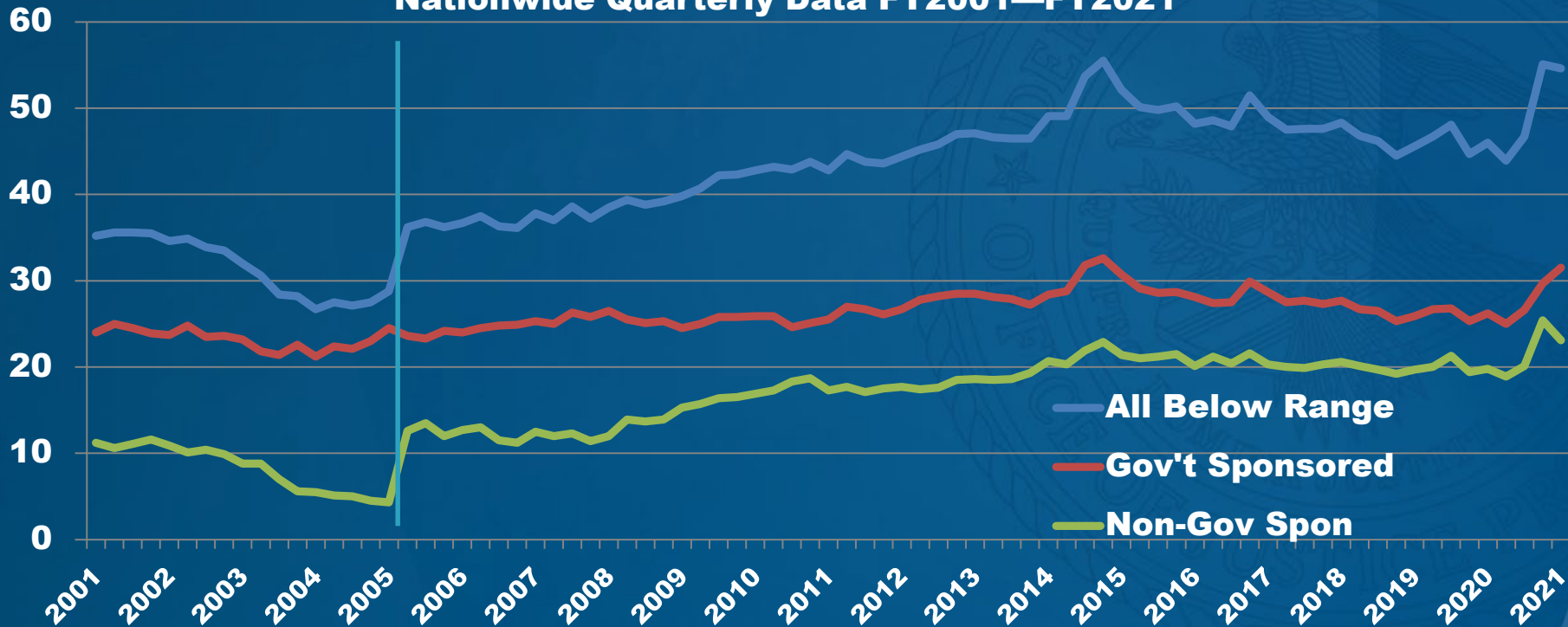
Crime & Justice, Vol. 48 (2019) pp. 137-186.



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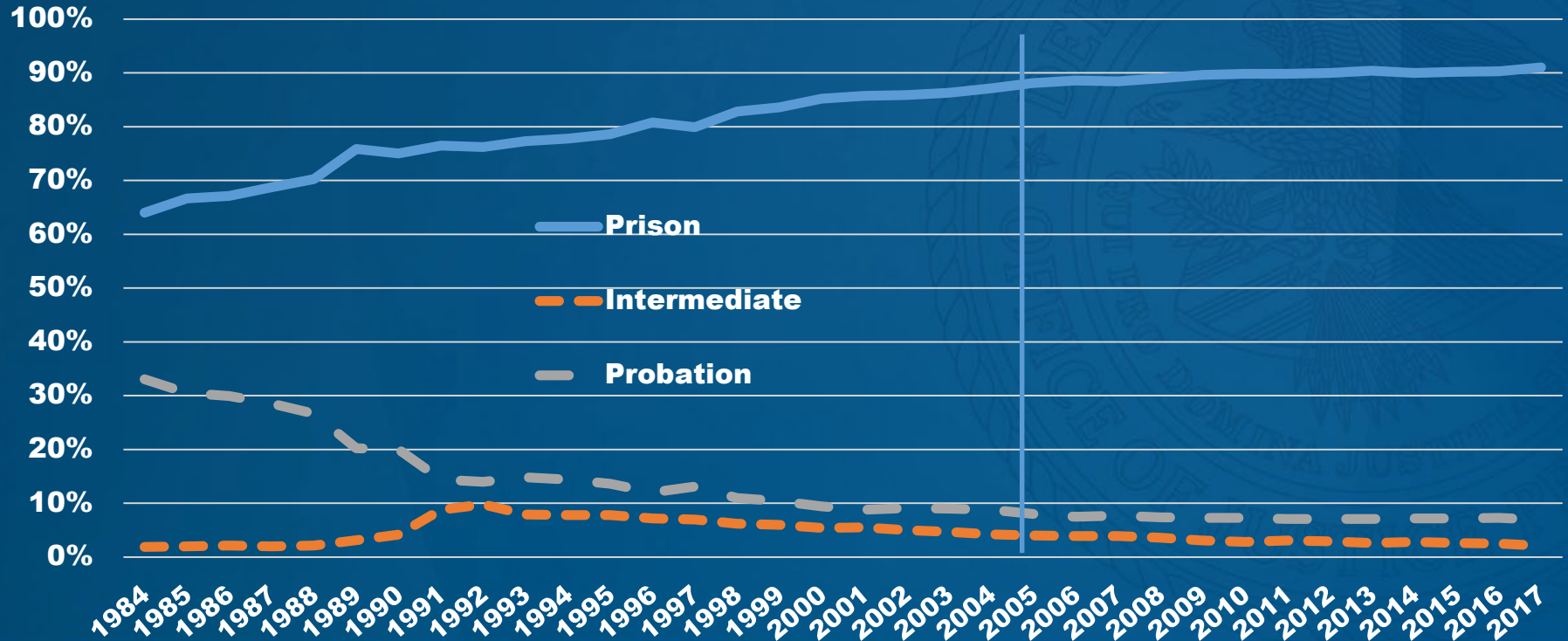
PERCENTAGE OF DEFENDANTS SENTENCED BELOW THE GUIDELINE RANGE

Nationwide Quarterly Data FY2001—FY2021



PERCENTAGE OF DEFENDANTS RECEIVING VARIOUS SENTENCING OPTIONS

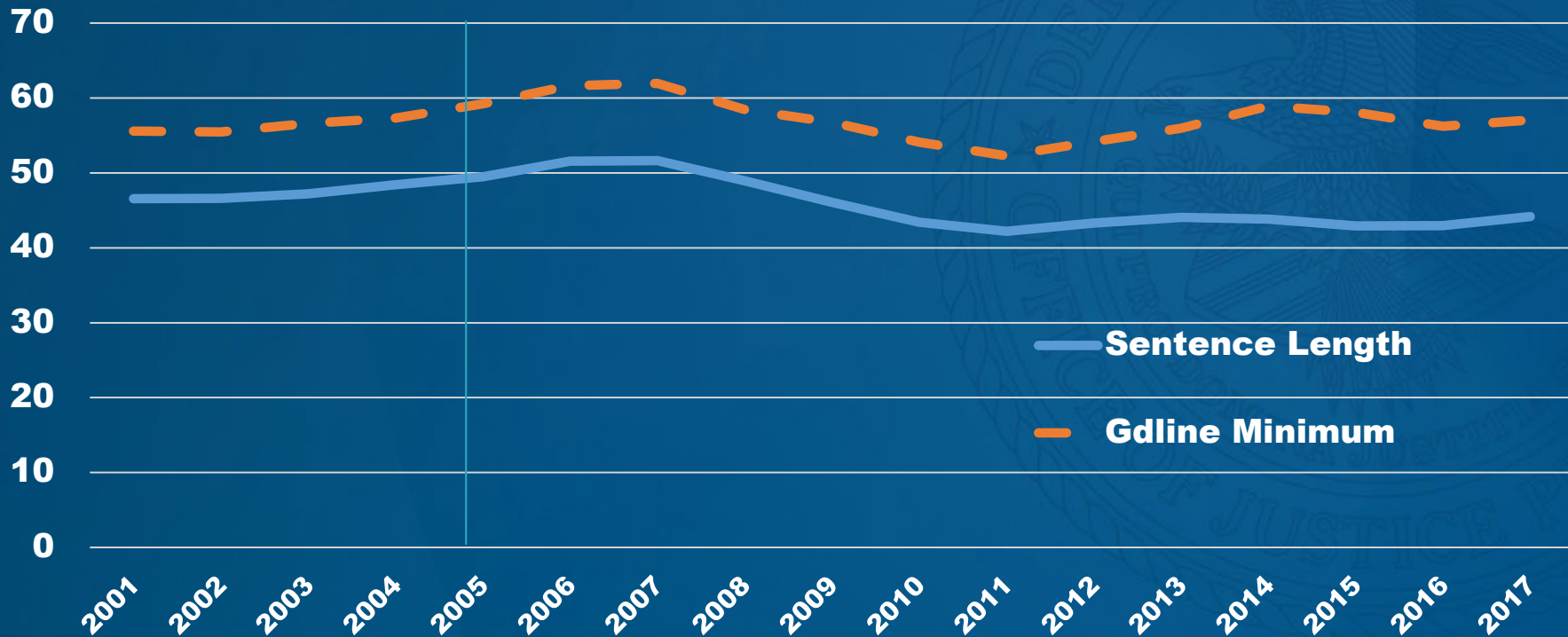
Nationwide Data FY2001—FY2021



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MEAN SENTENCE LENGTH AND GUIDELINE MINIMUM IN MONTHS

All Defendants Nationwide FY2001—FY2017



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28 U.S. Code § 991 - United States Sentencing Commission; establishment and purposes

(b) The purposes of the United States Sentencing Commission are to—

(2) develop means of measuring the degree to which the sentencing, penal, and correctional practices are effective in meeting the purposes of sentencing as set forth in section 3553(a)(2) of title 18, United States Code.

28 U.S. Code § 995 – Powers of the Commission

(15) collect systematically and disseminate information concerning sentences actually imposed, and the relationship of such sentences to the factors set forth in section 3553(a) of title 18, United States Code;

(16) collect systematically and disseminate information regarding effectiveness of sentences imposed;

Hofer, Paul J., *Ranking Drug Harms for Sentencing Policy* Available at SSRN: <https://ssrn.com/abstract=2612654>

Number of Typical Doses Resulting in 5-Year Sentences

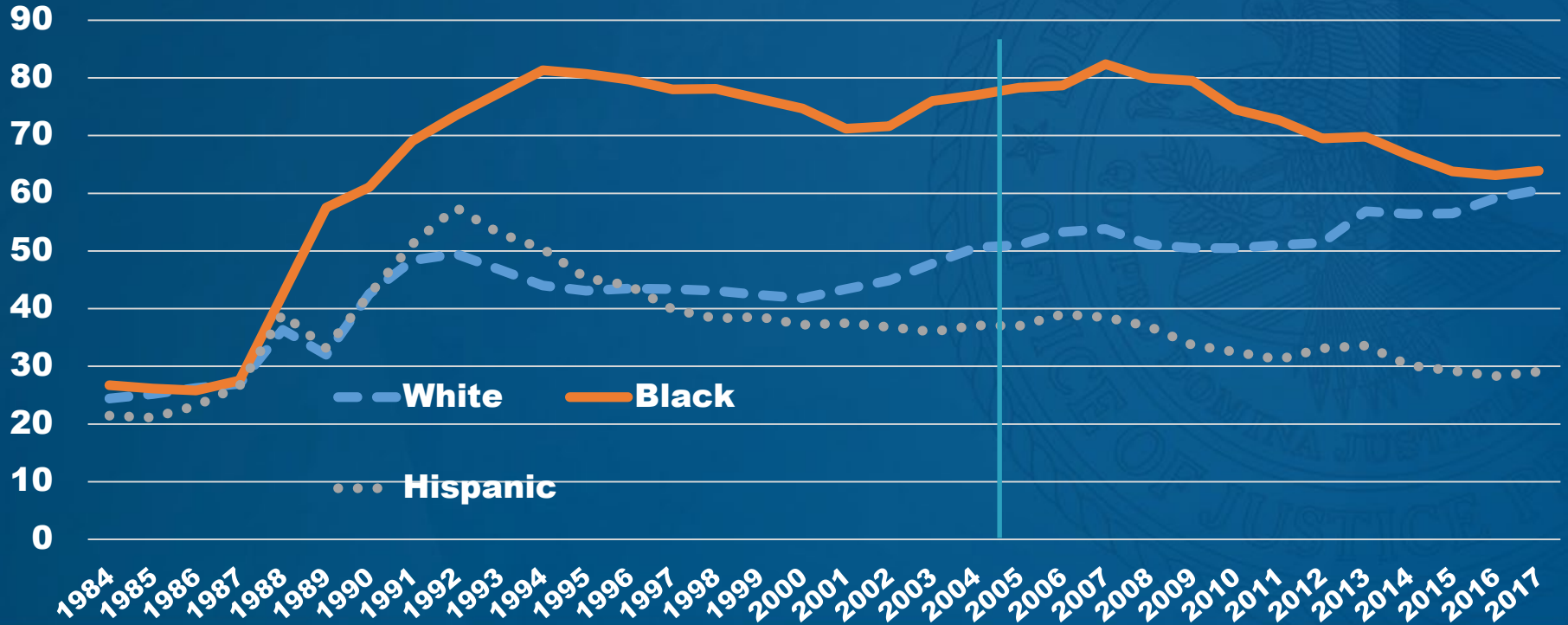
Drug	Number of Doses
Heroin	3,333
Powder cocaine	4,166
Crack cocaine	186
Meth Mix	3,333
Meth Actual	208
LSD	2,500
Marijuana	666,666
MDMA	430

Minimum and Typical Social and Economic Losses Caused by Various Crimes Receiving 5-Year Sentences

	Powder Cocaine Trafficking	Heroin Trafficking
Minimum/ Typical Loss	\$119,129/ \$474,135	\$446,736/ \$1,916,498
Pure Methamphetamine Trafficking	Theft, Fraud & Other Basic Economic Crimes ⁷	
\$2,220/ \$17,758	\$7,000,000/ \$11,922,636	

AVERAGE TIME SERVED IN MONTHS BY BLACK, WHITE, AND HISPANIC OFFENDERS

All Felonies FY1984—FY2017



Questions?

Please enter your questions into the [Q&A box](#)

Send to [All Panelists](#)



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