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## Organizational Conformity and Punishment: Federal Court Communities and Judge-Initiated Guidelines Departures

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# CRIMINOLOGY

## ORGANIZATIONAL CONFORMITY AND PUNISHMENT: FEDERAL COURT COMMUNITIES AND JUDGE-INITIATED GUIDELINES DEPARTURES

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*The U.S. Sentencing Guidelines represent a uniform set of formal rules that are implemented across a broad range of diverse social contexts. Drawing from neo-institutional theory and kindred perspectives on criminal courts, we argue that the federal courts represent an organizational field in which local influences play a key role in conformity to institutional rules. We use unique survey data from federal judges, aggregated to the district court level and combined with individual-level federal sentencing data, to examine hierarchical models of judicial departures from the Guidelines. Our analysis includes more proximate measures of court community culture than prior research. We find that the collective views of federal judges, including their perceptions of the degree of regulative constraint posed by the Guidelines, as well as the extent to which the Guidelines are normatively and morally legitimate, are intimately related to variation in judicial Guidelines departures across district courts.*

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## INTRODUCTION

Scholarly research on organizational legitimacy, legal authority, and conformity to formalized rules represents an enduring cornerstone of sociological inquiry. At the same time, recent scholarship on the sociology of punishment underscores the broad societal consequences of criminal punishment,<sup>1</sup> in part because the exercise of state-sponsored social control is “shaped by an ensemble of social forces and has a significance and range of effects that reach well beyond the population of criminals.”<sup>2</sup> Court actors must continually navigate the delicate balance between formally-structured rules and informal normative expectations.<sup>3</sup> Examining organizational

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<sup>1</sup> Darrell Steffensmeier et al., *Ethnicity and Sentencing Outcomes in U.S. Federal Courts: Who is Punished More Harshly?*, 65 AM. SOC. REV. 705, 718 (2000).

<sup>2</sup> David Garland, *Sociological Perspectives on Punishment*, 14 CRIME AND JUST. 115, 119 (1991).

<sup>3</sup> JAMES EISENSTEIN ET AL., *THE CONTOURS OF JUSTICE: COMMUNITIES AND THEIR COURTS* 30–36 (1st ed. 1988).

conformity within criminal courts thus provides a unique opportunity to investigate the socio-legal clash of standardized decision-making rules and localized cultural norms across court contexts.<sup>4</sup>

The federal justice system, in particular, is well-suited to an analysis of organizational conformity within the criminal courts. In 1984, Congress passed the Federal Sentencing Reform Act, establishing the United States Sentencing Commission (USSC) and empowering it to promulgate sentencing guidelines to formally structure criminal sentences for all federal offenders.<sup>5</sup> The goals of the federal Guidelines were to reduce unwarranted disparity, to ensure severe and uniform punishments, and to increase rationality and transparency in the federal punishment process.<sup>6</sup> The Guidelines were originally mandatory, recognized as the most rigid and complex sentencing rules ever enacted.<sup>7</sup>

However, in *United States v. Booker*<sup>8</sup> in 2005, the Supreme Court ruled that the Guidelines would thereafter be advisory.<sup>9</sup> Although federal judges still had to calculate and consider the Guidelines, they were no longer legally mandated to follow them.<sup>10</sup> This change might mean less consistency and uniformity in sentencing between district courts. Recent research evidence, however, suggests that despite the fact that the Guidelines are only advisory now, they continue to shape federal punishments; that is, their legal and normative constraining power remains intact.<sup>11</sup> However, this also raises important questions about local variations

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<sup>4</sup> Jeffery T. Ulmer, *The Localized Uses of Federal Sentencing Guidelines in Four U.S. District Courts: Evidence of Processual Order*, 28 SYMBOLIC INTERACTION 255, 272–76 (2005).

<sup>5</sup> U.S. SENTENCING COMM’N, FIFTEEN YEARS OF GUIDELINES SENTENCING: AN ASSESSMENT OF HOW WELL THE FEDERAL CRIMINAL JUSTICE SYSTEM IS ACHIEVING THE GOALS OF SENTENCING REFORM iv (2004), [http://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/miscellaneous/15-year-study/15\\_year\\_study\\_full.pdf](http://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/miscellaneous/15-year-study/15_year_study_full.pdf).

<sup>6</sup> U.S. SENTENCING COMM’N, 2012 REPORT TO THE CONGRESS: CONTINUING IMPACT OF UNITED STATES V. BOOKER ON FEDERAL SENTENCING 12 (2012), <http://www.ussc.gov/news/congressional-testimony-and-reports/booker-reports/report-continuing-impact-united-states-v-booker-federal-sentencing> [hereinafter U.S. SENTENCING COMM’N 2012 REPORT].

<sup>7</sup> KATE STITH & JOSE CABRANES, FEAR OF JUDGING: SENTENCING GUIDELINES IN THE FEDERAL COURTS 2–4 (1998).

<sup>8</sup> 543 U.S. 220 (2005).

<sup>9</sup> *Id.* at 222. *Booker*, along with subsequent decisions such as *Gall v. United States*, 552 U.S. 38, 38–39 (2007), significantly expanded federal judges’ sentencing discretion.

<sup>10</sup> *Gall*, 552 U.S. at 45–46.

<sup>11</sup> Jeffery T. Ulmer et al., *The “Liberation” of Federal Judges’ Discretion in the Wake of the Booker/Fanfan Decision: Is There Increased Disparity and Divergence between*

in court actor perceptions of the Guidelines, and judicial conformity to them, as local court actors use their discretion to selectively deviate from formal rules and policies imposed from above.

A primary example of organizational deviation occurs when federal judges “depart” by sentencing an offender to a punishment that falls outside the recommendations of the Guidelines.<sup>12</sup> Departures can occur in several ways. Some departures reflect prosecutorial discretion, such as departures for “substantial assistance” to the government in the prosecution of another case, government-sponsored departures that involve binding plea agreements, or pleas where a defense departure motion is not opposed by the government.<sup>13</sup> Other departures are initiated explicitly by judicial discretion.<sup>14</sup> Judges can sentence offenders outside the recommended sentencing ranges in accordance with special sentencing considerations laid out in 18 U.S.C. § 3553(a), which became especially relevant after the Guidelines became advisory.<sup>15</sup>

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*Courts?*, 28 JUST. Q. 799, 830 (2011); Amy Farrell et al., *Examining District Variation in Sentencing in the Post-Booker Period*, 23 FED. SENTENCING REP. 318, 320 (2011); Sonja B. Starr & M. Marit Rehavi, *Mandatory Sentencing and Racial Disparity: Assessing the Role of Prosecutors and the Effects of Booker*, 123 YALE L. J. 2, 27 (2013).

<sup>12</sup> In the post-*Booker* era, a distinction can be made between “departures” and “deviations.” In this terminology, departures are sentences that are above or below the Guideline range given for reasons that the USSC recognizes as legitimate. Substantial assistance and government-sponsored departures are of this class, as are certain judge-initiated departures (5K2). Deviations from the Guidelines, however, are judge-initiated departure sentences that are not given in accordance with these factors—for example, a deviation from the Guidelines based on a judge’s policy disagreement with the Guidelines. Kimberly A. Kaiser & Cassia Spohn, “Fundamentally Flawed” *Exploring the Use of Policy Disagreements in Judicial Downward Departures for Child Pornography Sentences*, 13 CRIMINOLOGY & PUB. POL’Y 241, 246–47 (2014). Prior to the *Rita* and *Gall* decisions, departures were permitted (but appealable) but deviations were not. In this paper, we combine *both* deviations and departures into our conceptualization of departures in the post-*Booker* context, since we are interested in the Guidelines as institutional rules and standards that courts can interpret in different ways. We thank an anonymous reviewer for helping us clarify these distinctions.

<sup>13</sup> Cassia Spohn & Robert Fornango, *U.S. Attorneys and Substantial Assistance Departures: Testing for Interprosecutor Disparity*, 47 CRIMINOLOGY 813, 834–38 (2009).

<sup>14</sup> Rodney L. Engen & Randy R. Gainer, *Modeling the Effects of Legally Relevant and Extralegal Factors Under Sentencing Guidelines: The Rules Have Changed*, 38 CRIMINOLOGY 1207, 1220–22 (2000).

<sup>15</sup> The categories of factors that can be considered under §3553(a) include the following: 1) special offense and offender characteristics, 2) the need to reflect the basic aims and goals of sentencing, 3) consideration of the sentences that are legally available, 4) the sentencing guidelines, 5) sentencing commission policy statements, 6) the need to avoid unwarranted disparity, and 7) the need for restitution. 18 U.S.C. § 3553(a) (2010).

Prior work has examined organizational conformity and departures from sentencing guidelines at both the state and federal level,<sup>16</sup> but none of this work incorporates local court actor perceptions or attitudes towards their institutional environments. Our study incorporates measures of the collective attitudes and perceptions of federal judges towards the Sentencing Guidelines. This research combines insights from organizational sociology with empirical work on the social contexts of criminal punishment. Using unique national survey data from federal judges, which is aggregated to the district level and combined with individual-level sentencing data, we examine organizational forces that affect judicial deviations from the Guidelines. We then supplement these data with material from qualitative interviews with federal judges, prosecutors, defense attorneys, and probation officers to shed additional insight into reasons behind conformity to and deviation from the Guidelines, and how departure decisions are embedded in local court contexts.

#### I. THE U.S. DISTRICT COURT SYSTEM AS AN ORGANIZATIONAL FIELD

The federal courts can be seen as an organizational field.<sup>17</sup> Organizational fields are “sets of interacting groups, organizations, and agencies oriented around a common substantive interest.”<sup>18</sup> They are bounded by the presence of a common regulatory system or shared normative (systems of formal or informal social norms) or cultural-cognitive frameworks (systems of cultural and cognitive meanings).<sup>19</sup>

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<sup>16</sup> See, e.g., Celesta A. Albonetti, *Direct And Indirect Effects Of Case Complexity, Guilty Plea, And Offender Characteristics On Sentencing For Offenders Convicted Of A White-Collar Offense Prior To Sentencing Guidelines*, 14 J. QUANTITATIVE CRIMINOLOGY 353, 353 (1998); Rodney L. Engen et al., *Discretion and Under Guidelines: The Role of Departures and Structured Sentencing Alternatives*, 41 CRIMINOLOGY 99, 107 (2003); Brian Johnson et al., *The Social Context of Guideline Circumvention: The Case of Federal District Courts*, 46 CRIMINOLOGY 737 (2008); John H. Kramer et al., *Sentencing Disparity and Guidelines Departures*, 13 JUST. Q. 81 (1996); John H. Kramer et al., *Downward Departures for Serious Violent Offenders: Local Court “Corrections” to Pennsylvania’s Sentencing Guidelines*, 40 CRIMINOLOGY 897 (2002); David B. Mustard, *Racial, Ethnic, and Gender Disparities in Sentencing: Evidence from the U.S. Federal Courts*, 44 J. L. & ECON. 285, 285 (2001); Ilene H. Nagel & Stephen J. Schulhofer, *A Tale of Three Cities: An Empirical Study of Charging and Bargaining Practices under the Federal Sentencing Guidelines*, 66 S. CAL. L. REV. 501, 501 (1992).

<sup>17</sup> Paul J. DiMaggio & Walter W. Powell, *The Iron Cage Revisited: Institutional Isomorphism and Collective Rationality in Organizational Fields*, 48 AM. SOC. REV. 147, 150 (1983).

<sup>18</sup> HOWARD E. ALDRICH & MARTIN REUF, ORGANIZATIONS EVOLVING 40 (2d ed. 2006).

<sup>19</sup> See W. RICHARD SCOTT, INSTITUTIONS AND ORGANIZATIONS: IDEAS AND INTERESTS 86,

Fligstein and McAdam refer to these strategic action fields as: “meso level social order[s] where actors (who can be individual or collective) interact with knowledge of one another under a set of common understandings about the purposes of the field, the relationships in the field (including who has power and why), and the field’s rules.”<sup>20</sup> DiMaggio and Powell identify three types of isomorphism (meaning “similarity of form”)<sup>21</sup>: coercive, normative, and mimetic.<sup>22</sup> Coercive isomorphism involves forced compliance, normative isomorphism involves acquiescence through established norms, behavioral expectations and perceived legitimacy, and mimetic isomorphism involves conformity through the routine application of shared cultural-cognitive tools that help reduce uncertainty.<sup>23</sup> We view judicial adherence to the Guidelines (and, alternatively, departures (i.e., non-conformity)) from them as an example of the interplay between organizational isomorphism, conformity, and deviation from institutional rules.

Importantly, foundations of institutional conformity are not mutually exclusive and can be intertwined in complex ways.<sup>24</sup> The federal Guidelines likely produce sentencing uniformity by constraining departures through both *coercive* and *normative* influence. For most of their history, a great deal of the Guidelines’ influence operated through their regulative and coercive power. Prior to 2005, the Guidelines were mandatory; judges were required to conform to them or justify why a sentence that departed from the Guidelines was warranted due to extraordinary circumstances.<sup>25</sup> Even then, the sentence could be appealed by the prosecution or defense, and the

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136–38 (3rd ed. 2008).

<sup>20</sup> Neil Fligstein & Doug McAdam, *Toward a General Theory of Strategic Action Fields*, 29 SOC. THEORY 1, 3 (2011).

<sup>21</sup> Calvin Morrill & Cindy McKee, *Institutional Isomorphism and Informal Social Control: Evidence from a Community Mediation Center*, 40 SOC. PROBS. 445, 449 (1993).

<sup>22</sup> DiMaggio & Powell, *supra* note 17, at 150.

<sup>23</sup> SCOTT, *supra* note 19, at 160–61 (elaborating on these organizational influences, identifying three primary influences in organizational conformity: 1) regulative, (i.e., coercive isomorphism), which entails coercive pressure toward conformity through expedience and cost-benefit rationality; 2) normative (i.e., normative isomorphism) in which organizations conform through normative obligations, expectations, or shared morality; and 3) cultural-cognitive (i.e., mimetic isomorphism) which involves conformity through common efforts at “sense making); *see also* KARL WEICK, *SENSEMAKING IN ORGANIZATIONS* 17 (1995).

<sup>24</sup> SCOTT, *supra* note 19, at 1610–16.

<sup>25</sup> U.S. SENTENCING COMM’N 2012 REPORT, *supra* note 6, at 3, 45; Kate Stith, *The Arc of the Pendulum, Judges, Prosecutors, and the Exercise of Discretion*, 117 YALE L.J. 1420, 1423 (2008).

circuit courts had the power to conduct a de novo review of the sentence.<sup>26</sup> Prior to the 2005 *Booker* decision, the circuit courts gave great deference to the Guidelines and held high standards for departures.<sup>27</sup>

But when the Guidelines were rendered advisory by *Booker*, their regulative power to restrict departures was substantially weakened.<sup>28</sup> Yet, from 2005 onward, the large majority of federal sentences continued to conform to the Guidelines, even though they had become merely advisory and did not have the same mandatory, coercive power.<sup>29</sup> This raises the possibility that the Guidelines do not merely influence court actors through regulative constraint but also through informal normative influence. In line with this, Scott suggests that in situations when legal constraint is reduced or ambiguous, the “law is better conceived of as an occasion for sense-making and collective interpretation, relying more on cognitive and normative than coercive elements for its effects.”<sup>30</sup> This suggests that the extent to which the advisory Guidelines restrict departures and maintain organizational uniformity across contexts may depend in large part on normative influences (as well as mimetic, uncertainty-reducing influences, to which we return at the end of our analysis). This would occur if the once-mandatory Guidelines have become embedded in organizational sentencing practices as expected norms or established informal rules.

For example, the Guidelines might have come to be seen as the embodiment of best practice sentencing standards—the product of the U.S. Sentencing Commission’s careful research and prescriptions that bear the stamp of congressional approval. To the extent that local court actors conform to the Guidelines because they view them as legitimate and effective organizational policy, these influences are normative in nature.<sup>31</sup>

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<sup>26</sup> De novo review of departure sentences was one feature established by the Feeney Amendment to the 2003 PROTECT Act from Congress. PROTECT Act, Pub. L. No. 108-21, 117 Stat. 650 (2003).

<sup>27</sup> See STITH & CABRANES, *supra* note 7, at 1463 (discussing the limitations on discretion in departing from the Guidelines imposed on district court judges by an abuse of discretion standard of review).

<sup>28</sup> *Id.* at 1481 (discussing the post-*Booker* shift returning discretion to judges).

<sup>29</sup> Paul J. Hofer, *United States v. Booker as a Natural Experiment: Using Empirical Research to Inform the Federal Sentencing Policy Debate*, 6 CRIMINOLOGY & PUB. POL’Y 433, 456 (2007); Jeffery T. Ulmer et al., *The “Liberation” of Federal Judges’ Discretion in the Wake of the Booker/Fanfan Decision: Is There Increased Disparity and Divergence between Courts?*, *supra* note 11 at 799, 830; U.S. SENTENCING COMM’N 2012 REPORT, *supra* note 6, at 10.

<sup>30</sup> SCOTT, *supra* note 19, at 54.

<sup>31</sup> Jeffery T. Ulmer et al., *Racial Disparity in the Wake of the Booker/Fanfan Decision*:

Thus, the Guidelines would become benchmarks from which localized understandings of appropriate “going rates” are established for “normal crimes.”<sup>32</sup> Once the Guidelines become embedded in organizational sentencing practices as expected norms and informal rules (or “going rates,”) they are likely to continue to shape punishment even when their formal regulative power is curtailed.

#### A. FEDERAL COURTS AS LOCAL “COURT COMMUNITIES”

There are a number of reasons why one might expect considerable uniformity in sentencing and Guideline conformity across district courts. High rates of compliance might reflect the substantial regulatory and normative force of the Guidelines and lead to minimal district-to-district variation in Guidelines departures across the federal courts. Even though the Guidelines are advisory, they were once mandatory, and federal law still requires that they be correctly calculated and considered as a benchmark in every case.<sup>33</sup> The USSC monitors adherence to the Guidelines and trains federal court officials in the Guidelines’ application, interpretation, and case law.<sup>34</sup> Politically, federal judges—unlike their state-level counterparts—are appointed for life terms, limiting the potential impact of local political and reelection concerns.<sup>35</sup> Moreover, deep-seated normative themes that emphasize equal treatment before the law may provide additional incentives for uniformity in federal punishment, what Eisenstein and associates refer to as “national legal culture—shared values and attitudes about how persons charged with crimes should be treated.”<sup>36</sup> Finally, at this point in history, most federal judges have never made sentencing decisions without the

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*An Alternative Analysis to the USSC’s 2010 Report*, 10 CRIMINOLOGY & PUB. POL’Y 1081, 1115–16 (2011); Ulmer et al., *supra* note 11, at 831.

<sup>32</sup> David Sudnow, *Normal Crimes: Sociological Features of the Penal Code in a Public Defender Office*, 12 SOC. PROBS. 255, 260, 262 (1965) (discussing sentencing norms that develop in courts for offenses organizationally seen by court personnel as “normal crimes.” Ulmer and Kramer evolved this concept further as the concept of “going rates,” and applied it in studying the informal use of sentencing guidelines); JEFFERY ULMER, *SOCIAL WORLDS OF SENTENCING: COURT COMMUNITIES UNDER SENTENCING GUIDELINES* 173 (1997); JOHN H. KRAMER & JEFFERY ULMER, *SENTENCING GUIDELINES: LESSONS FROM PENNSYLVANIA* 120 (2009) [hereinafter KRAMER & ULMER, *SENTENCING GUIDELINES*].

<sup>33</sup> Stith, *supra* note 25, at 1479–80.

<sup>34</sup> U.S. SENTENCING COMM’N 2012 REPORT, *supra* note 6, at 28–31.

<sup>35</sup> Carlos Berdejo et al., *Crime, Punishment, and Politics: An Analysis of Political Cycles in Criminal Sentencing*, 95 REV. OF ECON. & STAT. 741, 754 (2013).

<sup>36</sup> EISENSTEIN ET AL., *supra* note 3, at 12–13 (internal quotation marks omitted).

Guidelines,<sup>37</sup> so many contemporary judges likely rely on the Guidelines as a guiding constitutive scheme of categories and decision rules.

If the Guidelines constrain court actor behavior based on a mixture of coercive and normative influences, then why should organizational conformity vary across contexts? Organizational scholars have identified several mechanisms through which the same institutional rules result in differences in organizational conformity.<sup>38</sup> These include varying interpretations of institutional rules, unique cultural influences that affect local responses to institutional pressures, and specific adaptations, innovations, and strategic responses by different actors and organizations.<sup>39</sup> Although the Guidelines represent a uniform set of formalized rules, they illustrate a fundamental tension between efforts designed to promote uniformity in punishment and interests that emphasize flexibility, individualization, and localization of punishment.<sup>40</sup>

We argue that U.S. district courts are organizational arenas where criminal punishments are subject to a set of overarching “field-wide” rules (the Guidelines) that constrain court actor behavior through a mixture of regulative/coercive and informal normative influence. Compliance to the Guidelines, however, can and does vary across district courts. We posit that part of the explanation for this variation may be that judges in different contexts differentially interpret and apply the Guidelines in ways that reflect differences in their perceived normative and coercive influences, as well as related perceptions of their local organizational environments.

Local variation in the implementation of sentencing policies, such as sentencing guidelines, is a persistent theme in empirical research on state

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<sup>37</sup> Celesta A. Albonetti, *Judicial Discretion in Federal Sentencing: An Intersection of Policy Priorities and Law*, 10 CRIMINOLOGY & PUB. POL’Y 1151, 1152–53 (2011); see also Stith, *supra* note 25, at 1424; KRAMER & ULMER, SENTENCING GUIDELINES, *supra* note 32, at 13.

<sup>38</sup> Jo Dixon, *The Organizational Context of Criminal Sentencing*, 100 AM. J. SOC. 1157, 1183 (1995); SCOTT, *supra* note 19, at 160–62; Joachim Savelsberg, *Law that Does Not Fit Society: Sentencing Guidelines as a Neoclassical Reaction to the Dilemmas of Substantivized Law*, 97 AM. J. SOC. 1346, 1355 (1992).

<sup>39</sup> Judson G. Everitt, *Inhabitants Moving In: Prospective Sense-Making and the Reproduction of Inhabited Institutions in Teacher Education*, 36 SYMBOLIC INTERACTION 177, 193–95 (2013); Fligstein & McAdam, *supra* note 20, at 4–5; Brian D. Johnson, *The Multilevel Context of Criminal Sentencing: Integrating Judge- and County-Level Influences*, 44 CRIMINOLOGY 259, 264–66 (2006).

<sup>40</sup> Dixon, *supra* note 38, at 1167; Kramer et al., *Sentencing Disparity and Guidelines Departures*, *supra* note 16, at 101; Savelsberg, *supra* note 38, at 1361.

and federal courts.<sup>41</sup> Prior work argues that federal district courts can be understood as “court communities” that interpret formal institutional rules in locally-distinctive ways that produce variation in organizational compliance.<sup>42</sup> Scholars in this tradition view courts as unique social worlds, based on participants’ shared workplace, interdependent working relations between the prosecutor’s office, judges’ bench, and defense bar, and importantly, broader social influences from the surrounding environment.<sup>43</sup> These court communities exhibit distinctive organizational cultures, which establish formal and informal case processing and sentencing norms.<sup>44</sup> Importantly, court communities are open, not closed, systems—their contours are shaped by their surrounding sociopolitical and legal environments.<sup>45</sup> Dixon, for instance, argues that dominant case processing strategies differ across courts according to their social, political, and organizational contexts.<sup>46</sup> More generally, a sizeable number of studies demonstrate that state and federal court communities’ case processing and sentencing practices are conditioned by features of their surrounding sociopolitical and organizational contexts.<sup>47</sup>

Similar arguments have been applied to related areas of the justice system as well, such as policing. Ingram and his coauthors, for instance,

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<sup>41</sup> ULMER, SOCIAL WORLDS OF SENTENCING, *supra* note 32, at 166–67; Dixon, *supra* note 38, at 1164; Rodney L. Engen & Sara Steen, *The Power to Punish: Discretion and Sentencing Reform in the War on Drugs*, 105 AM. J. SOC. 1357, 1383–84 (2000).

<sup>42</sup> Paula M. Kautt, *Location, Location, Location: Interdistrict and Intercircuit Variation in Sentencing Outcomes for Federal Drug-Trafficking Offenses*, 19 JUST. Q. 633, 641 (2002); Johnson et al., *supra* note 16, at 769; Spohn & Fornango, *supra* note 13, at 819; Jeffery T. Ulmer et al., *Trial Penalties in Federal Sentencing: Extra-Guidelines Factors and District Variation*, 27 JUST. Q. 560, 588 (2010); Amy Anderson et al., *Lawlessness In the Federal Sentencing Process: A Test for Uniformity and Consistency in Sentencing Practices*, 27 JUST. Q. 362, 367 (2010).

<sup>43</sup> EISENSTEIN ET AL., *supra* note 3, at 35; ROY B. FLEMMING ET AL., THE CRAFT OF JUSTICE: POLITICS AND WORK IN CRIMINAL COURT COMMUNITIES 10–11 (1992); ULMER, SOCIAL WORLDS OF SENTENCING, *supra* note 32, at 27; Jeffery T. Ulmer & Brian Johnson, *Sentencing in Context: A Multilevel Analysis*, 42 CRIMINOLOGY 137, 140 (2004).

<sup>44</sup> See EISENSTEIN ET AL., *supra* note 3, at 231; Jeffery T. Ulmer & John Kramer, *The Use and Transformation of Formal Decision Making Criteria: Sentencing Guidelines, Organizational Contexts, and Case Processing Strategies*, 45 SOC. PROBS. 248, 251 (1998); ULMER, SOCIAL WORLDS OF SENTENCING, *supra* note 32, at 165–68.

<sup>45</sup> EISENSTEIN ET AL., *supra* note 3, at 260; ULMER, SOCIAL WORLDS OF SENTENCING, *supra* note 32, at 165–68; KRAMER & ULMER, SENTENCING GUIDELINES, *supra* note 32, at 134–37.

<sup>46</sup> Dixon, *supra* note 38, at 1192.

<sup>47</sup> See Jeffery T. Ulmer, *Recent Developments and New Directions in Sentencing Research*, 29 JUST. Q. 1, 11–16 (2012).

maintain that individual police attitudes become amplified into a collective feature of the police workgroup and department culture.<sup>48</sup> Similarly, we posit that local court organizational culture may be reflected in the collective attitudes and beliefs of federal court workgroups. Therefore, an examination of local court actors' attitudes and beliefs about the Guidelines and their court environments may provide unique insight into key sources of variations in federal Guidelines conformity.

#### B. FEDERAL COURTS, GUIDELINES DEPARTURES, AND CONTEXTUAL VARIATION IN PUNISHMENT

The vast majority of prior research on the federal courts examines inequalities associated with markers of social stratification in society, such as defendant race, ethnicity, gender, or citizenship.<sup>49</sup> One important finding from this work is that each type of Guideline departure represents an important potential locus of disparity.<sup>50</sup> A second key finding is that between-district variation in federal punishment (including departures) is common.<sup>51</sup> The U.S. Sentencing Commission noted that court disparities arise from numerous sources including the relative weight placed on different sentencing factors across regions, variation in case law and court personnel, and the uniqueness of political climates, local norms, caseloads,

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<sup>48</sup> Jason Ingram et al., *A Multilevel Framework for Understanding Police Culture: The Role of the Workgroup*, 51 THE ROLE OF THE WORKGROUP 365, 372 (2013).

<sup>49</sup> Celesta A. Albonetti, *Sentencing Under the Federal Sentencing Guidelines: Effects of Defendant Characteristics, Guilty Pleas, and Departures on Sentence Outcomes for Drug Offenses, 1991–1992*, 31 L. & SOC'Y REV. 789, 798 (1997); Albonetti, *supra* note 16, at 369–70; John Hagan et al., *The Differential Sentencing of White-Collar Offenders in Ten Federal District Courts*, 45 AM. SOC. REV. 802, 810 (1980); Richard Hartley et al., *Prosecutorial Discretion: An Examination of Substantial Assistance Departures in Federal Crack-Cocaine and Powder-Cocaine Cases*, 24 JUST. Q. 382, 391–92 (2007); Johnson et al., *supra* note 16, at 749; Kautt, *supra* note 42, at 644–45; Spohn & Fornango, *supra* note 13, at 822; Steffensmeier et al. *supra* note 1, at 709; Ulmer et al., *supra* note 11, at 809; Ulmer et al., *Racial Disparity in the Wake of the Booker/Fanfan Decision*, *supra* 31, at 1090; U.S. SENTENCING COMM'N, FIFTEEN YEARS OF GUIDELINES SENTENCING, *supra* note 5, at 120.

<sup>50</sup> Albonetti, *supra* note 49, at 817; Celesta A. Albonetti, *The Role of Gender and Departures in the Sentencing of Defendants Convicted of a White-Collar Offense Under the Federal Sentencing Guidelines*, in SOCIOLOGY OF CRIME, LAW, AND DEVIANCE 3, 37 (Jeffery T. Ulmer ed., 1998); Johnson et al., *supra* note 16, at 740–41, 772; Mustard, *supra* note 16, at 312.

<sup>51</sup> Kautt, *supra* note 42, at 658; U.S. SENTENCING COMM'N, *supra* note 5, at 101; Johnson et al., *supra* note 16, at 767–68; Mona Lynch & Marissa Omori, *Legal Change and Sentencing Norms in the Wake of Booker: The Impact of Time and Place on Drug Trafficking Cases in Federal Court*, 48 L. & SOC. REV. 411, 411 (2014); Ulmer et al., *supra* note 11, at 828.

and practical constraints in each federal court environment.<sup>52</sup>

Relatively little empirical work examines the factors that account for jurisdictional variations in Guidelines conformity. Prior empirical scholarship typically controls for, but does not investigate, between-court variation in sentencing practices.<sup>53</sup> Only a few studies provide in-depth examinations of between-court variation in federal punishment or Guidelines conformity.<sup>54</sup> Kautt, for instance, found significant between-court variation in the sentencing of federal drug trafficking cases, but little of this variation was explained by district-level factors.<sup>55</sup> Johnson and his coauthors reported substantial variation in the use of Guidelines departures across federal courts.<sup>56</sup> They found some evidence for the salience of caseload pressure and community characteristics, but these effects were small and inconsistent across types of departure.<sup>57</sup> Qualitative interviews in this work hinted at the importance of local cultural norms and established organizational routines, but no direct measures of these influences were available.<sup>58</sup> Similar conclusions were described in recent analyses of federal drug trafficking cases by Lynch and Omori.<sup>59</sup> They examined temporal and jurisdictional variations in federal sentencing tied to the *Booker* decision and concluded that “local legal practices not only diverge in important ways across place, but also become entrenched over time such that top-down legal reform is largely reappropriated and absorbed into locally established practices.”<sup>60</sup>

The organizational perspectives discussed above imply that judges

<sup>52</sup> U.S. SENTENCING COMM’N, *supra* note 5, at 93.

<sup>53</sup> See, e.g., Hartley et al., *supra* note 49, at 393; R.S. Everett et al., *Difference, Disparity, and Race, Ethnic Bias in Federal Sentencing*, 18 J. QUANTITATIVE CRIMINOLOGY 189, 196–98 (2002); Paula Kautt & Cassia Spohn, *Cracking Down on Black Drug Offenders? Testing for Interactions Among Offenders’ Race, Drug Type, and Sentencing Strategy in Federal Drug Sentences*, 19 JUST. Q. 1, 12–13 (2002); Steffensmeier et al., *supra* note 1, at 713.

<sup>54</sup> Amy Farrell et al., *Race Effects of Representation Among Federal Court Workers: Does Black Workforce Representation Reduce Sentencing Disparities?*, 623 ANNALS OF THE AM. ACAD. OF POL. AND SOC. SCI. 121, 126 (2009); Ben Feldmeyer et al., *Racial/Ethnic Threat and Federal Sentencing*, 48 J. RES. IN CRIME & DELINQ. 238, 248–49 (2011); Johnson et al., *supra* note 16, at 754–56; Mona Lynch & Marissa Omori, *supra* note 51, at 425–26; Kautt, *supra* note 42, at 651–53; Ulmer et al., *supra* note 11, at 810.

<sup>55</sup> Kautt, *supra* note 42, at 658–59.

<sup>56</sup> Johnson et al., *supra* note 16, at 764.

<sup>57</sup> *Id.* at 766.

<sup>58</sup> *Id.* at 769–70.

<sup>59</sup> Lynch & Omori, *supra* note 51, at 439–40.

<sup>60</sup> *Id.* at 411.

conform to the Guidelines because they experience coercive regulatory pressure to do so or because they believe in the normative validity of these rules as useful and valid decision-making tools. The court community perspective argues, in turn, that these types of organizational influences may vary significantly across federal district court contexts.<sup>61</sup> Although much prior research recognizes the importance of examining local courts' organizational environments, including judges' views of sentencing guidelines, direct measures of these are routinely absent from empirical studies of criminal punishment.<sup>62</sup> The vast majority of research relies on coarse aggregate measures of court contextual features, such as court size, case flow characteristics, or broad community factors like the proportion of the population belonging to certain minority groups.<sup>63</sup> Although these are all theoretically salient, none of them tap directly into the attitudinal environment of federal court judges toward important institutional rules such as the Guidelines.

To address this issue, the current study utilizes unique survey data from federal judges to construct measures of collective perceptions of the normative and coercive influences of the Guidelines. Judge-initiated departures represent a *lack of* organizational conformity—criminal cases that are sentenced outside the recommended Guidelines ranges (for whatever reasons) represent decisions where judges chose not to follow formal institutional sentencing rules. We focus on two interrelated research questions. First, we expect that *judicial departures from Guidelines will vary across contexts according to judges' collective perceptions of their normative legitimacy*. In districts where the Guidelines are perceived to be more valid, utile, or effective, judges will be less likely to depart from them. Second, we expect that *judicial departures from Guidelines will also vary according to their coercive influences*. The stronger the perceived regulatory force of the Guidelines, the less likely judges will be to deviate from them. Coercive influences can take several forms, including shared cultural views of the Guidelines themselves as well as regulatory oversight from U.S. Attorney's Offices (USAO) and circuit courts.

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<sup>61</sup> KRAMER & ULMER, SENTENCING GUIDELINES, *supra* note 32, at 3–4; JAMES EISENSTEIN ET AL., *supra* note 3, at 22–30.

<sup>62</sup> Brian Johnson et al., *The Multilevel Context of Criminal Sentencing: Integrating Judge and County Level Influences in the Study of Courtroom Decision Making*, 44 CRIMINOLOGY 259, 262–63 (2006); Jeffery T. Ulmer et al., *Court Communities Under Sentencing Guidelines: Dilemmas of Formal Rationality and Sentencing Disparity* 34 CRIMINOLOGY 383, 399–401 (1996).

<sup>63</sup> *See, e.g.*, Ulmer, *supra* note 47, at 14.

Although the survey data we examine contain measures that map directly onto the coercive and normative influences of the Guidelines, our data does not provide any direct quantitative measures that capture “mimetic isomorphism”—that is, how the Guidelines might foster conformity by reducing uncertainty and by devising categories and classifications that simplify complex decision-making processes.<sup>64</sup> We draw on supplemental interview data from federal judges, prosecutors, defense attorneys, and probation officers to illustrate our quantitative findings and to further suggest the potential importance of mimetic, uncertainty-reduction factors in judicial departures and Guideline conformity.

## II. DATA AND METHODS

Two sources of data are combined in the current study. First, individual level sentencing data from the USSC are merged for fiscal year 2005 with fiscal year 2007. These data were restricted to district courts located within the United States, excluding foreign territories. The sentencing data were limited to cases sentenced after the *Booker* decision in January of 2005, which rendered the Guidelines advisory rather than mandatory, but before the *Gall* decision in December of 2007, which widened judicial discretion further than *Booker* by clarifying that courts need not presume the Guideline sentences to be reasonable for a given individual case. This time period encompasses the administration of our federal court survey and captures the period of flux and legal uncertainty after *Booker* rendered the Guidelines advisory, but before *Gall* and subsequent decisions clarified what “advisory” meant.<sup>65</sup> This is an important time period because this was potentially a time of uncertainty and variation among judges in the perceived constraint and normative authority of the Guidelines.

Second, the individual sentencing data were augmented with survey data on the cultural milieu of federal district courts. District-level measures of court culture were created from surveys of federal district judges. As part of a larger research project, 314 interviews were conducted with federal court actors in seven geographically dispersed districts of varying size. We also use the qualitative data to illustrate, contextualize, and elaborate upon

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<sup>64</sup> See DiMaggio & Powell, *supra* note 17, at 149 (defining and describing the notion of institutional isomorphism).

<sup>65</sup> See *United States v. Booker*, 543 U.S. 220, 246 (2005); *Gall v. United States*, 552 U.S. 38, 47 (2007).

our quantitative findings. In particular, the interview data help to demonstrate ways that perceptions of the coercive, normative, and mimetic influences of the Guidelines vary across district courts.<sup>66</sup> Information from these interviews was used to construct a role-specific survey of federal court actors.<sup>67</sup> In the fall of 2005, we sent invitations to participate in this survey by both email and U.S. mail to all active federal judges. The survey was also sent to other federal court actors, but given our focus on judge-initiated Guideline departures, this study relies only on data from federal judges, which were received between October of 2005 and June of 2006.

Overall, valid survey responses were returned by judges in 82 of the 90 U.S. district courts for a district-level response rate of over 90%. At the time of the survey there were a total of 639 authorized federal district judgeships (excluding foreign territories). We received valid responses from 262 judges, which accounted for over 40% of all federal judges sitting on the bench at that time. Although the individual-level response rate is relatively low, a low response rate does not necessarily entail non-response error or invalidity<sup>68</sup>; it compares favorably with phone-based public opinion polls<sup>69</sup> and it provides valid survey data for the overwhelming majority of federal districts, which serve as the primary unit of analysis in the study. There are no a priori reasons to suspect systematic non-response bias on the part of federal judges, and there were no discernable statistical differences across a variety of district-level characteristics for federal courts included in the sample compared to those that are excluded.<sup>70</sup> The number of judge responses per district varied, which we address through weighting

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<sup>66</sup> See DiMaggio & Powell, *supra* note 17, at 150.

<sup>67</sup> We pre-tested role-specific drafts of the survey with five judges, eight federal public defenders or CJA Panel attorneys, and four federal probation officers. Based on their feedback, we were able to shorten, refine, and clarify the survey. The survey took between 30 to 60 minutes to complete. We developed both a web-based and paper version of the survey. We obtained names and addresses of all current district court judges from the Federal Judicial Center (FJC) and sent paper survey packets to all federal district court judges listed by FJC rosters. An enclosed letter gave them the option of taking the survey on the web, or taking the enclosed paper version. This was followed by reminder postcards to non-responders three weeks later and then a duplicate survey packet to remaining non-responders three weeks after that. A final reminder letter was sent in spring of 2006.

<sup>68</sup> See Don Dillman, *The Design and Administration of Mail Surveys*, 17 ANN. REV. OF SOC. 225, 229 (1991) (arguing that low response rate does not necessarily entail non-response error or invalidity).

<sup>69</sup> See PEW RES. CENTER, ASSESSING THE REPRESENTATIVENESS OF PUBLIC OPINION SURVEYS 1 (2012), <http://www.people-press.org/files/legacy-pdf/Assessing%20the%20Representativeness%20of%20Public%20Opinion%20Surveys.pdf>.

<sup>70</sup> See *infra* Appendix, Table A1.

procedures described below. The complete survey instrument and additional details about the survey's sampling, data, and measures are available from the first author by request. The final sentencing sample includes 162,870 criminal cases sentenced within the 82 federal district courts for which we have valid survey data.<sup>71</sup>

#### A. INDIVIDUAL-LEVEL VARIABLES

The analysis focuses on judicial decisions to conform to or deviate from the formal sentencing recommendations of the Guidelines. We focus specifically on downward departures. We do not examine upward departures (departures above the Guidelines) because they are very rare (1.6% of cases), and because there is insufficient variation in their occurrence (i.e., some districts report no upward departures). The dependent variable separates downward departures by judges (coded 1) from cases sentenced within the Guidelines (coded 0). It captures other downward departures controlled by the prosecutor in a third category to prevent them from being confounded with the primary contrast of interest. Because our fundamental interest is in the comparison between judge-initiated departures and conforming cases, we focus our discussion of findings on this comparison, though complete results for the other contrasts are available by request.

The federal sentencing data include detailed variables that capture specific information on socio-demographic offender characteristics, legal offense characteristics, guidelines calculations, and relevant case-processing considerations. The presumptive Guideline sentence is utilized to control for the combined nonlinear effects of offense severity and prior record.<sup>72</sup> It is comprised of the final adjusted minimum months of incarceration recommended under the Guidelines, after all mitigating and aggravating factors and statutory trumps (i.e., mandatory minimums) are incorporated.<sup>73</sup> It is standardized so a one-unit change reflects one standard deviation. In line with prior work,<sup>74</sup> a separate measure is also included for the six-point scale that captures defendant criminal history. This did not result in

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<sup>71</sup> The eight federal districts for which no judge survey data were obtained are geographically dispersed and diverse in population and socioeconomic characteristics. They include North Carolina Middle, Tennessee Middle, Idaho, Utah, Hawaii, New York North, Georgia Middle, and Colorado.

<sup>72</sup> Engen & Gainey, *supra* note 14, at 1208–09.

<sup>73</sup> U.S. SENTENCING COMM'N, FIFTEEN YEARS OF GUIDELINES SENTENCING, *supra* note 5, at 16–18.

<sup>74</sup> Johnson et al., *supra* note 16, at 753.

problematic collinearity between the presumptive sentence and criminal history score ( $r=.35$ ).

The type of crime is captured by a series of dummy variables for violent, property, firearms, fraud, immigration, drug, and “other” offenses with the reference being fraud crime.<sup>75</sup> A separate dummy variable is coded 1 for pretrial detainment and 0 for pretrial release. The type of conviction is captured with a variable coded 1 for bench or jury trials and 0 for guilty pleas. Dummy variables are also included for the sentencing year to control for potential temporal variations in sentencing with 2005 as the reference year. Age of the offender is included as the number of years at the time of sentencing. Gender is coded 1 for females and 0 for males, and race and ethnicity are included as a series of dummy variables, for black, Hispanic, and other race, with white defendants the reference group. A separate dummy variable is included for citizenship, with non-citizens coded 0 and U.S. citizens coded 1. Educational attainment is included as a categorical variable scored 1 for offenders with any college education or higher and 0 for offenders with a high school degree or less. The number of financial dependents, capped at 10, is also included in the model.

#### B. DISTRICT-LEVEL VARIABLES

Prior research suggests that jurisdiction size is one of the most important structural characteristics of criminal courts.<sup>76</sup> We therefore control for district size, as measured by the number of authorized judgeships in each federal district. We also control for the caseload pressure of the court,<sup>77</sup> operationalized as the number of cases sentenced in the district during the study period divided by the number of sentencing judges. Finally, we control for the total crime rate in the district, which is aggregated to federal districts from county-level Uniform Crime Report data.

We use aggregated survey items to capture judicial perceptions of normative versus coercive organizational influences that may encourage Guidelines conformity or departures. Normative influences tap into judicial attitudes about the legitimacy, effectiveness and morality of the Guidelines. Using Likert scales, judges were asked about the extent to which they

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<sup>75</sup> Other offenses include relatively uncommon crimes not subsumed by the other major crime categories, such as environmental crimes, pornography and prostitution, and gambling/lottery offenses.

<sup>76</sup> EISENSTEIN ET AL., *supra* note 3, at 283; Jeffery T. Ulmer et al., *Sentencing in Context: A Multilevel Analysis*, 42 CRIMINOLOGY 137, 167 (2004).

<sup>77</sup> See Dixon, *supra* note 38, at 1166.

agreed or disagreed with statements such as: a) “The sentencing commission has done a pretty remarkable job”; b) “Pre-guidelines there was great disparity, now disparity is much less”; c) “Congress has spoken and I have sworn to uphold what they have done”; and d) “The Sentencing Guidelines have failed to achieve their goals” (reverse coded). These items are combined into a summative scale capturing the *Normative Influence* of the Guidelines ( $\alpha=.64$ ).

Three additional scales capture different *coercive forces* that may affect the judicial use of departures. The first coercive factor, *Coercive Guidelines*, captures perceptions of the restrictiveness of the guidelines ( $\alpha=.70$ ). Judges were asked to what extent they agreed that: a) “If judges want to get something done, they can do it”; b) “Judges are regaining sentencing discretion” under the Guidelines; and c) “Judges have much more sentencing discretion after the *Booker* decision.” All items are reverse coded so higher scores reflect perceptions of less discretion and more coercion under the Guidelines. A second coercive factor, *Coercive USAO*, involves perceptions of the regulatory and coercive influence of the U.S. Attorney’s Office ( $\alpha=.60$ ). This measure included three items capturing the extent to which: a) the “USAO appealed departures routinely”; b) the degree to which the “U.S. Attorney sets the tone” in the district; and c) the extent to which the “USAO drives the system” and “is generally unaccommodating.” A third and final coercive factor, *Coercive Circuits*, captures perceptions of the restrictive influence of the circuit courts ( $\alpha=.64$ ). This factor consisted of two items. Judges were asked if they agreed that: a) “Most of the decisions that come out of [this] Circuit wind up being good for the government”; and the extent to which b) “you had better spell out your reasons and really lay it out in terms of why a case is outside the heartland, or else they [the Circuit] will reverse you.”

### C. ANALYTIC STRATEGY

This study analyzes judicial Guidelines conformity using hierarchical generalized linear models. Our analytic strategy captures alternative departure mechanisms by using a multinomial dependent variable that separates downward departures initiated by judges from conforming sentences. We focus the analysis on judge-initiated departures because we are theoretically interested in the discretionary behavior of federal judges and because our survey measures of perceptions of Guidelines are specific to judges. Consistent with prior work on federal departures,<sup>78</sup> other

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<sup>78</sup> See Johnson et al., *supra* note 16, at 770.

departures that are controlled by prosecutors are isolated in a separate category of the dependent variable to prevent them from confounding the key comparison between judicial departures and non-departures. Full results are available by request.

The multilevel model accounts for the fact that individual criminal cases nested within federal courts may share unaccounted-for similarities. It includes an additional error term to capture district-specific variance, it corrects misestimated standard errors, and it properly adjusts statistical significance tests as well as providing additional analytical advantages as detailed in elsewhere.<sup>79</sup> Consistent with prior work,<sup>80</sup> we specify a two-level random-coefficient model with federal cases nested within district courts.<sup>81</sup> Equivalent results were obtained using a random-intercept model with fixed coefficients. All variables are centered on their grand means and robust standard errors are reported. The coefficients from these models are exponentiated to produce relative risk ratios.

When using judicial surveys to tap into district court collective attitudes, it is important to investigate inter-rater agreement in survey responses among judges within the same district. This is a frequent issue that arises in organizational research that examines issues such as employee ratings of workplace climate.<sup>82</sup> In our case, multiple federal judges rated their district court environments. The  $r_{WG}$  statistic is the most commonly used index for evaluating inter-rater agreement when multiple judges rate the same environmental outcome.<sup>83</sup> These statistics are reported in the Appendix (see Table A2) and show that judges within the same district courts consistently demonstrate moderate to high agreement in their responses, with levels of inter-judge agreement falling well within common standards for justifying the aggregation of individual-level survey data.<sup>84</sup>

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<sup>79</sup> Lauren Shermer & Brian Johnson, *Criminal Prosecutions: Examining Prosecutorial Discretion and Charge Reductions in U.S. Federal District Courts*, 27 JUSTICE Q. 394, 420–21 (2010).

<sup>80</sup> See, e.g., Lynch & Omori, *supra* note 51, at 411.

<sup>81</sup> The following variables demonstrated significant variation in their effects across districts and were therefore included as random coefficients: presumptive sentence, criminal history, multiple counts, pretrial detention, and offender age, gender, race and ethnicity.

<sup>82</sup> See, e.g., Charles Glisson et al., *The Cross-Level Effects Of Culture And Climate In Human Service Teams*, 23 J. ORG. BEHAV. 767, 780 (2002); L.R. James et al., *Estimating Within-Group Interrater Reliability With And Without Response Bias*, 69 J. APPLIED PSYCHOL. 85, 85 (1984).

<sup>83</sup> James L. LeBreton et al., *Answers to 20 Questions About Interrater Reliability and Interrater Agreement*, 11 ORGANIZATIONAL RES. METHODS 815, 818 (2008).

<sup>84</sup> See *id.* at 836 (providing useful standards for evaluating the  $r_{WG}$  statistic. They

Furthermore, there is greater between-district variation in judicial responses than the within-district variation, which suggests that the individual survey data can be reliably used to tap into meaningful variation in district-level collective judicial perceptions of the Guidelines.

An additional complication introduced by the use of judicial surveys is that different districts have varying numbers of judges and varying judicial response rates. We address this issue by using weighting procedures to account for differential response rates across districts. The level 2 units were weighted by overall response rates for each district, so that districts with higher response rates contribute more to the level 2 estimates.<sup>85</sup> Overall, the combination of unique survey data on federal judges' views of the Guidelines with actual sentencing data on judicial departure patterns offers a unique opportunity to investigate the organizational influences that shape criminal punishment across federal court communities.

Following our discussion of the quantitative analysis, we also present illustrative material from the interview data noted earlier. We have direct survey measures that tap into both coercive and normative influences that may affect Guidelines conformity and departures, but our qualitative data are useful for also suggesting the potential importance of additional mimetic, uncertainty-reducing influences not captured by our survey.

### III. FINDINGS

#### A. DESCRIPTIVE ANALYSIS

Table 1 reports the results of descriptive statistics for the individual and contextual variables examined. The majority of offenders are sentenced within the recommended Guidelines range, with 13% of offenders receiving discretionary departures below the guidelines from sentencing judges. Individual offender characteristics are generally consistent with prior work

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suggest that values above .50 indicate at least moderate agreement, while values above .70 suggest strong agreement. All of our aggregated measures exhibited at least moderate agreement and the majority approached strong levels of agreement.).

<sup>85</sup> Comparison of models with and without weighting procedures produced equivalent findings. Specifically, we examined unweighted models, models weighted by the number of judge respondents, and models weighted by judicial response rates (reported), all of which produced similar substantive conclusions. We also investigated various subsets of federal districts with different numbers of judge respondents and different judicial response rates and also found the same pattern of results. This suggests our findings are not being driven by different response rates across districts. These additional models are all available from the authors by request.

on federal punishment practices.<sup>86</sup> The number of federal judgeships ranges from a low of 1.5 in the Eastern District of Oklahoma to a high of 28 in Southern District of New York. Bar graphs for the distributions of the district-level survey measures are reported in the Appendix and demonstrate considerable variation across federal districts in both the normative and coercive factors. To ease interpretation, all of the district-level survey measures are standardized, with a mean of 0 and a standard deviation of 1. The coefficients for these measures therefore represent the effect that a one standard deviation increase exerts on the individual odds of receiving a downward departure from the judge.

**Table 1. Descriptive Statistics for Individual and District-Level Predictors**

	<u>Mean</u>	<u>SD</u>	<u>Min</u>	<u>Max</u>
Dependent Variable				
Judicial Departure	.13	.33	.00	1.00
No Departure	.60	.49	.00	1.00
Other Departure	.27	.44	.00	1.00
Level 1 Predictors				
Year 2006	.37	.48	.00	1.00
Year 2007	.37	.48	.00	1.00
Presumptive Sentence	62.87	77.19	.00	470.00
Criminal History	2.48	1.73	1.00	6.00
Multiple Counts	.20	.40	.00	1.00
Age	34.93	10.73	16.00	97.00
Female	.13	.34	.00	1.00
Black	.22	.41	.00	1.00
Hispanic	.42	.49	.00	1.00
Other Race	.12	.33	.00	1.00
U.S. Citizen	.69	.46	.00	1.00
Dependents	1.58	1.73	.00	10.00
College Education	.21	.41	.00	1.00

<sup>86</sup> Albonetti, *supra* note 49, at 797; Johnson et al., *supra* note 16, at 753; Ulmer et al., *supra* note 31, at 1092. In the interest of space, descriptive statistics for reference groups (i.e., male, white, non-citizen, less than college education, pretrial release, plea conviction, and fraud offense) are omitted from Table 1. For this reason, some values do not sum to 100%.

**Table 1. Descriptive Statistics for Individual and District-Level Predictors**

	<u>Mean</u>	<u>SD</u>	<u>Min</u>	<u>Max</u>
Presentence Detention	.72	.45	.00	1.00
Trial Conviction	.05	.21	.00	1.00
Violent Offense	.03	.18	.00	1.00
Property Offense	.02	.15	.00	1.00
Drug Offense	.37	.48	.00	1.00
Firearms Offense	.12	.32	.00	1.00
Immigration Offense	.24	.43	.00	1.00
Other Offense	.04	.20	.00	1.00
Level 2 Predictors				
District Size	.00	1.00	-.92	4.19
Caseload Pressure	.00	1.00	-.97	4.94
Crime Rate	.00	1.00	-2.34	2.97
<i>Organizational Factors</i>				
Normative Influences	.00	1.00	-3.42	2.45
Coercive Guidelines	.00	1.00	-1.62	3.67
Coercive USAO	.00	1.00	-1.92	2.85
Coercive Circuit Court	.00	1.00	-2.14	1.65

## B. DOWNWARD DEPARTURES FROM GUIDELINES

Table 2 reports the findings from the random coefficient model for individual (i.e., level 1) effects on judicial departures from the Guidelines. The odds of departure are greater for cases with higher presumptive Guidelines sentences. A one-standard deviation increase in the presumptive sentence raises the odds of downward departure by 40%. Federal judges may view very long sentences as overly punitive and longer sentences may offer greater opportunity for judges to deviate below recommendations. In general, this effect coincides with findings from nearly all federal sentencing research—the Guidelines presumptive sentence is among the strongest predictors of federal punishment outcomes.<sup>87</sup> In terms of

<sup>87</sup> See, e.g., Kautt *supra* note 42, at 658; Paula Kautt et al., *Cracking Down on Black Drug Offenders? Testing for Interactions Among Offenders' Race, Drug Type, and Sentencing Strategy in Federal Drug Sentences*, 19 JUST. 1, 27 (2002); Hartley et al., *supra* note 49, at 394–95; Johnson et al., *supra* note 16, at 768; Spohn & Fornango, *supra* note 13, at 814; U.S. SENTENCING COMM'N, *supra* note 5, at 16–18; U.S. SENTENCING COMM'N 2012

extralegal offender characteristics, older offenders are slightly more likely to receive downward departures from judges and female offenders are notably more likely than male offenders to receive them. Being female increases the odds of departure by 27%. Black and Hispanic defendants, however, are significantly less likely to benefit from downward departures. The odds for black and Hispanic defendants are .81 and .78 times that of whites respectively. In addition, more educated defendants are also more likely to benefit from judicial departures; defendants with college schooling have odds of departure that are 17% greater than defendants without higher education. These findings are consistent with prior sociological work on social stratification and inequality in federal punishment.<sup>88</sup>

**Table 2. Hierarchical Generalized Linear Random Coefficient Model of Judicial Guidelines Downward Departures – Individual-Level Effects**

	<b>Judicial Departure<sup>89</sup></b>			
	<u>b</u>	<u>SE</u>	<u>Odds</u>	
Constant	-1.76	.08	—	***
<u>Level 1 Predictors</u>				
Year 2006	-.06	.05	.95	
Year 2007	-.02	.06	.98	
Presumptive Sentence <sup>x</sup>	.34	.03	1.40	***
Criminal History <sup>x</sup>	-.02	.01	.98	
Multiple Counts <sup>x</sup>	-.04	.03	.96	
Age <sup>x</sup>	.01	.00	1.01	***
Female <sup>x</sup>	.24	.03	1.27	***
Black <sup>x</sup>	-.21	.03	.81	***
Hispanic <sup>x</sup>	-.25	.05	.78	***
Other Race	-.23	.06	.80	***
U.S. Citizen	.05	.05	1.05	
Dependents	.01	.01	1.01	

REPORT, *supra* note 6, at 58; Ulmer et al., *supra* note 11, at 830; Ulmer et al., *supra* note 31, at 1098.

<sup>88</sup> Albonetti, *supra* note 49, at 811–12; Johnson et al., *supra* note 16, at 764; Steffensmeier et al., *supra* note 1, at 715–16.

<sup>89</sup> To simplify presentation of results, only contrasts between judicial departure and no departure are reported in this and subsequent tables.

**Table 2. Hierarchical Generalized Linear Random Coefficient Model of Judicial Guidelines Downward Departures – Individual-Level Effects**

	<u>Judicial Departure</u> <sup>89</sup>			
	<u>b</u>	<u>SE</u>	<u>Odds</u>	
College Education	.15	.02	1.17	***
Presentence Detention <sup>×</sup>	-.85	.03	.43	***
Trial Conviction	-.11	.06	.89	*
Violent Offense	.08	.07	1.08	
Property Offense	-.36	.06	.70	***
Drug Offense	.11	.08	1.12	
Firearms Offense	.16	.04	1.17	***
Immigration Offense	.27	.09	1.31	**
Other Offense	.12	.04	1.13	**
<hr/>				
N <sup>1</sup>	162,870			
N <sup>2</sup>	82			
District-Level Variance	.41			***

p ≤ .05\*\* p ≤ .01 \*\*\* p ≤ .001

<sup>×</sup> Random coefficient varies significantly across districts

Case processing factors also affect the odds of downward departure in ways consistent with prior literature. For instance, defendants detained prior to trial are less than half as likely as released defendants to receive departures, and defendants convicted at trial are also significantly less likely to receive downward departures. Notable differences also emerge for different crime categories. Compared to fraud offenders who serve as the reference group, property offenders are less likely to receive downward departures whereas individuals convicted for firearms or immigration crimes are significantly more likely to receive them. The increased odds of departure for firearms offenses may reflect the especially long federal mandatory sentences associated with them, whereas departures for immigration crimes are likely tied to the expedited use of deportation.<sup>90</sup>

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<sup>90</sup> Richard Hartley et al., *Defending the Homeland: Judicial Sentencing Practices for Federal Immigration Offenses*, 29 JUST. Q. 76, 97–98, 101 (2012).

**Table 3. Hierarchical Generalized Linear Random Coefficient Model of Judicial Guidelines Departures- District-Level Effects**

	<u>Judicial Departure</u>			
	<u>b</u>	<u>SE</u>	<u>Odds</u>	
Constant	-1.78	.07	—	***
<u>Level 2 Predictors</u>				
District Size	.10	.05	1.10	*
Caseload Pressure	.03	.02	1.03	
Crime Rate	-.07	.04	.93	†
<i>Organizational Factors</i>				
Normative Factor	-.11	.05	.89	*
Coercive Guidelines	-.13	.05	.87	**
Coercive USAO	-.05	.06	.95	
Coercive Circuit Court	-.18	.04	.84	***
N <sup>1</sup>	162,870			
N <sup>2</sup>	82			
District-Level Variance	.22		***	
Between-District R <sup>2</sup>	46%			

†  $p \leq .10$  \*  $p \leq .05$  \*\*  $p \leq .01$  \*\*\*  $p \leq .001$

Note: Model includes all level-1 predictors reported in Table 2. Estimates weighted by district-level response rates.

Table 3 reports the findings for district-level predictors of judicial departures. To first investigate whether or not the likelihood of departure varied across courts, we examined unconditional models (not reported in tabular form) that clearly demonstrated significant variation in the likelihood of downward departure across federal districts ( $\chi^2=6311.4$   $df=81$ ;  $p=.000$ ). This variation remained substantial and statistically significant after individual level predictors were included in the model ( $\chi^2=6031.6$ ;  $df=81$ ;  $p=.000$ ). In fact, the inclusion of individual-level predictors did little to explain inter-district variation in the judicial use of downward departures, which suggests that variation is not the product of compositional differences in case characteristics across courts. To illustrate the magnitude of inter-district variation in judicial Guidelines circumvention, downward departures were awarded in only 4% of cases in the Northern District of Mississippi, but they were meted out in 31% of cases in the Districts of

Connecticut and Eastern New York. Because inclusion of the level-2 predictors in the model did not substantively change the estimates for the level-1 variables, Table 3 is restricted to the district-level effects.

More favorable perceptions of the Guidelines reflected in the normative factor are associated with increased guidelines conformity. That is, stronger normative views of the Guidelines reduce the likelihood of judicial departures. A one standard deviation increase in the normative scale reduces the odds of downward departure by a factor of .89. Coercive influences tied to the Guidelines and circuit courts are also associated with decreased odds of judicial departure. Downward departures are less likely in judicial districts where the Guidelines are perceived to be more restrictive. A one standard deviation increase in the perceived coerciveness of the Guidelines multiplies the odds of departure by a factor of .87. Even larger effects emerge for the perceived coercive power of circuit courts. In districts where judges view the circuit as more conservative and more likely to reverse their decisions they are less likely to grant departure sentences. A one standard deviation increase in the perceived coerciveness of the circuit multiplies the odds of downward departure by .84, after accounting for individual-level offense and offender characteristics. The effect for perceived coerciveness of U.S. Attorneys' Offices was also in the expected direction, suggesting more coercive offices are negatively associated with judicial departures, but this effect failed to achieve statistical significance.<sup>91</sup>

Judicial perceptions of the coerciveness of the Guidelines could be the product of historical patterns of guideline departures in the district. To investigate this issue, we estimated supplemental models that controlled for prior pre-*Booker* departure rates of districts (FY2003–FY2004). Although this measure was, as one would expect, positively related to the odds of downward departure ( $b=.09$ ;  $SE=.01$ ;  $p\leq.001$ ), it had virtually no effect on the estimate for judicial perceptions of the coerciveness of the Guidelines ( $b=-.14$ ;  $SE=0.04$ ;  $p\leq.001$ ). This shows that judicial perceptions of the coercive influence of the Guidelines influence departure independent of time-stable differences between districts that might also influence the likelihood of departures.

Some of our district level control variables also demonstrate noteworthy effects. Larger districts are more likely to grant judicial

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<sup>91</sup> Additional analyses (not reported) also investigated potential interactions between extralegal offender characteristics and district-level organizational factors. Few of these interactions were statistically significant and none were substantively large. These analyses are not reported but are available from the first author by request.

departures. Specifically, a one standard deviation increase in the number of judgeships increases the odds of departure by 10%. District-level crime rates are also marginally related to the odds of judicial departure, with each unit increase associated with a 7% decrease in the odds of judicial departure.

Overall, the findings for inter-district variation in judicial departures provide support for the importance of normative perceptions of the guidelines and for the influence of coercive forces that contextualize the individual sentencing landscape across federal district courts. Collectively, the district-level predictors explained 45% of the total inter-district variation in judicial downward departures. Results of this study provide clear evidence of contextual variation in judicial conformity to the Guidelines. Inter-district variation in judicial departures remained highly significant even after accounting for a broad array of relevant offense and offender considerations. To place the magnitude of this variation in additional context, the mean probability of receiving a judge-initiated downward departure varied between 8% and 25% across one standard deviation of federal district courts, and it varied between 4% and 39% across two standard deviations.<sup>92</sup>

Judicial perceptions and attitudes toward the Guidelines were strongly related to the likelihood of downward departure across districts. Judges in districts that attached greater normative and moral force to the Guidelines were less likely to deviate from them. Court contexts where the Guidelines were viewed as more effective and legitimate were also characterized by lower odds of judicial departure. Taken as a whole, these findings suggest that important district variance exists in judicial attitudes regarding the normative and coercive force attached to the Guidelines as well as in attitudes toward circuit courts and their likelihood of reversal on appeal.

#### IV. QUALITATIVE INSIGHTS

We conducted more than 300 qualitative, open-ended interviews with federal court actors in eight geographically-dispersed districts, and these offer additional insights into these and related sources of contextual variation in organizational conformity to the Guidelines (the interviews were collected on the condition that the names of individuals and of districts would be kept anonymous). The interviews highlight important

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<sup>92</sup> These estimates are derived by setting all individual-level predictors in the model to their means and then using the district-level variance component to calculate one and two standard deviation increases and decreases in the probability of departure.

themes involving normative constraint, coercive social forces, and also mimetic, uncertainty-reducing influences that affect organizational conformity and deviation from the Guidelines. The interviews suggest that these three types of influence often operate distinctively, but can also combine in unique ways to shape district-level conformity to and departure from the Guidelines.

#### A. VARIATION IN NORMATIVE CONSTRAINT

Consistent with our quantitative findings, the interview data suggest that many judges clearly recognize the moral force and normative constraints of the Guidelines. A judge in one medium-sized southeastern district, for instance, noted that there are “fairly decent guidelines on when you may depart downwardly,” and he went on to say

I don't look at the downward departure provisions of the Guidelines as an excuse for me to impose my own type of sentence and find some colorful basis for downward departure, even when I believe the U.S. Attorney isn't going to fuss about it. I don't do that. I sort of go by the book as much as I can.

Another judge in the same district stated: “I was skeptical of the Guidelines at first, largely, because of the bureaucratic nature of them. But I do feel that a core value of uniformity in sentencing and certainty in sentencing are both things that I believe in.”

A judge in a large southern district similarly articulated a mixture of normative and coercive reasons for avoiding departures from the Guidelines:

I like the Guidelines. I ask what is happening nationwide? And what does Congress want us to do? I respect that. They force us to give reasons why we sentence the way that we do and I think that is good. There are no crazy sentences. The Guidelines eliminated extremes, and if you give an extreme you've got to say why. And there is almost no reason to. The Guidelines keep us humble, and most say that judges could use to be humbled.

By contrast, some judges in other districts seemed more critical of the Guidelines on normative grounds, expressing clear willingness to depart. For example, a judge in a large west coast district stated, “This is the ‘anguish of the drug war.’ You want to ameliorate the excessiveness of the penalties through departures. . . . If they have more than their share of hardships I will take a look at their circumstances.”

Similarly, a judge in a small northeast district noted his respect and appreciation for the Guidelines, but expressed clear willingness to depart from them when necessary and believed that the normative credibility of the Guidelines was enhanced by allowing departures. He admitted:

I am perceived as being somewhat overly sensitive to the human qualities of the individual defendant. You know, it would be nice if there were more departures. I am an advocate for judicial discretion within the parameters of the Guideline system. I believe in the Guidelines. I think they're great. But I think more flexibility gives them greater credibility.

As these brief quotations suggest, judges recognize the moral and normative force of the Guidelines, even though there are clear inter-district variations in their perceptions of the ability and need for sentences that depart from them.

## B. VARIATION IN COERCIVE CONSTRAINT

Our quantitative findings also indicated that districts that viewed the Guidelines as more restrictive and less flexible and those that perceived the circuit courts to be less supportive and more likely to reverse decisions were less likely to depart from the Guidelines. The interviews clearly contained differing themes about coercive pressures across court contexts. One judge in a medium-sized southeastern district expressed disdain for the federal justice system's efforts to promote conformity. He noted:

Lots of offices are trying to tell judges what to do. Federal Judicial Center (FJC), Administrative Office of U.S. Courts (AOUSC). I don't know if it's affecting people but they're trying. They make judges go to trainings, conferences. Always a press for uniformity. There are bulletins from the FJC, school for new judges . . . et cetera.

A number of court actors also recognized that the circuit courts loomed large in their decisions to depart from the Guidelines. Reflecting on departures in one particular circuit, a judge in a large midwestern district noted that: "[t]he attitude among district judges is that the [Xth] Circuit is nasty on downward departures," and that

has a deterrent effect on district judges. The [Xth] Circuit is very conservative. I think a lot of judges, if they didn't have to worry about that, they would depart because you really need to look at these situations on an individual case-by-case basis. You can't look at every, you know, all these drug crimes as being all the same, because they're not. Same with bank robbery cases, same with everything. Everything.

In contrast, other circuit court environments were perceived to be far less constraining with regard to judicial departure decisions. According to a judge in a medium-sized northeastern district:

You have seen more downward departures. That statistic is on the up. But all that shows is that we follow the law. Since they said you can do it, we do it. But when they were saying we couldn't, you didn't see very many departures. Judges are pretty staunch about following the law, me included. We whine, we complain, but we follow it. [Our Circuit] has always said our discretion is the key.

He elaborated that judges could “try to get them to see and to convince them that if you do see it as unusual as we see it, then that is a proper judicial function to depart. And you won’t be reversed. Be confident in that.” Another judge in the same circuit, but a different district similarly noted:

If I tend to think that I’m a little vulnerable [in my departure reasoning] . . . I’ll throw in totality of circumstances. It’s pretty tough to lose under totality of circumstances. You know, they make the circumstances unusual. Very seldomly will the [Yth] Circuit reverse. [sic]

These statements illustrate that judges are aware of the coercive power of circuit courts to reverse their departure decisions, and they further highlight the variation that exists in these perceptions across district court contexts. Similar views were expressed by other federal court actors as well. The U.S. Attorney in a medium-sized southern district, for instance, noted that “The [Zth] Circuit is fairly strict constructionists on statutory interpretation. It is very pro-sentencing Guidelines. It reads them very strictly and that’s a blessing to the prosecution because we . . . can appeal departures and don’t have to worry, ‘what’s the Circuit going to do?’”

In contrast, a U.S. Attorney in a large west coast district took a more “middle of the road” stance on appealing departures and stated, “Generally, I think my sense is unless it’s a really bad decision, truly out of bounds, that we won’t appeal.” In this district, the U.S. Attorney’s office was relatively uninterested in appealing judicial departures. The U.S. Attorney continued, noting the stance of the circuit and stating “The judges here shouldn’t be feeling that they don’t have sufficient discretion . . . because they’ve exercised it and we have challenged them very rarely on that exercise of discretion. It’s a tough challenge to make in [our] Circuit anyway.” He concluded, “if a judge is articulate enough, he [sic] can justify a departure that will withstand the power of review in any appellate case.” Finally, a judge in another northeastern district expressed the broad acceptability of departures in his district, noting that:

There is not a single case with the exception of a mandatory minimum case . . . where there’s no [defense] request for departure of some kind. I will say that in many ways, very often, the majority of cases in which I depart the government agrees. I’ve been a judge for 7 years; the government’s appealed me once.

### C. MIMETIC INFLUENCE: THE UNCERTAINTY REDUCTION INFLUENCE OF GUIDELINES

Although our quantitative analysis did not have direct measures of mimetic influences affecting Guideline conformity and departures, many of

our interviews contained important themes related to them. All sentencing guidelines reduce uncertainty by categorizing offenses and offenders and by making bounded sentence recommendations in connection with those classifications.<sup>93</sup> The federal Guidelines provide an “anchoring structure” that defines the parameters of applicable sentences in ways that help simplify complex decision-making processes—they categorize cases and provide enhanced predictability and reduced uncertainty in punishment. The interview data suggest an important role for this kind of mimetic, uncertainty-reducing influence. One prominent theme that emerged was the important role of the Guidelines in simplifying sentencing and reducing uncertainty through the categorization and ranking of offenses, offenders, and sentences. Regardless of individual opinions about whether the Guidelines were too harsh or not, there was broad consensus that the Guidelines did in fact help to anchor sentencing decisions while reducing unwanted uncertainty. For example, one federal probation officer in a medium-sized northeastern district even complained that:

The Guidelines have reduced . . . judges to a “cookbook mentality.” If it calls for a tablespoon they are not going to alter that. The Guidelines provide a recipe for judges. It’s easy, a judge can look at it and say, “Guidelines say this, this is what I am going to do, I don’t have to think about adapting them to something else.” . . . If we stopped sending pre-sentences to the court [containing Guideline calculations], some of the judges would be totally lost.

Two judges in a large midwestern district characterized the usefulness of the Guidelines for cognitively structuring decision making as follows:

I’m not one of those people who rail against the Guidelines like a lot of other people do, and I actually think the goals of it are good because I certainly think that when I was a prosecutor, you know, generally they did it by sort of a gestalt. Now there is a framework. . . . And I think that they’re good because maybe they sort of give guidance to everybody and to the court.

My attitude towards the Guidelines has evolved over the years, judges who entered the bench before the Guidelines have a very different view, they chafe, they hate them, blah, blah, blah. I came on the bench after. I don’t feel the same, it is not as personal to me, all I know about is the Guidelines . . . I view the Guidelines as a tool to achieve a just result. I try to do the right thing while trying to apply the Guidelines.

A judge in the medium southwestern district largely agreed and noted that:

See, I started my career after the Guidelines came into effect and I never had the power that my colleagues who set forth periods of time before the Guidelines went into effect had. I never had the power of discretion, so I never felt the loss of discretion. I think the Guidelines conceptually are a good idea.

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<sup>93</sup> KRAMER & ULMER, SENTENCING GUIDELINES, *supra* note 32, at 26–32.

A U.S. Attorney in a large midwestern district noted that not only are the Guidelines cognitive decision-making aids, but they also ease the emotional burden of having to decide punishments on their own:

Some of them [judges] are relieved that they do not have as much discretion. There are some district court judges who like the sentencing guidelines because they don't like to make the hard decisions. Guidelines relieved them of a lot of that. You talk to judges over drinks and some tell you that their brothers and sisters for the most part love them, it takes the burden off their shoulders. They love the fact that they don't have to make these hard calls. But then there are some that realize that, "Jesus, this is my job." I am sure it is those guys that are doing the departures.

A judge in a large southern district agreed with the U.S. Attorney above: "I think eventually for many judges the guidelines provide some insulation from kind of the raw human pain that is involved in sentencing somebody." In addition, a judge in a northeastern district elaborated on this theme of how Guidelines simplify sentencing both cognitively and emotionally:

I think initially the judges were overwhelmingly pleased with Guidelines because it's a tremendous moral burden to carry around with you. To pronounce these sentences on people like they're coming out of your head, and that's what you're doing, and you have to sleep with it at night, and wasn't it wonderful to have a set of guidelines that almost mathematically told you what the sentence was, and therefore it absolved you, basically, of the moral responsibility, to some extent, of whether the sentence was too harsh, whether you should have considered some of these other factors, yadda, yadda, yadda.

Like some of the quotes above, additional insights from an experienced Chief Federal Defender in a small southern district contrasted older judges, who sentenced pre-Guidelines, to judges appointed later, who leaned on and embraced the Guidelines. He noted that for "District court judges who were on the bench in the past, the Guidelines were painful. The judges were resentful of the Guidelines." However, over time his district established "a very strict routine under the Guidelines" in which judges are expected to "just follow the rules," and he explained:

The rules do not look as problematic to them [newer judges] as they do to somebody who came before them. [The Guidelines] gave them structure. The newer judges have never had the option to do anything else . . . they lean on the Guidelines a lot more than judges did that were on the bench when the guidelines became effective. It seems to me like before, the [old] judges were often looking for an excuse to do something outside the Guidelines. Where now, with these [newer] judges, you really have to show them something that tells them that they should do this [depart below Guidelines], you know. They still may say, "Well, I recognize that I have this discretion, but I choose not to use it."

Finally, the Chief Federal Defender in a small northeastern district contrasted her experience in her current and former districts. She perceived

that judges in her former district uncritically followed the Guidelines because it was cognitively (and perhaps emotionally) easier to do so. She appreciated that judges in her current district felt free to depart from the Guidelines:

I've seen judges that I think hide behind the Guidelines . . . rather than be creative or interpret the Guidelines in a judicial fashion, I've seen judges hiding behind them. "Sorry, I've washed my hands on this one." I saw that a lot in [former district]. Some judges would do mass sentencings, 20 or 30 hearings a day, and just read out centuries of time.

In her current district, she felt the judges were "open to sentencing arguments" and "they did their judicial duty to find departures where there was a reason." These comments comparing two different districts highlight both the general importance of mimetic, uncertainty-reducing influences in guidelines conformity, and also the notable differences that can occur in these justifications and in the use of Guidelines departures across federal court communities.

#### CONCLUSION

We argue that the federal courts represent an important organizational field in which local norms and organizational influences play a key role in explaining conformity to, and deviation from, institutional rules. U.S. district courts can be seen as local organizational arenas whose punishment decisions are subject to a set of overarching field-wide rules—i.e., sentencing Guidelines—that constrain judicial discretion with a mixture of regulative, normative, and mimetic social force. District courts are inhabited by court actors who make sense of formal institutional rules through the lens of locally-interpreted organizational norms and expectations.

We investigate these social influences, focusing on different types of organizational pressure for judicial conformity to the Guidelines. We measure one specific aspect of that organizational culture relevant to federal courts and their relationship with the Guidelines: the collective judicial attitudes about the Guidelines' normative and coercive influences. We examine normative influences that encourage conformity through the perceived moral force and legitimacy of the Guidelines, as well as coercive influences that encourage Guideline conformity through various types of regulative constraints. Our interview data help to illustrate these influences and also raise the potential importance of additional, mimetic forces, or cultural-cognitive pressures toward conformity that are rooted in organizational goals of decision-making efficiency and uncertainty reduction.

Our results are consistent with prior socio-legal research that suggests local court actors often implement formal legal policies in locally distinct ways.<sup>94</sup> Indeed, our findings suggest district court sentencing practices are coupled to the Guidelines to varying degrees, depending on judicial interpretations and perceptions of the Guidelines and on surrounding pressures to conform to them. The collective perceptions among judges of the Guidelines as normatively legitimate, their definitions of the coerciveness of the Guidelines and the local circuit court climate, are all intimately related to contextual patterns of Guidelines conformity. In short, our analysis implies that the federal criminal justice system and its sentencing Guidelines represent an “inhabited institution,”<sup>95</sup> where local actors’ efforts at sense-making produce important variation in punishment outcomes for individual defendants.

The court communities’ perspective views courts as open systems within organizational fields, influencing and being influenced by their surrounding socio-political contexts. Thus, we do not wish to argue that collective judicial attitudes, as a measure of one component of court community culture, exist in isolation of broader influences. Much research demonstrates that courts vary substantially in their sentencing practices in connection with factors like court caseloads and crime dynamics, surrounding political features, the size of local racial and ethnic minority populations, local religious climate, and others.<sup>96</sup> Thus, judicial attitudes about the normative value and coercive influence of the Guidelines are quite likely shaped by factors both internal and external to the courthouse itself. However, empirically assessing the influences on the judicial attitudes themselves is beyond the scope of this study.

Despite its unique contributions, our study has other important limitations as well. The use of judge surveys to tap into local court organizational culture comes with limitations tied to survey research. As with any survey instrument, nonresponse bias, measurement error and cognitive biases may affect our measures of court culture. The fact that our results are not sensitive to different response rates (see Appendix, Table A3) provides some assurance against these concerns, though it will be important for future work to replicate these findings. Another notable limitation of our data is that we cannot connect individual judge survey

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<sup>94</sup> Nagel & Schulhofer, *supra* note 16, at 547–49; Johnson et al., *supra* note 16, at 767–68; Lynch & Omori, *supra* note 51, at 411.

<sup>95</sup> See Tim Hallett, *The Myth Incarnate: Recoupling Processes, Turmoil, and Inhabited Institutions in an Urban Elementary School*, 75 AM. SOC. REV. 52, 53 (2010).

<sup>96</sup> Ulmer, *supra* note 47, at 13–16.

responses to individual judges' sentences. The USSC does not publicly release data on individual sentences by judge nor do they publicly provide anonymous judge identifiers.<sup>97</sup> If future research could obtain judge identifiers, and could connect individual judge attitudinal or other survey measures to individual judges' sentencing decisions, this would be a major contribution to the literature.

Future work could expand on this research in several other productive directions. First, we focus only on collective judicial perceptions and their effects on judicial departures from guidelines. However, the incorporation of perceptions from other court actors could broaden the scope of the current work and open the door for additional lines of inquiry. For instance, prosecutor surveys could be used to inform our understanding of prosecutor-controlled departures, especially since these types of departures are frequently embedded in the guilty plea process. Second, our focus on Guideline departures reflects organizational perspectives on the tension between formal institutional rules and local court actor behavior,<sup>98</sup> but it is important to recognize that judges make several other consequential decisions that are also embedded in the local culture of the court. Predominant case processing strategies, pretrial decisions, and other punishment outcomes, such as the likelihood and length of incarceration should be examined in future work on the organizational contexts of sentencing.

As described at the outset, the Guidelines were once mandatory, but the 2005 *Booker* decision ruled the Guidelines advisory and restored considerable sentencing discretion to federal judges, which weakened their coercive power to restrict departures as a matter of law.<sup>99</sup> Yet, recent research shows that the Guidelines continue to exert strong influence on federal sentencing, and while judge-initiated departures have increased compared to pre-*Booker* years, the large majority of sentences conform to the Guidelines.<sup>100</sup> We suspect that this is because the U.S. Sentencing Guidelines do not merely, *or even now primarily*, influence through

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<sup>97</sup> Max Schanzenbach & Emerson H. Tiller, *Reviewing the Sentencing Guidelines: Judicial Politics, Empirical Evidence, and Reform*, 75 U. CHI. L. REV., 715, 720–29 (2008).

<sup>98</sup> See generally JAMES MARCH & HERBERT SIMON, ORGANIZATIONS (1958) (on formal and informal organizational rules and decision-making).

<sup>99</sup> Stith, *supra* note 25, at 1477.

<sup>100</sup> Kaiser & Spohn, *supra* note 12, at 261–62; U.S. SENTENCING COMM'N, U.S. SENTENCING COMM'N'S 2011 ANNUAL REPORT 35 (2011), <http://www.ussc.gov/about/2015-annual-report/archive/annual-report-2011>; Ulmer et al., *supra* note 11, at 830; Ulmer et al., *supra* note 31, at 1098.

regulative constraint, but *also* through informal normative influence, and perhaps mimetic influence (by providing useful tools to manage uncertainty). Subsequent Supreme Court decisions have made it clear that judges need not presume that the Guidelines are reasonable sentences in given cases,<sup>101</sup> and that judges may depart from the Guidelines if they disagree with them on policy grounds.<sup>102</sup> Therefore, the regulatory influence of the Guidelines has been significantly reduced, which likely makes normative influences more important in constraining judicial departures. Our interview data further suggest that the Guidelines also serve an important uncertainty-reducing function, and that district courts' reliance on them illustrates a form of mimetic isomorphism.<sup>103</sup>

Additional research is therefore necessary to examine the complex interplay between legal shifts in sentencing policy and patterns of conformity to institutional rules such as the Guidelines. In the wake of not only *Booker*, but subsequent decisions<sup>104</sup> that occurred after our survey was collected, local organizational contexts may become even more important as the Guidelines' formal legal constraints are further weakened. This suggests that court conformity to the Guidelines may depend increasingly on their normative or mimetic (e.g., uncertainty reduction) influences.

Thus, to the extent that the Guidelines have become embedded in federal sentencing practice as anchoring rules and normative standards, they will continue to shape the landscape of federal sentencing, but they may increasingly be subject to local interpretation and adaptation. In some ways, the role of normative influence may be especially important. For instance, Kaiser and Spohn<sup>105</sup> recently found that district judges around the country have expressed policy disagreements with the Guidelines' recommendations for non-production child pornography sentences by departing downward at very high rates. Such policy disagreement departures may become more common,<sup>106</sup> reflecting the reduced coercive influence of the contemporary Guidelines. This also suggests that the Guidelines may exert very different levels of normative influence over

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<sup>101</sup> *Gall v. United States*, 552 U.S. 38, 39, 50 (2007).

<sup>102</sup> *Kimbrough v. United States*, 552 U.S. 85, 101 (2007).

<sup>103</sup> Ulmer, *supra* note 4, at 255–56.

<sup>104</sup> *See, e.g., Gall*, 552 U.S. at 38–39; *Kimbrough*, 552 U.S. at 85–89; *Rita v. United States*, 551 U.S. 338, 338–40 (2007).

<sup>105</sup> Kaiser & Spohn, *supra* note 12, at 262; *see also* Carissa Byrne Hessick, *Disentangling Child Pornography from Child Sex Abuse*, 88 WASH. U. L. REV. 853, 853, 887 (2011).

<sup>106</sup> Kaiser & Spohn, *supra* note 12, at 259.

sentencing for different crimes. A few years ago, the USSC requested that Congress direct district courts to give the Guidelines “substantial weight” in sentencing decisions, to provide a “presumption of reasonableness” standard to Guidelines sentences, and to provide a “heightened standard of review” for departure sentences based on policy disagreements.<sup>107</sup> Our research here implies that in the contemporary context, a major way to encourage district courts to give the Guidelines substantial weight would be to listen to the signals that judge-initiated departures send, because these may indicate an important lack of normative alignment between specific Guideline sentences and the attitudes of district judges. Seen this way, judicial departures are not necessarily indicative of troublesome noncompliance with the Guidelines, but instead have normative feedback value.

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<sup>107</sup> Amy Baron-Evans & Kate Stith, *Booker Rules*, 160 U. PA. L. REV. 1631, 1730–32 (2012).

APPENDIX: DISTRICT COMPARISONS, INTER-RATER AGREEMENT,  
WEIGHTING AND BAR CHARTS

**Table A1. Comparison of Federal Districts with and without Judicial Survey Responses**

	<b>Included Districts (n=82)</b>	<b>Excluded Districts (n=8)</b>	<b>T-Test Statistic</b>
<u>District Characteristics</u>	<u>Mean</u>	<u>Mean</u>	
Total Crime Rate	36.41	37.57	-.23
Number of Judgeships	7.56	4.25	1.62
Total Departure Rate	.35	.37	-.42
Judge Departure Rate	.11	.10	.22
Caseload Pressure (cases per judge)	333.01	368.40	-.35
Total Population	3,461,394	2,528,178	.89
% Black Population	13.28%	10.30%	.70
% Hispanic Population	9.81%	8.67%	.28
Median Household Income	\$49,130.84	\$50,696.73	-.50
% Population in Poverty	13.7%	12.6%	.89
% Male Judges in District	79.2%	86.7%	-1.13
% White Judges in District	86.0%	86.1%	-.02
% Black Judges in District	9.3%	10.8%	-.38

**Table A2. Inter-rater Agreement for Survey Measures  
Aggregated to District Level**

	<b>r<sub>WG</sub> index</b>	
	Mean	SD
<i>Organizational Factors</i>		
Normative Factor	.69	.27
Coercive Guidelines	.51	.35
Coercive Circuit Court	.69	.27
Coercive USAO	.76	.25

**Table A3. Comparison of District Organizational Factors for Weighted and Unweighted Estimates**

<b>Judicial Departures</b>				
<b><u>Model 1</u></b>				
<u>Weighted by District</u>				
<u>Response Rate</u>				
	<u>b</u>	<u>SE</u>	<u>Odds</u>	
Constant	-1.78	.07	--	***
<u>Level 2 Predictors</u>				
District Size	.10	.05	1.11	*
Caseload Pressure	.03	.02	1.03	
Crime Rate	-.07	.04	.93	†
<i>Organizational Factors</i>				
Normative Factor	-.11	.05	.90	*
Coercive Guidelines	-.13	.05	.88	**
Coercive USAO	-.05	.06	.95	
Coercive Cir. Court	-.18	.04	.84	***
N <sup>1</sup>	162,870			
N <sup>2</sup>	82			

†  $p \leq .10$  \*  $p \leq .05$  \*\*  $p \leq .01$  \*\*\*  $p \leq .001$

Note: Models include all additional level-1 predictors reported in Tables 2 & 3

**Table A3. Comparison of District Organizational Factors for Weighted and Unweighted Estimates Cont'd**

<b>Judicial Departures</b>				
<b><u>Model 2</u></b>				
<b><u>Un-weighted</u></b>				
<b><u>Estimates</u></b>				
	<b><u>b</u></b>	<b><u>SE</u></b>	<b><u>Odds</u></b>	
Constant	-1.76	.06	--	***
<b><u>Level 2 Predictors</u></b>				
District Size	.13	.04	1.14	**
Caseload Pressure	.00	.04	1.00	
Crime Rate	-.06	.04	.94	†
<b><i>Organizational Factors</i></b>				
Normative Factor	-.13	.05	.88	*
Coercive Guidelines	-.10	.05	.90	*
Coercive USAO	-.05	.05	.95	
Coercive Cir. Court	-.21	.05	.81	***
N <sup>1</sup>	162,870			
N <sup>2</sup>	82			

†  $p \leq .10$  \*  $p \leq .05$  \*\*  $p \leq .01$  \*\*\*  $p \leq .001$

Note: Models include all additional level-1 predictors reported in Tables 2 & 3