

POLICY ESSAY

RACIAL DISPARITY IN WAKE OF THE BOOKER / FANFAN DECISION

Judicial discretion in federal sentencing An intersection of policy priorities and law

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Questions about who has authority to make which decisions with how much discretion has occupied the attention of organizational sociologists for years. As applied to the criminal legal system, the focus is on judicial and prosecutorial discretion. After decades of allowing judges extensive discretion within broadly defined statutory limits, coupled with unreviewable sentence outcomes in both federal and state courts, critics in the early 1970s and 1980s argued for limitations on judicial discretion (Frankel, 1972). Critics argued that judicial discretion produced uncertainty and disparity in sentence severity.

Some social scientists found that that federal sentence disparity prior to reforms of the 1980s was linked to extralegal variables such as the defendant's race/ethnicity, gender, and socioeconomic status (Albonetti, 1998, 1999; Hagan, Nagel, and Albonetti, 1982; Nagel and Hagan, 1982; Peterson and Hagan, 1984; Weisburd, Wheeler, Waring, and Bode, 1991; Wheeler, Weisburd, and Bode, 1982). Other researchers found no significant relationship between defendant's socioeconomic status and sentence severity (Benson and Walker, 1988).

Federal Reform Measures

After years of policy debate, in the mid-1980s, the U.S. Congress enacted laws that virtually transformed sentencing practices. Policy priorities were aimed at severely limiting judicial discretion in an attempt to eliminate unwarranted sentence disparity. How much discretion should judges' exercise at sentencing? Should limits be placed on that discretion? What reform mechanisms could be instituted that would limit judicial discretion effectively? Should judicial discretion be formally overseen? Who is to perform this oversight?

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Congress began answering some of these questions early on by enacting mandatory minimum drug laws and passing the Sentencing Reform Act of 1984. More specifically, The Anti-Drug Abuse Act of 1986 mandated minimum penalties for offenders who (a) sell drugs to persons under 21 years of age, (b) hire a person under 18 years of age in a drug offense, and (c) possess a firearm.¹ The Omnibus Anti-Drug Act of 1988 mandated 5-year minimum sentences for simple possession of more than 5 g of crack cocaine. The Act requires a minimum 20-year imprisonment for offenders convicted of involvement in a drug enterprise. It also applied the mandatory minimum penalties for substance distribution and importation/exportation conspiracies to commit these crimes. These laws expressed the “get tough with crime” policies of both houses of Congress and President Ronald Reagan. In 1984, Congress substantially amended the 1968 Gun Control Act² as part of Comprehensive Crime Control Act of 1984 by changing the previously wide range of sentences that could be imposed for use of a firearm in the commission of a felony to mandatory 5-year sentences for a first offense and 10-year for subsequent violations (18 U.S.C. § 924(c) (Supp. III), 1985). Two years later, Congress amended the original Act by providing mandatory longer sentences for the use of a machine gun or a firearm with a silencer or some form of muffler (18 U.S.C. § 924(c) (Supp. V), 1987). The change provided for an additional 10-year sentence for first offenders and an additional 20-year sentence for repeat offenders. These statutory changes from indeterminate sentencing for drug and firearm offenses to mandatory minimum penalties and sentence enhancements were aimed not only at deterring criminal behavior but also at reducing judicial sentencing discretion. With these changes, Congress translated policy into sentencing law and intruded into judicial autonomy by limiting judicial discretion at a point in the criminal justice system where judges have historically retained substantial control within an indeterminate sentencing scheme.

By far, the greatest intrusion into federal judicial discretion occurred with the enactment of the Sentencing Reform Act of 1984 and the subsequent implementation of the Federal Sentencing Guidelines in 1987 (hereafter Guidelines). The Guidelines codified congressional and administrative policies to reduce sentence disparity by all but eliminating judicial discretion. The Guidelines replaced indeterminate sentencing within statutorily defined limits with presumptive structured directives.

Current Study and Policy Implications

The current study contributes to our knowledge of federal sentencing by exploring the impact of the 2005 Supreme Court decision in the consolidated cases of *United States v. Booker* and *United States v. Fanfan* (hereafter *Booker*) and sentencing outcomes after the

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1. This Act assigned a 5-year mandatory minimum for 100 g or more of a mixture or substance that contains heroin and 500 g or more of a mixture or substance containing cocaine. A 10-year mandatory minimum was assigned for second convictions of these offenses.
 2. This Act is part of the Omnibus Crime Control and Safe Streets Act of 1968.

Gall v. United States decision in 2007. Based on the analyses by Ulmer, Light, and Kramer (2011, this issue), the authors “question the notion that *Booker* and *Gall* have caused increases in race/ethnic and gender sentence-length disparity compared with the full range of years when the Guidelines were mandatory” (2011, p. 1108).

Ulmer et al. (2011) conclude that:

If post-*Booker/Gall* racial/gender length disparity levels were comparable to or lower than levels in previous periods when the Guidelines were also mandatory, this calls into question the notion that the post-*Booker/Gall* eras of advisory Guidelines have produced *uniquely high* levels of racial disparity in sentence lengths. In our view, this calls into question the need for blanket policy remedies that would attempt to curtail overall judicial sentencing discretion in the name of disparity in sentence lengths. [emphasis in original]

I agree with these policy recommendations. There is no need to institute statutory remedies for sentences that do not greatly differ from those imposed under pre-*Booker* mandatory guidelines structure.

One might ask why post-*Booker* racial/gender sentences lengths are not substantially different than those observed during the immediate years pre-*Booker*. Several reasons may explain Ulmer et al.’s (2011) findings. These reasons have policy relevance to what action, if any, should be taken to constrain judicial discretion. First, by the time *Booker* is decided in early 2005, most of the sitting lower court federal sentencing judges have known no other sentencing scheme but the Guidelines. For the relatively few judges that are holdovers from pre-Guidelines days, 18 years of following the step-by-step path to determine sentence outcomes probably has been routinized.

Second, because the Supreme Court in *Booker* replaced the then *de novo* standard of appellate review with a “reasonableness” standard that itself is tied to 18 U.S.C. § 3553(a), lower court judges’ sentencing decisions are still made in reference to same policy related directives reflected in mandatory Guidelines. As provided by 18 U.S.C. § 3553(a) (2006), the court is to consider the following in determining the sentence to impose:

- (1) the nature and circumstances of the offense and the history and characteristics of the defendant;
- (2) the need for the sentence imposed—
 - (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
 - (B) to afford adequate deterrence to criminal conduct;
 - (C) to protect the public from further crimes of the defendant; and
 - (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;
- (3) the kinds of sentences available;

- (4) the kinds of sentence and the sentencing range established for—
 - (A) the applicable category of offense committed by the applicable category of the defendant set forth in the guidelines;
- (5) any pertinent policy statement—
 - (P) issued by the Sentencing Commission;
- (6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and
- (7) the need to provide restitution to any victims of the offense (18 U.S.C. § 3553 (a)).

By tying post-*Booker* appellate review standard of “reasonableness” to the policy-related considerations found in 18 U.S.C. 3553(a), the Supreme Court constrained lower judges to the same policies that are the cornerstone of the mandatory federal sentencing guidelines enacted in 1987. In effect, the Supreme Court in *Booker* moderated the amount of sentence disparity and continued to limit the extent to which lower court judges could stray from policy related statutory constraints that were at the heart of the mandatory federal sentencing guidelines.

Third, the statutory mandatory minimum penalties of the 1980s and thereafter were let untouched by the *Booker or Gall* decisions. Lower court judges are still required to impose mandatory minimum sentences for drug and gun offenses. The statutory mandatory has always trumped the federal sentencing guidelines. The only exceptions to imposing these mandatory minimum penalties is that the defendant qualifies for the “safety valve” provision (18 U.S.C. §§ 3553 (1)-(5), (1994); U.S. Sentencing Guidelines Manual § 5C1.2, 1995) in drug cases or the government files a substantial assistance departure (18 U.S.C. § 3553(e) and 28 U.S.C. § 994(n); U.S. Sentencing Guidelines Manual §5K1.1, 1987). Absent either of these exceptions, lower court judges are required to impose the mandatory minimum sentences post-*Booker*. For the preceding three reasons, it is not surprising that post-*Booker* race/ethnicity and gender sentence length disparities are similar to those found during pre-*Booker* days. I agree with the authors that there is no need to implement policy remedies—the Supreme Court and Congress already put into place statutes that maintain virtually the same constrains on judicial discretion that existed pre-*Booker*.

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Celesta A. Albonetti's research focuses on judicial and prosecutorial discretion in the criminal legal sentencing. Her work develops the uncertainty avoidance/causal attribution theory of judicial and prosecutorial decision making and the legal bureaucratic model of criminal adjudication. Her research explores linkages between extra-legal defendant characteristics, sources of discretion, and legally relevant case-level variables. Recently, her research examines the federal circuit and district differences in federal sentencing linked to differences in interpretation of sentencing jurisprudence. Her research has appeared in *American Sociological Review*, *Social Forces*, *American Journal of Sociology*, *Law & Society Review*, *Criminology*, *Journal of Quantitative Criminology* and *Social Problems*.