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Federal Sentencing Guidelines: The Continuous Line between Unwarranted Disparities and
Institutional Discretion in Federal Sentencing

by

Miaya Scott

B.A., Purdue University, 2020

A Research Paper

Submitted in Partial Fulfillment of the Requirements for the
Master of Arts

Department of Political Science
in Graduate School
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RESEARCH PAPER APPROVAL

Federal Sentencing Guidelines: The Continuous Line between Unwarranted Disparities and Institutional Discretion in Federal Sentencing

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Miaya Scott

A Research Paper Submitted in Partial

Fulfillment of the Requirements

for the Degree of

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Approved by:

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Graduate School
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Miaya Scott, for the Master of Arts degree in Political Science, presented on April 5th, 2022, at Southern Illinois University Carbondale.

TITLE: FEDERAL SENTENCING GUIDELINES: THE CONTINUOUS LINE BETWEEN UNWARRANTED DISPARITIES AND INSTITUTIONAL DISCRETION IN FEDERAL SENTENCING

MAJOR PROFESSOR: Dr. Scott Comparato and Dr. Benjamin Bricker

In 1984, the Federal Sentencing Reform Act was signed into law. This act of reformation set a new standard of mandatory minimum federal sentencing guidelines for anyone who was convicted of an unlawful crime. Under the Federal Sentencing Reform Act, Congress created a new agency, the United States Sentencing Commission. As a bi-partisan, independent agency, the United States Sentencing Commission set the standard of guidelines with the objective to decrease unwarranted disparities within the federal system. Federal Supreme Court cases like *United States v Booker* overturned federal guidelines moving them mandatory to advisory based on a Sixth Amendment violation. With the reform guidelines already evidently impacting the federal judicial system, research has explored extralegal factors and actively works towards identifying other disparities. To expand on this forum, research is leaning into measuring prosecutorial and judicial discretion within sentencing. The objective of this research paper is to examine how research has used extralegal factors, legal discretion, and policy reform to analyze federal sentencing disparities.

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HEADING 1

ESTABLISHMENT OF FEDERAL SENTENCING GUIDELINES

In 1984, Congress, the Executive and the Judicial branch produced a plan to implement strict guidelines to deter crime. This act, known as the Federal Sentencing Reform Act of 1984, began a new standard of federal sentencing. Any defendant who was in violation of a federal crime now faces mandatory sentencing guidelines for any crime they are found guilty of under the Federal statute. Not only did this federal act lay down the law but it also created a new political institution. Within the boundaries of the Federal Sentencing Reform Act of 1984 (S. 668 (98th)), the United States Sentencing Commission (U.S.S.C.) was created.

The United States Sentencing Commission was created with the sole purpose of establishing guidelines for federal sentencing. On one hand, past research has openly considered the data available examining independent and intersectional extralegal factors on incarceration and sentence length in federal courts. On the other, research mentions the United States Sentencing Commission not always providing the most relevant or circumstantial data to the public for research. Reviewing what is provided and the said effort in criminal justice reform, the United States Sentencing Commission has provided modern federal sentencing research with limited content to work with. The limitations mentioned here will be put into a bigger perspective in section two of this research paper. For now, we place our attention on federal criminal justice reform acts like the Federal Sentencing Reform Act of 1984, The Federal Crime Bill of 1994, also known as the Bill Clinton crime bill, and federal statues after federal court case *United States v. Booker* (2005).

Section 18 U.S.C 3553(a), established criteria for sentencing in the Sentencing Reform Act, the criteria included but is not limited to; sentencing cost efficiency, sentencing reflecting

severity of a crime, how to deter crime, protect the public, and how to curb recidivism. The articles found in the SRA were incorporated to provide consistency across federal courts. However, these same acts have been too restrictive on sentencing, leading to resistance. One argument criticizing the United States Sentencing Commission holds that the commissions mandatory minimum Penalties in the Federal Criminal Justice System, 2011 report stands as a convincing argument about the wastefulness of mandatory guidelines (Hofer, p. 2). Following the same argumentative standpoint, Franklin and Henry address the shortcoming of United State Sentencing Commission data between fiscal years (FY) 2010 through 2012. Their research focused on the unwarranted racial disparities in sentencing, which are suspected to come from judicial discretion in imposing sentences. I will touch on both arguments in section two. For now, these arguments prove relevant to show how the guidelines have lacked empirical data proving a deterrence in sentencing disparities. After the Crime Bill of 1994, research headed in a different direction. The Crime Bill of 1994 was one of a multitude of crime bills that filled a large gap in research. This crime bill held a clear disparity of its own so seeing it in action allows research to highlight extralegal differences in treatment amongst offenders within the criminal justice system.

The Violent Crime Control Act and Law Enforcement Act of 1994, also known as the Crime Bill of 1994, was signed into effect by President Bill Clinton to prove that the Democratic party could take a strong stance on crime. The Crime Bill may have been signed with the intention to curb crime but instead it placed the values of the criminal justice system into a realm of its own. Many associate the increase in incarceration with the Federal Crime Bill. Disproportionate rates of incarceration tell part of this story. The federal crime bill was not a trigger for mass incarceration, but it was one of the leading bills in increasing incarceration on a federal level. Following the Crime Bill of 1994, all fifty states had passed at least one mandatory minimum law

(Hofer, 2019). This bill incentivized massive infrastructure reformation, federal jails and prisons were being constructed at increasingly alarming rates. With more room for jailing and housing inmates, incarceration rates increased in numbers and sentencing length. Other things like an increase in death penalties and prosecution of young people as adults also occurred. For this research, we want to focus on the incarceration rates of adults in the federal system. Twenty years would pass before we see the first notable federal case opposing federal crime statues. The supreme court case that turned the tide, *United States v Booker* (2005).

United States v Booker (2005) is a leading Supreme Court case on criminal sentencing. The question this case addresses is whether Federal Sentencing Guidelines violated the Sixth Amendment. Defendant Booker was on trial for drug trafficking. Under mandatory guidelines, Booker was required to serve a 210–262-month long sentence. The judge presiding over the case later found additional evidence of Booker possessing 566 grams of crack cocaine. The jury, unaware of this evidence, did not guarantee that this newfound evidence would authorize an additional sentence for Booker. Based off precedent set in *Blakely v Washington*, the Court concluded that the Sixth Amendment is applicable to the Sentencing Guidelines. The jury's verdict was not enough to authorize sentencing regarding the additional discovery of evidence. What did this mean for the federal sentencing mandates? Justice Breyer concluded in his opinion that the court following section 18 of the United States Commission Article 3553(b)(1), which makes the Federal Sentencing Guidelines mandatory, is not compatible with the Sixth Amendment (Cornell Law School). The guidelines violated the Sixth Amendment's jury trial holding and modified the guidelines to become advisory for courts in terms of sentence ranges.

Outside of the fact that Booker highlighted a violation of constitutional rights, it also began an in-depth analysis of sentencing disparities. Prior to Booker, scholars had already begun to

question whether race, ethnicity, gender, and socio-economic status played a role in sentencing. Evidence outside of the guidelines has proven racial disparities within the American Criminal Justice system. Approximately 100,000 people (about the seating capacity of the Los Angeles Memorial Coliseum) are incarcerated in local jails. In terms of race and sex, 2,272 per 100,000 black men are incarcerated in state and federal prisons. Compared to that of 392 per 100,000 white men. Seeing these disparities exist within the study of federal sentencing alone brings the question of whether these disparities exist when guidelines are placed into order. Intended to curb these disparities, guidelines provide a basic rubric of federal sentencing, however cases like *United States v Booker*, leaves this open to interpretation.

Now that we have established guidelines, this paper will be evaluating where systematic disparities stem from and exist within guidelines. Within the uncovering of systematic disparities, there will be a review of the systematic discretion, including prosecutorial and judicial discretion. The paper will revisit how legislative action establishes guidelines and inherent discretion within the guidelines. Concluding the research with a comprehensive examination of federal sentencing policy. The purpose of this research is to review the literature on federal sentencing disparities and the influence of discretion from key players within the Federal court system. With the intention of clarifying how useful guidelines are, this research looks at the overall impact of Federal Sentencing Guidelines.

HEADING 2

SYSTEMATIC DISPARITIES

Frequently referenced in Federal Sentencing research, Ulmer et al. stands as a staple piece in Federal Sentencing Guidelines. The worry Booker brought into the criminal justice system was that it increased unwarranted disparities, proving the opposite of their intended purpose. In March 2010, the United States Sentencing Commission, released a report showing that racial disparity in federal sentencing lengths had increased following Booker (2005) and another federal case, *Gall v United States (2007)*. The United States Sentencing Commission reported prior to Booker there was a five percent difference between black males and white males in sentencing length. Post-Booker, this disparity jumped to a fifteen-percent difference in sentencing length, meaning black males were more likely to receive a longer sentence for similar crimes committed when compared to a white male (Ulmer et. al., 2011). Beginning here with the disparity difference between a white man and a black man in the United States criminal justice system, it would be beneficial to look at engrained systematic disparities. One of the most notable and measurable sentencing disparities that researchers still analyze till this day, began in the 1980's.

Briefly mentioned before in 1984, President Ronald Reagan signed into law the Sentencing Reform Act of 1984. Reagan's administration marked the beginning of a prolonged period of increased incarceration rates, having what some may say was an adverse effect. The number of incarcerated non-violent offenders skyrocketed. Almost immediately after the Sentencing Reform Act was signed into law and the United States Sentencing Commission was created, a multitude of other drug and criminal reform acts were signed into law. The War on Drugs included many forefronts to fight anti-drug abuse laws. The most detrimental of these acts

in the 80's was the Anti-Drug Abuse Act of 1986. The Anti-Drug Abuse Act of 1986 mandated a minimum penalty for first time offenders, in violation of drug trafficking laws. Within the parameters of this legislation, a large-scale approach on anti-drug abuse was the anti-cocaine laws targeted towards black men in the South.

Statistics show that in 1980 there were approximately 50,000 people incarcerated on nonviolent drug related charges. By 1997, this number increased to over 400,000 (A History of Drug War, 2022). Those convicted of a trafficking offense were required to serve a minimum federal time for any possession of crack cocaine over five grams, or five hundred grams or more of powder cocaine. That sentence alone speaks a lot about the measurements placed on criminal offenses, harmonizing with what many believed this period to be a “war on drugs.” This war on drugs created a distinct distribution of racial and ethnic disparities, specifically focusing on where each form of cocaine was found. To be more concise, crack cocaine was found primarily in African American or Black communities, whereas powder cocaine was dominant in White communities. The ratio of crack cocaine to powder cocaine in the 1980's stood at a whopping, 100:1 ratio for mandatory minimum sentencing to be triggered for trafficking. This ratio also sets up a mandatory minimum for nonviolent offenses like simple possession of crack cocaine. These mandatory guidelines lead to a plethora of disproportionate punishments of low-level drugs dealers and African Americans (Asher, 2011).

In 2012, it was estimated that 50 percent of federal incarcerations were due to drug law violations such as possession or trafficking, this is 10 times the amount of incarceration in 1980, before the Sentencing Reform and Anti-Drug Abuse Acts were put into motion. Although Black or African American people only make up 13 percent of the U.S. population, they account for 30 percent of arrest for drug violations and 40 percent of black people incarcerated are in state or

federal prisons for drug violations (The Drug War, Mass Incarceration and Race, 2015). Research by Everett and Wojtkiewics (2002), looks at the impact of federal sentencing guidelines on social differences in sentencing severity. Focus is placed on race, ethnicity incorporating legal variables, offense type, offense severity, and criminal history. Initially studies were not finding evidence of disparities in federal sentencing guidelines. It was not until an intersectional approach was taken that we see measurable disparities. Looking at the relationship between race, gender, age, and sentence severity Everette and Wojtkiewics research shows evidence of a direct link between these factors, sentence severity, and the likelihood of incarceration.

Ulmer et al., argues extra-legal and unwarranted disparities existed post-Booker. Following in pursuit of this argument, Everette and Wojtkiewics, analyze data to see if unwarranted disparities are successfully controlled by guidelines, limiting the range of extra-legal factors on sentencing. Their focus on sentencing due to racial and ethnic disparities places value on where a defendant falls in terms of the first, second, third, or fourth quarter of sentencing ranges in federal guidelines. Four extra-legal factors are taken into consideration, gender, age, education, and alien status. This intersectional approach shows that race and ethnicity are not the only limiting factors to affect federal sentencing length. Intertwined with race and ethnicity, data begins to show a pattern particularly between race/ethnicity and socio-economic status. For example, general findings of their study mention black defendants are less likely to be convicted of an economic offense and more likely to be convicted of a drug offense (199). Some of the most common drug offenses black defendants have been convicted are for crack cocaine and marijuana.

Crack cocaine and marijuana regulation place black defendants at a higher disadvantage

within the criminal justice system. This disparity has been long standing and highly controversial, making crack cocaine convictions the key to examining federal sentencing disparities. Fischman and Schanzenbach acknowledge this in their research. The impact of federal sentencing guidelines shows a disparity in the treatment between crack and powder cocaine (2012, 734). Research is now progressing to refine key measures like criminal history and offense severity. As suggested, research analyzes how race and ethnicity have influence in sentencing decisions. Though many would like to have believed the guidelines were serving their proposed purpose and would decrease disparities, its efficiency cannot be defended, at least not in its pre-Booker format. Ulmer's suggestion of extending research to analyze how race and ethnicity might vary by criminal history became limited sooner rather than later. To implement a more flexible study, Franklin, and Henry ties Ulmer's research into other research, sentencing factors on sentencing outcomes. This approach maneuvers the variables in Ulmer's study. The study investigates whether an offender's criminal history conditions affect their race and ethnicity on sentencing outcomes, for example incarceration decisions and sentence length decision (2020, 5).

One hypothesis tested was how a decrease in sentencing led to disadvantages as criminal history increased. Three minority groups were accounted for, African Americans, Latino's, and Native American offenders' relative to white offenders. One finding worth noting was when Asian offenders were added to the list of minority groups to test for. Asian Americans are commonly referred to as the "model minority." To test other commonly stereotyped minorities against a model minority removes the idea that disparities only exist between the majority and minority. With this viewpoint, researchers can measure the relevancy of extra-legal factors on other minority offenders. As Asian Americans hold this "model minority" outward reflection,

their stereotype congruency occurred in the opposite direction when compared to other minorities. In other words, Asian Americans were not viewed as being violent or unintelligent. Often Asian Americans are associated with positive stereotypes. They are viewed as being successful, intelligent, and hardworking (Franklin & Henry, 2020, as cited in, Franklin & Fearn, 2015). Unlike other minorities, Asian American conform to the idea of the model minority and exhibit low levels of criminal history. Asian Americans also on average receive the greatest advantage in sentencing when compared to other minorities. They are statistically like White offenders. So, what is the difference between Asian American and other minority offenders? We can look at extra-legal factors on sentencing decisions.

There is an argument congruent to the point made, criminal history is accounted for and the highest amongst black defendants. Data shows on average prison sentences for black men are 40 months (about 3 and a half years) longer than for whites (McConnell & Rasul, 2018). This same argument is mirrored in Rehavi and Starr's text; estimates for racial disparities in federal sentencing are explained by differences in arrest offense characteristics and preexisting defendant characteristics. Criminal history is the primary preexisting defendant characteristic to look at. Observing cases from the point of arrest to sentencing allows this research to pinpoint where unexpected disparities originate in the judicial process. Doerner and Demuth use data from the United States Sentencing Commission, to examine independent and joint effects of extralegal factors on incarceration and sentence length in federal courts. Surely there is enough research with a focus on extralegal factors. Continuously building off one another, researchers have shown that disparities result in harsher sentences for black defendants compared to similarly situated white defendants. Steffernsmeier and Demuth (2000) study was proof of this, white defendants are least likely to be incarcerated in federal court and receive shorter sentences

(Doerner & Demuth, 2009).

Sentencing outcomes can be relational to increased severity for minorities due to stereotypes associated with that minority group. During the early phases of the War on Drugs, propaganda was used to portray a negative image of African Americans. Research has not denied nor failed to acknowledge the criminal stereotypes associated with African Americans. This is not giving the research credit but bringing to light where gaps can be filled in. Taking what is already hypothesized about federal sentencing in relation to extra-legal factors. Research can work to relate empirical data from political campaigns to measure which stereotypes were poured into the media and where these stereotypes came from. Let us not forget a bill cannot be passed without a collective effort. Were stereotypes stemming from the judiciary, legislation, or the executive, if not all simultaneously? Some stereotypes that have been associated with minorities, specifically for African Americans and Latino offenders display them as being gang affiliated and committed to street lifestyles. These stereotypes appear harmless, but data shows bias from these characteristics.

These stereotypes initiate a spillover effect into court actor's punishment decisions, known as the focal concerns theory (Franklin & Henry, 2020). A court actor's discretion when it comes to punishment is based on three sets of focal concerns; offender blameworthiness, or culpability, protection of the community, and practical constraints associated with a sentence. These same focal points are related to an argument that sentencing outcomes can be more severe for minorities whose criminal history is congruent with associated stereotypes. This argument relates back to two perspectives previously mentioned and is embedded within additional research. Ulmer and Laskorunsky (2016), identify Black and Latino offenders with more criminal history can be perceived as being more dangerous and crime prone (Franklin & Henry,

2020).

Initially this study was focused on age and gender disparities but when doing in-depth literature review. Many studies do not measure gender and especially not age in their primary focus of analysis. Disparities that have been found associated with the variable concluded that older offenders tend to be sentenced more leniently than younger offenders. A study by Steffensmeier et al. (1995) found that in Pennsylvania courts, there is evidence of older offenders being less likely to be imprisoned than younger offenders. Peak age for sentencing severity most can agree on, floats around the ages 21 through 27. A proposal for research, evaluating why this is the peak age for sentencing disparity and interrelating it into other extralegal factors like race and ethnicity, criminal history, and social status. There is speculation that pre-trial disparities are related to socioeconomic differences, which can be closely tied to race and ethnic differences. Examples of this can include the income and wage gaps and educational gaps between minority offenders and white offenders. A study by Spohn and Holleran (200) articulates the research from Steffensmeier et al., broadening the research from Pennsylvania courts to other courts around the country. Their research reached state courts in Chicago, Miami, and Kansas City. The general pattern of the study shows defendants who are male, black, or Hispanic, age 21 through 29, and unemployed are more likely to be incarcerated.

This may be where research intended to be, at a point where multiple extralegal factors can be measured. Data from Doerner and Demuth's research is consistent with another sentencing research. Legal factors are a critical predictor of sentencing outcomes. Defendants with more extensive criminal histories and crime severity are more likely to receive harsher sentences than those with the opposite, less extensive criminal history and less severe offenses. One take away from this section on research has been that legal and contextual controls such as

race/ethnicity, gender, and age have significant independent effects on sentencing outcomes. If research now removes the extralegal factor from the primary focus, examination of disparities because of discretion within federal sentencing can add to a picture already being constructed.

Articles have shifted focus from extralegal factors to types of punishments under federal sentencing guidelines. Using federal data from 2010 through 2017, Johnson, Spohn, and Kimchi look at disparities in life without parole sentencing. Their research was organized to answer who gets life in prison and how disparities are distributed across minority groups. Their study finds that Black and Hispanic offenders have higher eligibility for life sentences when following the federal guidelines. Even with a decrease in death sentences, federal guidelines follow a pattern of increasing sentencing for life without parole. Existing literature has relied on limiting measurements like prior convictions, felonies, and violent offenses. Assessing more robust data on criminal history and assessing the relevancy of both race and criminal history, should provide clarity where research has been proving open to interpretation. Evaluation of socio-economic factors, like education level, household income, and crime rates in a defendant's neighborhood can add a new lens to investigate.

There is an assumption that the condition of presumptive sentence along with other features of criminal conviction are problematic because the measurements used to determine these processes and negotiate may contain racial disparities. Evidence points to racial disparities existing within the conditions of the applied guidelines. To curb this side of the study, shifting the focus to court actor's discretion is better applicable to this paradigm of research. Rehavi and Starr kick off this approach and argue that research needs to look at how prosecutorial influence applies racial and ethnic disparities to federal sentencing.

HEADING 3

SENTENCING DISCRETIONS WITHIN THE JUDICIAL INSTITUTIONS

It is estimated that 95 percent of federal cases do not go to trial, many of them are settled through plea agreements. Plea agreements are the prosecution's primary source of federal policing that researchers have not been able to fully account for. In theory prosecutors are the “gate keepers” of the law, ensuring that laws are properly applied and used judiciously. The other main contributors to federal policing are judges. Federal judges use their power of discretion to determine sentencing. Research has observed judicial discretion and the effect it has on racial disparities in sentencing. There is suspicion that racial disparities are not only related to judicial discretion but also to prosecutorial behavior, biases, or sentencing policies (Fischman & Schanzenbach, 2012). The shift in debate about the power of discretion is set between two paradigms, judiciary discretion and prosecutorial discretion.

Examination of federal sentencing guidelines looks at racial disparity changes as doctrine changes, either to enhance or limit judicial discretion. Studies focused on unwarranted racial disparities that were suspected to come from judicial discretion. Liberation hypothesis is one of the thesis federal sentencing research projects have been constructed out of. The Liberation hypothesis proposes that judicial discretion is partially dependent on the seriousness of a criminal case. Judges are “liberated” from strict guidelines regarding legally relevant factors, which allows space for increased discretion to influence decision-making processes (Franklin & Henry, 2020). With judicial oversight, federal judges have the right to review plea bargaining, charging, and cooperation decisions. Findings show that judges are less biased and typically operate independently. Federal judges are regulated by other branches of government, but with prestige and legitimacy are more autonomous in their judicial decision making (Barkow, 2005).

When and if guidelines play a detrimental role in the sentence agreement from both parties, the courts can exercise judicial discretion under the United States Sentencing Commission Amendment clause.

Judges are required to impose sentences that are sufficient but not greater than necessary to serve sentences. Judges are autonomous in sentencing discretion but with these discretions comes the increased chance of a judicial decision being appealed. Their discretion is public and can be appealed through judicial review. One evidential circumstance for unwarranted disparities is the restrictions of discretion. Restriction of discretion arises when judges are precluded by mandatory guidelines and required to impose the guidelines, that had not yet proven to be effective. Guidelines provide judges with the opportunity to provide a defendant with clarity on why the sentence is being proposed, “today sentences are more just, honest, and respectful” (Bunin, 2009). When judges do move away from guidelines, there seems to be more benefits. Sentencing outside of the guidelines provides information to the United State Sentencing Commission, allowing Congress and the Commission to evolve the guidelines. In 1990 and 1991, the Sentencing Commission interviewed and surveyed district judges. Judges are split down in the middle of the debate over sentencing disparity. Nineteen percent of judges have assumed that sentencing disparity has remained the same. This assumption is not too farfetched, but data shows in cases of robbery and heroin possession, convictions and disparities were reduced under the guidelines in terms of both sentencing and time served (Bunin, 2009, p 129). Aside from judges imposing guidelines, federal prosecutors operate as officiants of the court as well. The argument now is that the guidelines reduced inter-judge sentencing and shifted power to prosecutors when charging defendants and complying with plea deals. United States Attorneys, federal prosecutors are appointed to office by the President and confirmed by

Congress. Federal prosecutors serve as federal law enforcement agents within their judicial district. Fischman and Schanzenbach suspect that prosecutorial behavior, biases, and sentencing policies have a disproportionate effect on minorities (2012). Following with similar ideology, Rehavi and Starr discuss prosecutors' advantages in unilateral decision-making over the initial charges. Prosecutors are the ones who decide the initial charges and result of a plea agreement, subsequent plea arrangements are up to the defendant. This court arrangement highlights where research is questioning prosecutorial engagements. It is not a question about lack of boundaries for a prosecutor's authority. The question now stand is whether legal authority of prosecutors has seemed to turn in favor of prosecutorial discretion in comparison to defendant and judicial discretion.

One boundary in place on prosecutors is in exchange for a plea agreement, a prosecutor cannot bring or dismiss other charges. Before guidelines, plea bargaining was not as certain without knowing the probable outcomes of sentencing via trial. If a prosecutor or defense attorney could predict the outcome of a case, then it would be easier to predict the sentencing outcome as well. With guidelines in place, prosecutors and defense attorneys have a better range to estimate the outcome of sentencing during a trial. The guidelines aid the judicial system in decreasing uncertainty around sentencing. There is more information now being exchanged during plea negotiations. One benefit of this is that prosecutors are granted increased control over bargaining terms and sentencing results. When legislation verified guidelines becoming advisory, two thirds of defendants sentenced under the old crack cocaine and powder cocaine guidelines made appeals to have their sentences reduced and succeeded. This is opposing the statement made by court in the past that if a sentence was ordered prior to the guidelines, then the sentence cannot be reduced in accordance with the new guidelines (Asher, 2011). The

primary factor affecting this would be plea agreements set between federal prosecutors and defendants.

A lack of boundaries or in this case, lack of separation of powers amongst federal prosecution; allows federal agents to act as law enforcement and prosecution. When prosecutors do not take a case to trial and rely on a plea agreement, they are setting themselves up to fully police the case. To address this Barkow suggests ways to curb abuse of prosecutorial power. This would mean imposing a separation of functions and attention to superiors. The first part of prosecutorial power is the combined work of federal law enforcement and prosecution. Federal prosecutors are responsible for ensuring a proper course of action within the court system. Separating federal prosecutors into their own jurisdiction, they are responsible for making sure matters are not under state jurisdiction. For example, in Chamber County, Texas a person transporting drugs of Interstate-10 will more than likely be charged and filed within a state or district court. Now just on the other side of Interstate-10, in Jefferson County the same case is more likely to be federally prosecuted, mandating a minimum five-year prison sentence (Bunin, 2009, p 2). These two cases highlight the critical difference between state prosecution and federal prosecution. In Jefferson County, federal prosecution operates as a primary enforcer of law. Under the federal prosecutor, a drug trafficker would automatically be mandated to five years imprisonment. The five-year minimum does not even factor in other disparities like criminal history and rate of recidivism. The line between state prosecution and federal prosecution is thin but this has not stopped federal prosecutors from pursuing jurisdiction. Chamber County and Jefferson County are just one example of this metaphorical yet abstract concept of legal authority. The mandatory minimums within sentencing guidelines have increased prosecutorial leverage, leading to more plea agreements and fewer trials. Arguing

against the system, William Stuntz argues that in reviewing pleas, courts should require the government to use precedence. His exact works, “point to some reasonable number of factually similar cases in which the threatened sentence has been imposed, not just threatened (as cited in, Barkow, 2005). Relying on precedence shifts the power dynamic back towards judicial discretion. Precedence is a power reserved specially for judges, it can be useful for defendants as it limits plea bargaining and charging discretion by prosecution. Another check on prosecutorial discretion proposed by Professor Angela Davis, is where constituents review complaints brought by the public and randomly review prosecutorial decisions as a routine check (p 912). Keeping prosecutorial discretion in check seems counterintuitive after creating guidelines but studies are showing an increase in power. Not only has discretion increased, but guilty pleas have also increased, trials have decreased, and mandatory punishment allows prosecutors to set the terms of a sentence (p 921).

To look at how cases are processed within a prosecutor's office, Braniff offers a supply and demand model, in this case the supply and demand are prosecutorial crime and resources. The Supply and Demand model states that if there is an influx in supply and demand, it will lead to an effect on the price of the “product.” In terms of prosecutorial crime, the resources of prosecutorial crime can affect sentences imposed (1993). The article uses a case example pertaining to illegal immigration at the San Diego-Mexico-U.S. Border. First, I want to mention that the case of San Diego prosecution is beneficial to the study as immigration is not a topic typically covered under federal sentencing disparities. It may be that Hispanic and Latino are measurable subjects in terms of measuring unwarranted disparities but not in relation to what kind of crimes they are charged with. It also proves to be a solid case example as the differences between public defenders and prosecutors in San Diego vary.

Defense attorneys in San Diego believe there are not enough resources to deal with the crime problem, making it impossible to fully comply with sentencing guidelines without “declining a large number of cases” (Braniff, 1993, p 4). On the other side, prosecutors in San Diego state that the number of cases is manageable and can be negotiated on an individual level without referencing or interfering with another case. I will not get into the whole debate on whether prosecutor offices have allocated resources to deal with increasing cases, but evidence alone suggests that the current judicial system is overridden with cases and an increasing incarcerated population. Illegal immigration at the U.S-Mexico Border in San Diego, shows there may be a shortage of supply in district judges, there are not enough judges to process incoming federal cases. So how would one fill the gap? By relying on prosecutorial plea agreements. Luckily for them, federal prosecutors retain discretion to charge and plea bargain to fit with any local conditions. In this case the conditions would be processing illegal immigration cases.

This debate over institutional discretion remains two sided. Conflicting one another, judges are required to impose sentences that are sufficiently but not greater than necessary to achieve the purpose of sentencing. Whereas federal prosecutors have been advised by the Department of Justice to seek the harshest sentence possible (Bunin 2009). When pushing for the harshest sentence, prosecutors are more likely to push for guilty plea, cooperation, and punishment of defendant who do choose to go to trial. The disparities are not apparent but the exercise of discretion from prosecutors stems from their legal tactics like the ones previously mentioned, plea bargaining, coercion, and initial charges. Aside from these disparities, the guidelines do allow judges the opportunity to explain to a defendant why they were sentenced the way they were. Any sentencing outside of the guidelines provides feedback to the United

State Sentencing Commission, which allows them and Congress the opportunity to evolve the guidelines. One remaining institutional factor is Congressional influence. Being one of the first to suggest guidelines, legislators have played a significant role in establishing Federal Sentencing Guidelines. More important regulation than that suggested by judicial actors.

HEADING 4

LEGISLATIONS ROLE IN FEDERAL SENTENCING

Up to this point, research has addressed the issues of race, ethnic biases, and unwarranted disparities within federal sentencing. The starting point for this topic of the paper will address the legitimacy of the United States Sentencing Commission (U.S.S.C) created by Congress. One research strategy has included reviewing guidelines as an effort of Congress to limit judicial discretion. Guidelines were put into effect beginning November of 1987. Congress had assumed because the guidelines had been passed that the Sentencing Reform Act would apply to all sentencing procedures thereafter, this was not confirmed though. Guidelines were not fully adopted on the state level until January 1989.

Outside of passing the bill establishing federal sentencing guidelines, legislators created the United States Sentencing Commission. As an effort to address potential biases in the political process, decision making authority can be insulated relative to a sentencing commission (Barkow, 2009). State and federal agencies have used a host in several jurisdictions to set sentencing policies, one of the primary agencies that legislation has used is the United State Sentencing Commission. Making the commission one of the most politically used tools in federal sentencing. The Sentencing Reform Act requires that three members of the United State Sentencing Commission be federal judges and no more than four commissioners can be from the same political party. This is one of the better judgement calls to reduce polarization and partisanship in federal sentencing policy. After full implementation of both, research on federal sentencing took off. One area research did lack for years was in the concentration of legislative influence on sentencing guidelines. Moving towards a new objective, research has found its hand in legislative reformation of federal sentencing guidelines.

Hofer describes the commission as an independent agency in the judicial branch, or ideally as a hybrid institution that extends itself between the three branches of government. Taking in its authority, the Sentencing Commission gives two reasons why guidelines should be followed. First, the guidelines give advice to judicial actors through reasoned administrative procedures outlined by the Sentencing Reform Act. The second reason is that the guidelines represent the political will of Congress (Hofer, 2012). Pulling its legitimacy from legislators, the commission stands as a hybrid agency to assist with political influence over judicial actors. The Sentencing Commission imposes its power through a notice-and-comment approach to rulemaking. A downside of the notice-and-comment approach is it does not encourage face-to-face interaction and exchanges of ideas. Producing little to no collaboration between the sentencing commission and the judiciary. The notice-and-comment approach of rulemaking primarily benefits the commission and congress. This approach allows the commission to exchange ideas and draft proposed rules without consulting judicial authorities (Howard-Nicolas, 2013). The opinion of the commission was that open discretion from the judiciary allowed for unwarranted disparities. Both state and federal actors disfavored this open-ended approach to sentencing, hinting at a correlation between legislative action and the creation of federal guidelines.

Countering this argument, an analysis by Ryan King shows that when judges are given discretion to follow mandated guidelines, they are flexible and fully open to the merits of a case. Meaning they are still likely to impose the harshest sentence possible for serious offenses and better able to distinguish between real and non-real threats to public safety (2005). The United States Sentencing Commission has brought its own legitimacy into question with so many provisional changes to the mandated guidelines. For example, while Congress was generating

penalties for crack cocaine and powder cocaine charges (keeping in mind the disproportionate ratio), a former Counselman of the House of Judiciary Subcommittee stated, “numbers were being pulled out of the air with no empirical evidence, it was the craziest political power game” (King & Mauer, 2005). The commissions recommended a 5:1 ratio for crack cocaine to powder cocaine, which Congress did not support, and instead proposed an 18:1 ratio which was eventually adopted into policy practice. These modes of measurement are set by standards associated with federal guidelines. Other recommendations by the sentencing commission have included reform to keep states from exceeding prison capacity. This recommendation does not seem to be one that the prison system takes heed of.

Seeing how legislation and executive order have now affected the judiciary, researchers have a better idea of additional actors in policies concentrated on sentencing. State expenditures on correction entered the billions between the years 1985 and 2019. A steady increase in incarceration cost proves that incarceration is a numbers game to legislators. At the federal level, sentencing policies from the War on Drugs resulted in an increase in incarceration. From the year 1980 when the War on Drugs took effect, 2019 the U.S. prison population for drug charges has increased tenfold. In 1980, 40,900 Americans were incarcerated on drug related charges. By 2019, 430,926 were incarcerated on federal drug offenses. Sentencing length increased three times in length, with an average of a 62-month sentence (The Sentencing Project). The Sentencing Project, who studies the cost of imprisonment and recidivism, finds that lengthy sentences are ineffective when it comes to preventing crime. Congress would argue that this is not true, with little interest in the cost of federal imprisonment compared to state legislators, the budget spent on crime does not motivate Congress to make any progressive changes. Barkow relates this point back to proposed bill LIFER (Life Imprisonment for Egregious Recidivist) by

former United States representative Bob Livingston. In the proposed bill, Livingston spent no time discussing the cost and tradeoff of his proposal. His bill reflected a general Congressional view, their primary concern is to avert crime, the effort spent to save a life overrules other concerns. The objective is not focused on statistics, only numbers, lives, and quality of those lives (Barkow, 2009). If it were focused on statistics, legislators would know that federal imprisonment is not curbing recidivism. In 1994, Vincent and Hofer research data showed that the Bureau of Prison estimated a 70 percent growth in federal prison population, because of longer sentences for drug related offenses (Free, 1997). Without statistics, the reliance on numbers focuses on averted crimes and not the cost and benefits of increasing sentencing.

When adjusting legislation to become more effective in terms of federal crime politics, there is the issue of authority. Harvard Law Professor William Stuntz recognizes this issue early on. His argument is that efforts to constitutionalize and reform criminal procedure are countered by changes in substantive criminal law. In the 1960's and 1970's when courts were more liberal leaning, criminal defendant procedural rights expanded. Unfortunately, the right to enforce this expansion was halted by conservative legislators, undermining judicial development (Etienne, 2004). Arguing a connection between criminal defense advocacy and federal sentencing policy, Etienne shows how federal sentencing can adversely target certain groups. Legislative disparities are just as prevalent in sentencing disparity just as judicial disparities are.

The direct connection between the two stems from the fact that the guidelines were created to or as they say "justify," micromanagement of federal judges by the Sentencing Commission. Apart of this "micromanagement," the commission studies four statutory evaluations following mandated guidelines. Implementation study examining the operation of the guidelines, guideline impact on sentencing disparity, use of incarceration, and prosecutorial discretion and plea

bargaining. When the guidelines were created, the sentencing commission was advised to create a neutral policy statement. The intention behind this was to create a policy that did not target an offender's race, sex, national origin, creed, or socioeconomic status (Heaney, 1991, as cited in Free, 1997).

Research suggests creating an alternative commission that would be free from institutional influence and restraints from Congress and the Judiciary. The current United State Sentencing Commission is restricted to statutory regulation and minimums set by Congress. An alternative commission would have the authority to draft guidelines that are empirically reviewed through research and negotiations from stakeholders (Howard-Nicolas, 2013). State level sentencing commissions are ideal models for the federal commission, as many states have effective guidelines in place.

HEADING 5

FEDERAL SENTENCING POLICY

In theory the Federal Sentencing Guidelines would be a “one stop shop” to effectively implement sentencing policy. Its attribution to federal sentencing guidelines was one aimed at decreasing unwarranted disparity and rates of recidivism. Changes in law over the years seemed to mitigate disparities and supported a system that was more equal in sentencing distribution. It is not exactly the guidelines themselves that are reducing racial disparities in sentencing; policy reformation and judicial discretion are the two most key factors in reducing sentencing disparity. Policies have not been effectively changed on the federal level but researchers who have examined sentencing policy on the state level have found that state legislation is contributing to the decline in disparity.

One of the first effects of guideline changes at the federal level was the reduction and amendment of sentencing related to crack cocaine. Effective March 3, 2008, The United States Sentencing Commission amended section 2D1.1. Granting sentencing amendments for well over 25,000 incarcerated individuals. Under this amendment, by law there are two conditions that must be met as described in Article 18 of the United States Sentencing Commission 3652 © 2 for a defendant to be granted a motion to appeal their sentencing. The problem the Sentencing Commission had with their amendment was that those who were sentenced under plea agreement must abide by that basis for sentencing. They cannot rely on amended guidelines, as a plea agreement is a binding “contract” made between the defendant and federal prosecutors. This points back to the discretion level of prosecutors. Under federal guidelines, the commission does not take the step to reform and amend bindings set by the prosecution. As you may recall, three members of the commission are federal judges, this inability to amend sentences just gives one

more example of judicial discretion shifting to prosecutorial discretion. The United States Commission has the authority to reduce prison terms and amend guidelines, but there is little to no explanation on why they may not choose to do so. As a guide to see how the commission can amend guidelines in a non-partisan manner, looking at state amended guidelines stands as a base foundation.

The state of Washington has a statutory administrative, Sentencing Guidelines Commission in place known as the Washington State Sentencing Guidelines Commission. This administrative office was constructed to design and develop sentencing guidelines that are “presumptive only” This presumptive nature of the commission allows judges to apply their discretion when imposing sentences geared toward a departure from set legal standards and rules. The Washington State Sentencing Guidelines Commission consists of twenty voting members, judges, prosecutors, defense attorneys, law enforcement office, elected officials, victims' advocates, and civilians. This is a switch from the foundation set within the United States Sentencing Commission. The Washington State Sentencing Guidelines Commission engages in the community and interviews victims of crime, taking a more hands on approach to policy reform. Voting members can use this information to come up fair policies that address incarceration and mandatory prison sentences (Howard-Nicolas, 2013). This method of rulemaking is known as the negotiation rulemaking approach. Comparing the negotiation rulemaking approach to the notice and comment approach utilized by the Federal Sentencing Commission, we can see the effectiveness of one in comparison to the other.

The negotiated rulemaking allows stake holders the opportunity to directly contribute to the development of regulation before it is implemented. The community is allowed to comment on and address proposals before they are implemented into law. Negotiated rulemaking

encourages collaboration between stakeholders and community members, whom the policies directly affect. A platform is generated not only to address policy issues but also to find solutions, increase community participation in decision making, promote rule improvement, reduces litigation, and improves level of compliance (Howard-Nicolas, 2013, p 679). The guidelines set by the Washington State Sentencing Guidelines Commission appear to be more adaptable and ideal in guidelines settings. State guidelines can be used as a starting prompt for federal guidelines. Direct influences of the state guidelines have been beneficial in proposing fewer restrictions on the three-strike rule, place mandatory minimums toward violent crimes like murder, assault, and rape. For less offensive crimes, the Washington Commission has placed alternatives like rehabilitation, community supervision, community supervision, and restitution for defendants.

The most notable difference from the Washington Commission and the United States Sentencing Commission stands in the fact that the Washington Commission is not judicial or prosecutorial heavy in relation to discretion. Discretion is shared amongst stakeholders and representatives vary amongst these stakeholders. Choosing a more representative body to be on the Washington State Commission allows for a more inclusive body that reflects the neighborhood, race, and social classes that are affected by the criminal justice system (Howard-Nicolas, 2013). There is one case that weakens the argument for the Washington State Sentencing Commission, and it is within *Blakely v Washington*. In *Blakely v Washington*, a provision in the Washington State sentencing guidelines was struck down. The guidelines permitted a judge, when deciding whether to enhance a sentence above the guidelines range, to consider factors that had not been proven beyond a reasonable doubt in front of a jury (King, 2005, p 134). Compared to the strike down of multiple articles under the guidelines set by the

United States Sentencing Commission, states are still ahead of the federal government in criminal justice reform.

For example, Washington has now passed a drug treatment diversion program, this program became a stand in, middle ground approach to address being tougher on sentencing, while also not increasing the cost of imprisonment (Barkow, 2005). If research has not explained in what capacity states are implementing guidelines standards, they are surely measuring the effects of those in action. Everett and Wojtkiewicz findings show that Minnesota sentencing guidelines measure the differences that attribute to sentencing disparities. Research on Pennsylvania's guidelines have provided similar data as well. Initial studies did not find disparities in federal sentencing guidelines but after reevaluation, looking at the interrelationships between race, gender, age, and sentence severity. Research using these variables has shown evidence of a direct link between the factors, sentence severity, and the likelihood of incarceration (Everett & Wojtkiewicz, 2002). Aside from using state guidelines as alternative proposals for resetting federal guidelines, overall cost and benefits analysis are necessary.

A cost and benefit analysis brings attention to proxies used for political interest, civil liberties, and interest of political actors, defendants, and victims of crime. Alternatives to guidelines have been questioned on whether they would be equally effective, more effective, or less effective than those already in place. The cost and benefits analysis are both a fiscal debate and a civil liberties debate. One general aspect of cost and benefit states have begun to take to reduce incarceration rates and sentence lengths was by repealing laws that established mandatory minimum sentences. In Kansas, one policy requires treatment instead of incarceration for first-time nonviolent drug offenders (Barkow, 2005). This was an approach to combat the crack

cocaine, powder cocaine disparity. This alternative to petty crime was figured out without a sentencing guideline, goes to show that alternatives to imprisonment can be considered without the need for guidelines. Additionally, states have recommended new policy reform to keep states from exceeding prison capacity.

Cost-Benefits-Analyses by Paul Hofer asses the cost of prison maintenance and the cost of offenders being released, to see how policy should be moving forward. Incarceration for defendants who are most “crime-prone” can provide proper rehabilitation, crime deterrence, and research when resources are properly allocated. The analysis can allow the United States Sentencing Commission to properly weigh the cost of policy changes in comparison to economic sanctions. Doing this would allow the commission to save money and deter crime. In 2010, it cost over 25,000 U.S. dollars to incarcerate just one inmate in the federal prison system. Now comparatively evaluate this cost to the 200,000 prisoners in custody at federal correctional facilities (Howard-Nicolas, 2013). That means the average cost for federal imprisonment is approximately 5 million dollars. Now researchers are questioning if length sentences have long term benefits for defendants who are convicted as drug traffickers, 10 percent of defendants incarcerated are imprisoned for drug-related offenses. Although the Sentencing Reform Act establishes that sentencing should be cost effective and reflecting the seriousness of the crime.

Research has not shown adequate data that this criterion has been met, sentencing guidelines do not vary between current incidences in the community and nation. One of the largest disparities in sentencing data seems to come from prosecutorial power. For reference, William Stunz suggests courts should require the government to use similar cases where a sentence has been imposed when there is a discrepancy between judges and prosecutors in how to rule on a case (Barkow, 2005). Greater administrative and institutional checks could decrease

the lack of separation of power amongst judicial actors. Allowing for a decrease in unchecked abuses of power and greater civil rights for federal defendants. This is just another routine policy check of the power balance, that could prove beneficial to the judicial system.

HEADING 6

CONCLUSION

With guidelines becoming advisory following the outcome of Booker, observing disparities within the federal sentencing becomes limited. Existing research has relied on limiting measurements like prison sentences, felonies, and violent offenses. Other limiting measurements include race, ethnicity, socioeconomic status, and judicial and prosecutorial discretion. Research could move away from measuring disparities in sentencing, to using agency data to analyze disparities from the initial point of arrest through sentencing. Doing so would allow research to analyze the entire incarceration process, pinpointing where discrepancies in data and disparities stem from. Researchers have been presumptive in assuming that only race and ethnicity play a role in sentencing disparities. Only utilizing these variables alone can be problematic when used to determine federal processes. Research questions whether disparities are results of actor discretion or disparities that applied within the sentencing guidelines.

Legal scholars, judges, and practitioners of law primarily agree that prosecutorial discretion has played an influential role in determining sentencing (Gilbert & Johnson 1996; Miller 2004; Stith 2008, as cited in Rehavi & Starr 2014). Legal factors are important predictors of sentencing outcomes, but they are not the only predictors. Results show that legal factors like race and ethnicity, gender, and age mostly have an independent effect on sentencing outcomes. Filling in the gap, it will be important to consider which dependent factors influence sentencing outcomes. Expansion of this topic can extend to assessing judicial biases, prosecutorial power, and, or legislative influence of criminal justice policies.

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