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

December 7, 2021 | 1:00 PM ET

The webinar will begin shortly
Important Notification

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

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

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

We provided an alternative to the USSC report, finding:

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

We argued that the findings raised questions about whether the decisions caused increased disparity; whether guidelines must be mandatory in order to limit racial/ethnic/gender disparities.
Ulmer and Johnson (2017); Judicial guideline departures and perceptions of guidelines legitimacy and constraint

- Time period captures a period of uncertainty after *Booker* rendered the Guidelines advisory, but before *Gall*, etc. clarified what “advisory” meant.
  - Potentially a time of variation among judges in the perceived constraint and normative authority of Guidelines.
- Guideline conformity/judge-initiated departures were strongly influenced by judges’ perceptions of guidelines as normatively legitimate, perceptions of the constraint of their circuit courts, and perceptions of U.S. Attorney’s offices.
• Post-Booker/Gall, Guidelines do not primarily exert influence through regulatory constraint, but through normative influence, and making sentencing easier, reducing uncertainty.

• Perceived legitimacy and appropriateness of the Guidelines very important.
Ulmer, Painter-Davis, and Tinik (2016); much of racial/ethnic differences come from factors determined before sentencing.

- Is disproportional incarceration of black and Hispanic/Latino men due to sentencing decisions by local courts (Type A discretion), or differential impact of sentencing policies and case processing factors that differentially impact minority men (Type B discretion)?

- To what extent are racial/ethnic sentencing differences mediated by guideline factors (criminal history, guideline recommendations, departures) mandatories, case-processing (trial conviction, presentence detention) and extralegal factors (citizenship, education)

- 2005–2009 federal court (and Pennsylvania state data)

- Thus, most disproportionality was determined by factors that occur prior to sentencing.
Disparity is complicated and bound up in local district contexts

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

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

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

Thus, Hispanic/Latinx immigration (or lack thereof) notably affected the sentencing of Hispanic non-citizens before and after Booker.
Federal sentencing disparity existed before Booker, and existed after, defying simplistic explanations relying on legal/guideline changes affecting judicial discretion.
Dr. Mona Lynch, PhD
Professor
University of California, Irvine
Motivating Questions

• How are policy changes responded to—and resisted—in varied, creative ways by legal actors?

• How do those variations manifest as local norms and practices that transcend policy change?
Quantitative *Booker* Study:

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

Quantitative *Booker* Study:

- Do within-district drug case sentencing patterns demonstrate stability across different policy periods, indicating the influence of local norms? **YES**

- Are the mechanisms for getting to sentence outcomes changing in response to policy reforms? **SOME INDICATION, YES**

- Are cases that are not subject to mandatory minimums more likely to vary from the guidelines compared to those that are subject to them? **NO**
Booker Interview Study

- What were court actors’ perceptions of how Booker changed local criminal practices in 4 distinct districts?

- What specific legal strategies changed at three stages of criminal process: Charging, plea negotiations, & sentencing?

Multiple Effects, with Local Variation

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

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

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

Dr. Paul Hofer, PhD
Adjunct Faculty
Johns Hopkins University
Paul J. Hofer

Federal Sentencing after Booker

PERCENTAGE OF DEFENDANTS SENTENCED BELOW THE GUIDELINE RANGE
Nationwide Quarterly Data FY2001—FY2021
PERCENTAGE OF DEFENDANTS RECEIVING VARIOUS SENTENCING OPTIONS
Nationwide Data FY2001—FY2021

- Prison
- Intermediate
- Probation

NIJ
MEAN SENTENCE LENGTH
AND GUIDELINE MINIMUM IN MONTHS
All Defendants Nationwide FY2001—FY2017

Sentence Length

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

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

***

(2) develop means of measuring the degree to which the sentencing, penal, and correctional practices are effective in meeting the purposes of sentencing as set forth in section 3553(a)(2) of title 18, United States Code.
28 U.S. Code § 995 – Powers of the Commission

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

(16) collect systematically and disseminate information regarding effectiveness of sentences imposed;
Hofer, Paul J., *Ranking Drug Harms for Sentencing Policy*
Available at SSRN: [https://ssrn.com/abstract=2612654](https://ssrn.com/abstract=2612654)

### Number of Typical Doses Resulting in 5-Year Sentences

<table>
<thead>
<tr>
<th>Drug</th>
<th>Number of Doses</th>
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<tbody>
<tr>
<td>Heroin</td>
<td>3,333</td>
</tr>
<tr>
<td>Powder cocaine</td>
<td>4,166</td>
</tr>
<tr>
<td>Crack cocaine</td>
<td>186</td>
</tr>
<tr>
<td>Meth Mix</td>
<td>3,333</td>
</tr>
<tr>
<td>Meth Actual</td>
<td>208</td>
</tr>
<tr>
<td>LSD</td>
<td>2,500</td>
</tr>
<tr>
<td>Marijuana</td>
<td>666,666</td>
</tr>
<tr>
<td>MDMA</td>
<td>430</td>
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</tbody>
</table>

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

<table>
<thead>
<tr>
<th>Powder Cocaine Trafficking</th>
<th>Heroin Trafficking</th>
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</thead>
<tbody>
<tr>
<td>Minimum/Typical Loss</td>
<td>$119,129/$474,135</td>
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<tr>
<td></td>
<td>$446,736/$1,916,498</td>
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</tbody>
</table>

<table>
<thead>
<tr>
<th>Pure Methamphetamine Trafficking</th>
<th>Theft, Fraud &amp; Other Basic Economic Crimes</th>
</tr>
</thead>
<tbody>
<tr>
<td>$2,220/$17,758</td>
<td>$7,000,000/$11,922,636</td>
</tr>
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Questions?

Please enter your questions into the Q&A box

Send to All Panelists