



Determinate Sentencing and the Epidemic of Biases in American Courts

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ABSTRACT

The 1984 Sentencing Reform Act was first put into place to direct court rulings and mitigate biases from the outcomes of sentences. By implementing universal responses to any given scenario, the ability to rule discretionally based on external factors was to be eliminated, designated to a relic of a past era. Unfortunately, the efforts were less than successful. Due in large part to the decisions made in the case United States vs. Booker in 2005, America has started its shift back to discretionary sentencing policies. The dissatisfaction with the outcomes of determinate sentencing was made clear, but the issues were not inherent with the guidelines as much as with the same issues which have plagued the country for over two centuries now. While failing to live up to its high expectations, determinate sentencing still manages to surpass discretionary sentencing measures by its structural simplicity, philosophies, and potential. In the United States, many disparities exist similarly outside of the judicial system, including wealth, race, sexual orientation, and gender disparities. With each of these segments of society, unique disproportionalities arise that have helped to highly benefit only small percentages of the community, creating a system that overall fails to reconcile and inevitably exacerbates many of the limited community resources and impacts of disparate treatment. This paper intends to display the fundamental failings of strict sentencing guidelines and purport that, while they have failed in living up to their expectations of eliminating structural inequality, the disparities exist not by failing to allow discretion, but by failing to limit these systems which perpetuate its existence.

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INTRODUCTION

The United States is plagued. In 1971, President Richard Nixon kicked off what became known as the War on Drugs. What was presented on the surface as a dual-efforted public safety and rehabilitation plan quickly became one of the largest incarceration programs in the United States' history. Fifty years later, we live in a country that has disproportionately affected and harmed black and other minority communities, often in tandem with the poor (Gaston). The court systems in place were built to mitigate discrepancies and give a fair and equal chance to all citizens by providing reasonable response and remediation. Originally, mitigation was laid out through the judge's discretion, allowing for individuals in power to best determine the appropriate punishment. The law was built minimally in order to give each judge the most control over individual situations, allowing the system to evolve without much legal revision. Disproportionate outcomes as a result of social biases led to sentencing guidelines evolving in the last fifty years in search of greater equality of outcome. The 1984 Sentencing Reform Act was first put in place to direct court rulings and mitigate biases from the outcomes of sentences. By implementing universal responses to any given scenario, the ability to rule with discretion based on external factors was to be eliminated, designated a relic of a past era. However, these efforts were less than successful. Due in large part to the decisions made in the case *United States v. Booker* in 2005, America has started its shift back to discretionary sentencing policies. The dissatisfaction with the outcomes of determinate sentencing was made clear, but the issues were not inherent with the guidelines as much as with the same issues, which have plagued the country for over two centuries now. While failing to live up to its high expectations, determinate sentencing still manages to surpass discretionary sentencing measures by its structural simplicity, philosophies, and potential. In the United States, many disparities exist similarly outside of the judicial system, including wealth, race, sexual orientation, and gender disparities. With each of these segments of society, unique disproportionalities arise that have helped to highly benefit only small percentages of the community, creating a system that fails to reconcile and inevitably exacerbates many of the limited community resources and impacts of disparate treatment. This paper will display the fundamental failings of strict sentencing guidelines and assert that, while they have failed in living up to their expectations of eliminating structural inequality, the disparities exist not by failing to allow discretion, but by failing to limit these systems which perpetuate its existence.

THE ROAD TO FEDERAL GUIDELINES

To understand determinate sentencing, it is important to first recognize the history leading to its implementation. The 1960s were a cultural pivot point for much of America. The civil rights and anti-war movements went into full swing and public consciousness shifted in large part toward the glaring inequalities of the system. Around this same time, the War on Drugs was initiated. The War on Drugs was an incredibly significant moment in the evolution of the judicial system because the political motivations and judicial inequalities were so abundantly clear. In a now famous interview from 2016, Nixon's counsel and Domestic affairs assistant, John Ehrlichman, stated, "The Nixon campaign in 1968, and the Nixon White House after that, had two enemies: the antiwar left and black people. [...] We knew we couldn't make it illegal to be either against the war or black, but by getting the public to associate the hippies with marijuana and blacks with heroin, and then criminalizing both heavily, we could disrupt those communities. We could arrest their leaders, raid their homes, break up their meetings, and vilify them night after night on the evening news. Did we know we were lying about the drugs? Of course we did" (Baum). While it focused on arrests instead of directly on sentencing, the War on Drugs made it clear that the American judicial system was being unduly influenced, and public cries for reform began their notable climb.

In 1984, a major landmark in sentencing reform was passed within the Comprehensive Crime Control Act, in a piece known as the Sentencing Reform Act (SRA), which developed into the creation of the United States Federal Sentencing Guidelines. The explicit goals of the SRA were to "reduce judicial discretion and increase uniformity in sentencing," and the guidelines that evolved from the act were put in place as universal decisions in response to each major crime category (Ritter-Wiseman, 137). While the reform was enacted to reduce all disparities, from malicious intent to food-related mood swings, the SRA was specifically enacted to target and eliminate the racial disparities in rulings, which were repeatedly displayed by studies at the time (Ritter-Wiseman, 141). The Federal Sentencing Guidelines were fully enacted within the next few years and quickly became a staple of the United States judiciary system. As with all major shifts, however, direct predetermination of sentences was flawed in many ways and garnered a growing level of backlash and problems over time. The American dam finally broke in 2005 with the supreme court ruling of *United States v. Booker*, stating that Federal Sentencing Guidelines were to become flexible and left up to the discretion of the judge to implement.

Returning to the classical thought with only remnants of the regulatory purpose remaining, since 2005, the United States has been in a post-*Booker* world, hoping to finally capture an equity that has been lacking since the formation of the country.

WHY BOOKER?

Why, though, did determinate sentencing create so much backlash? Why was it seen as a failure by many people? The answer may just be to many that it was a new system that had not had time to be tweaked and figured out yet, but the answer is slightly more complex. To begin understanding the distress, we must look at some of the numbers and outcomes of a SRA America, and the results were none too good. A man's first drug trafficking offense was significantly more likely to receive a custodial sentence than a woman's was (Harper, 103). From the years 1989 to 1992, black defendants were significantly less likely to be given the chance to receive the lowest sanctions when directly compared to white defendants in the same category (Painter-Davis, 266). Under the SRA, judges were actually able to use external status and stability factors for the defendant's situation to decide which sentencing guidelines should be applied to the case, perpetuating discretionary sentencing initiatives (Painter-Davis, 271). In 1992 and 1993, the average severity of designated sentences was more than double that of those before the guidelines had been fully implemented in 1987. (Gorton, 47) Citizens were being punished more harshly than ever before under the Federal Sentencing Guidelines, and many were not happy at this development. The problem with this is we see many of the same trends occurring both Pre-SRA and Post-*Booker*. Between 2003 to 2007, following the *Booker* decision, the average sentence rose from around 40 months to almost 60 for white men, and from around 80 months to nearly 100 for black men (United States Sentencing Commission, 2017). We tend to see a fairly drastic drop in average sentence time in the year directly following a major reform, with it always seeming to rise over time in the years after. This led to many questions about why these trends had emerged and opened the idea that maybe this practice was not unique to determinate sentencing, but revealed a symptom of larger forces at play.

It is crucial then, that we investigate what sort of trends continue today in a post-*Booker* world, and what the fundamental causes of such disparities are. The recurring cycle of new policies being implemented and shifting the atmosphere is consistent across the last fifty years. As each system begins to normalize, the establishment is allowed to shift into the opposite direction instead of addressing the

roots of discrimination. While biases will be much harder to destroy, it is important to look at how they are still getting through in each system and where those problems distinctly lie within each structure. Discretionary policy is the simpler structure to examine in this instance. Discretionary rulings can easily lend themselves to inherent bias when a judge is held unaccountable and fully in charge of the outcome of a trial. This goes for a jury as well. Data showed that, in 2005, faces with Afrocentric features were more frequently associated with crime, drugs, and aggression by study participants (Willis-Esqueda, 101). At the same time, the study showed that when instructed or shown their biases, the results began to level off quite dramatically (Willis-Esqueda, 100). Allowing for full and unhindered power will always lend itself to the worst and best of human biases; therefore, a structure depending on it must inherently rely on the prevalence of human decency.

The difficulty comes in attempting to analyze determinate sentencing. The problems here are possibly more obvious than it may seem, although the solution is not. While it succeeded in removing many of the effects of harmful biases in the arbitrator, it failed in dissociating from the power dynamics that initiated the disparities. While there were hurdles put into place in order to keep disparity to a minimum, the wealthy and well-resourced were able to find their way around this while others were left in the dust. While discretion allowed the judge the ability to stop issues like this if they truly were well intentioned, strict sentencing did not. The rules set by the establishment are to be upheld to the letter, and those with the resources to find where that letter inherently can fault, are given full reign over the decision. This reflects a major flaw in determinate sentencing. The Federal Sentencing Commission failed in its attempts to stop exploitation at the simplest levels by failing to recognize exploitative power and address it, with many of these issues continuing despite the changes in mere codification. Lawyers are at the heart of this issue in the modern day. With the quality of service behind some level of paywall, a hierarchy of wealth develops in the affordability of freedom. Beyond bail, the process of even defending oneself is left up to access to resources that become nearly unavailable without ample liquidity.

A common argument for the restoration of discretionary sentencing was the increase in loopholes that were being created by the overly determinate wording. The argument was that specific wording structures forced the court systems to become overly dependent on the language and provided much more room for the lawyers on either side to take advantage of spins in the wording or lack of concision, in order to create even more loopholes in the system. In 2003, Attorney General John Ashcroft explicitly stated his findings on the evolutionary interpretation of

language, urging that strictly adherent guidelines had led to an abundance of criminals getting off in many situations he believed they never could have previously (Johnson, 5a). While there is a possibility for this statement just to be based on an anecdotal shift in the levels of discrimination by court systems, the most disheartening differences to many were in who was getting away with crime. As good lawyers became better and better at exploiting loopholes, the better they were, the more they were able to charge. Unfortunately, any public defendants and paralegals not encouraged to put the effort into each case to do the same began to put their clients at a distinct disadvantage. Christopher Poulos described his experiences with the disparity to the Sentencing Project, an organization dedicated to displaying sentencing inequalities, in 2016. Poulos states in his interview that the court appointed attorney had begun the discussion about his federal charges with guilty pleas and a promise of eight years in prison, with that as the best option his defendant could provide. Thanks to family money, he was able to hire a private lawyer, whom he enrolled on the case, and was subsequently released within hours without bail. Poulos spoke of the situation, describing that, "When I walked out of jail that day, I left behind scores of others who could not afford to hire a private lawyer. Most of them were indigent and lacked access to higher education. Many were men of color. This is the difference that money can make in the criminal justice process. My fate went from not having a detention hearing because it was hopeless, to not needing one because an agreement for my release was immediately reached" (Rovner).

The issue of continued inequalities is what turned so many away from the system, determined that those with good hearts could and would stand up and rebuke the underhanded. The issue being that even when the system is exploited, the judges are left mildly powerless to exercise discretion in correcting it, since the set for punishment is predetermined. Sentencing guidelines succeeded in preventing any rightful action in the courts, while leaving external powers unimpeded, which left the judges helpless. The flaw in the confrontational logic is that the wealth and exploitation cannot be mitigated under strict sentencing any more than external biases can be completely removed under discretionary decision, and the argument comes down to control of law versus prevailing human conditions. At this point it should be obvious that, while perceptions can be shifted, there is no way to force or create a new consciousness in every member of a population. Law is about the control of externalities, and the beauty of determinate sentencing was the hope of eliminating unwanted externalities in the decisions that alter citizen lives. Subsequently, the return to a system, which had been

guided and developed in the unwillingness to develop the shift towards more cohesive coverage, is little less than a blind eye or stubborn rejection of the pervasive nature of human indecency, standing dead in the way of progress.

AN ASIDE ON FOUNDATIONAL COHESION

The departure from and guard against tyranny has stood strong in the American lexicon as a staple of value and hope for many. In the United States, the legal process was intended to stand in the path of kings or power-seekers, making the path towards changing law so slow that no individual could personally benefit from their efforts within a lifetime. It is important to consider the system as a whole, in order to understand and mediate legal systems within it, especially with cases such as the executive order. While a general term has been used by each president, Franklin Delano Roosevelt changed the term forever in 1933 with the direct order for banks to close for a day. In an effort to circumvent the collective action problem, FDR began a long career of unilateral dictation. While many of these decisions helped to directly stimulate and improve economic conditions, several, such as the internment of Japanese citizens during World War II, did not (Whitman). Today, the United States continues to see even more debates about Executive Orders and the power of the president to implement policy over the heads of the other branches. The precedent for executive actions exists in the Constitution and was even enacted by George Washington himself. Why, then, is there still discussion over the constitutional legitimacy of these actions, whether partisan or not?

The difference is in the use and scale of the actions. When Roosevelt expanded the power of the executive action in 1933, it was the natural progression to utilize his position and power to follow within the process, and yet circumvent the intentions of the system structure to meet his own goals. The precedent laid the groundwork for future presidents and the continuation of independent action when consensus could not be provided. At the moment, however, the question among scholars is not whether the constitutional role of the president should be scrapped in favor of the Supreme Court ruling on every role the president wants to take. In realism, the follow up must be the conversation around defining and reducing the abilities of exploitation of an intricate system through positions of influence, and it is the duty of the law then to patch the dilemmas or misuses that occur in this growth. As society evolves, so must the law progress forward. Some power must be allocated for the protections of the opportunities of all.

PHILOSOPHIES OF A SYSTEM

In a situation in 2016, Matthew Connolly was indicted for bank fraud for manipulating the interest rates at the bank he worked at. Because of the severity of the crime, the Financial Conduct Authority got involved to help disseminate and investigate the details of the case. The Financial Conduct Authority is a British organization built around regulating and investigating financial services in firms, in order to secure the integrity of the institutions. The Department of Justice, similarly, is the American organization dedicated to the same goals. Each organization is built around the sole purpose of protecting and preventing fraud within the financial institutions within their jurisdiction. As Connolly had worked alongside a British cohort, the FCA was able to involve themselves in the case and work alongside the DOJ to help bring justice to the gross mishandling and treachery of the case. Unfortunately, in the court of law, the regulations that had been established to prevent mishandling of evidence worked against them. Because the scale and nature of the case had been large enough to warrant attention from both parties, Connolly was able to file for the prosecution's evidence to be thrown out, as it had been tainted and investigated by an outside party. The trial was able to continue after months of blockades. However, the sheer power of his influence allowed Connolly to disrupt the system and attempt to run away with his own indictment, putting the prosecution on the defensive. While pressure and burden of proof may be staples of the American legal system, this situation not only allowed it to be taken advantage of, but also barred those without wealth from the same opportunity of exploitation. The holes in the strict codification showed. However, as with the case of Christopher Poulos, status had stuck its claws into the system. External factors became evident as an inescapable staple of both the system and the tools implemented to control it, yet fundamentally, where the United States Constitution centered itself around reducing room for the exploitation of power, the Federal Sentencing Guidelines had followed suit.

How, then, must a system focus on equality of opportunity? What defines the basis of a system's structure? The way in which a structure is implemented is important when looking at the prospect and validity of adopting it. John Stuart Mill's take on Utilitarianism states that, "A person may cause evil to others not only by his actions but by his inaction, and in either case he is justly accountable to them for the injury" (Mill, 1). Specifically, the focus is on the ability to prevent a known discrepancy and the moral weight of that decision. When comparing determinate and discretionary policy design, this becomes a distinct advantage on the moral side of implementation

for strict sentencing. When looking at the rationales behind the Founders' setup for the government and determinate sentencing, we can see a cohesion that aligns in the attempt to create a system based on the idea of providing equal justice for all citizens.

In defining the limits of the system's exploitation of the commonwealth, the same issues of wealth and inequality rose to the surface, not simply because of the system's complexity, but as a reflection of the nature of society at large. In a space in which greed has always found a way to seek personal advantage, the SRA failed to adapt to the methods of exploitation. The opposition suggests that discretionary ruling has the potential to adapt to the advantages of the wealthy, yet where the underlying philosophies of discretion fundamentally rely on the basic structures of society to sort themselves out, a determinate sentencing policy is hinged purely on the ideals of providing equal opportunity, regardless of status, though hindered by the same structures. This is where the question returns to the morality of inaction. While both systems have led to the exploitation of the system through previously acquired power, one is much more inherently complicit in its structure to the status quo. While it may seem strange to look at these cores in a utilitarian sense, the starting point of development is crucial in developing the outcome. When a system is built around the basis of inaction, the default of that system largely leans towards a lack of progressive action, and when a system of imbalance is in place, we have seen the outcomes of the court systems consistently lean towards maintenance of those norms and a lack of proper justice. From a utilitarian perspective, inaction can be just as morally reprehensible as evil action, and the reliance on individual decision has failed miserably to fundamentally disconnect itself from the societal influences that created disparities, continuing an unjust circumstance. The Federal Sentencing Guidelines failed in disconnecting themselves as well, but the essential motivation beneath the system to do so is what carries its weight moving forward. Therefore, going forward, the moral weight of the decision is important to note in selecting the basis for a newer system that is willing to regulate the sentences of United States citizens without breaching the goals of the establishment.

REALISTIC CEILINGS

If both systems are limited, therefore, by the structures they reside in, how much potential does any structure have? Strict sentencing guidelines limited the societal biases within the courtroom but failed distinctively to limit the consequences that are brought in from outside of the courtroom. No system has managed to fully tackle

this influence yet and, unfortunately, it is an issue larger than the court systems. Nevertheless, there are ceilings for reasonable expectations in each system. The basics come down to the reliance of each system. Discretionary policy relies on a court room and/or jury that is routinely filled with unbiased, informed, and well-intentioned individuals. Determinate sentencing requires a set of rules that works to mitigate and remove all external factors from the courtroom before dealing a reasonable pre-set punishment. Determinate sentences would then rely very heavily on specific information and details over each category detailed by well-informed experts in each crime. While the latter is obviously a difficult and extensive process, the approach towards intricate codification is far closer to a sustainable and realistic goal than the former. To judge character and maintain accountability in a system is to put the lives of your citizens in the hands of discretion. While this can play out well in small scale situations, the end result is to allow miseducation to persist and baggage to carry on. The placement of codified values delivers the citizens into the untainted hands of scripting that may be surveilled and perfected with time. In approaching equitable treatment, many factors must be taken into play with each segment. The first major set of regulations to amend must be that of the sentences themselves. In 1991, the state of Louisiana faced a case in which 2.5 kg of cocaine was found built into a suitcase, which weighed 12.8 kg, and faced issues interpreting whether the suitcase would count in the sentencing. The difference would mean a minimum of 10 years sentence versus no minimum sentence for the offender (Kallam, 1,267). In two separate cases, the Supreme Court had ruled two different ways on the correct measuring method for these situations, leaving the interpretation even more to the scenario, despite being under a “universal” sentencing system (Kallam, 1,269).

Under the Federal Sentencing Guidelines, these discrepancies have repeatedly been utilized and seized in order to direct a sentence one way or the other. The discrepancies themselves have created a middle space in which the privileges outside of the courtroom allow the situation to be exploited, while the rulings within the courtroom are unable to respond. This is the worst of strict sentencing outcomes and the reason for the failure to begin with. By setting a unanimously understood and comprehensive guideline, the discrepancies can best be reduced to a minimum. This requires that well-informed and well-intentioned experts be involved in setting these rules, however. If the rules are unfair to begin with, as with the War on Drugs, the outside discrepancies begin to feed in. This is the second crucial remedy to the Federal Sentencing Guidelines. Outside factors of the individual must be allowed to be taken into account by the sentence. This

mitigation is by far the much harder position to implement systematically. As with the current system, relevant factors, such as prior convictions and overall situation, still must be taken into account, but it is the responsibility of the government in drawing up these new scenarios to closely examine the moral implications of stances and circumstances. For instance, current discretionary policies allow for reduced time for more valuable or high-level information. The state of California specifically used this as a tool for antagonistically pushing defendants towards the direction they desired (Prosecutor’s, 1972). While this incentivizes and rewards those for playing along with the government, the direct result is a system that in itself values crime differently based on a level of higher status or involvement. While this is obviously a system that is beneficial and crucial to progression, the value-judgements behind relating it to sentencing must be evaluated and decided on by the new system. Many inherent difficulties exist within the system currently that can impact little when alone, but may have larger implications when formulated as the basis of a structure. The system must be put into place with an essential idea of who it is there to serve. While all of these revisions require extensive effort and review, the goal is achievable even in our flawed society, with potential to even the sentencing board across a divided and terrified nation. With even the best intentions, the biases and cultural understandings of every new justice or jury is too difficult to simply quantify and control in any meaningful way. Regulating equality with progression towards perfection is much easier than regulating character continuously and completely. The possibility for equality must come from the outside before the progression towards internal quality can be realized.

CONCLUSION

After the dust settles, little ever remains as perfect as first hoped. The Federal Sentencing Guidelines lacked the gumption and support to evolve past the societal inequalities they promised to help mitigate. Nevertheless, the future must rely on stricter guidelines if it hopes to better improve equality of opportunity and outcome in the country. The reforms necessary to bring about equality are far more accessible through determinate sentencing than through discretion, and the possibilities of equal treatment are within reason. The system must not restrict the access to fair trial to those with access to wealth or power, and the issues that plagued the courts are not limited to court rooms. Wealth inequality and inequality of opportunity are issues that have plagued the United States and all of its subsequent programs since the country’s inception.

The SRA's failings have always been hindered by it, just as all rulings have been. However, the SRA provides an opportunity to control this issue more easily. If this one area is captured, the failings of the sentencing guidelines can be pushed from the picture and a new future can finally begin to open up for the United States of America. In 2015, President Barack Obama began working with the US Sentencing Commission to reduce drug sentences and issue new guidelines for equal treatment. In the years since, as predicted, there has been a decline in racial disparity, as is always the case immediately after new rules are implemented (United States Sentencing Commission, 2017). As for the future, it is unsure what is to come with sentencing reforms and implementations. No system will ever be perfect, and the country is constantly in states of attempting to improve; nevertheless, the directions it takes will influence millions and the outcomes will impact millions of lives, for better or worse.

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