

Place, Race, and Variations in Federal Criminal Justice Practices

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Thank you so much to the Reckless and Dinitz families for creating and supporting this wonderful lecture series, and to Ryan King, Dana Haynie, and everyone here at the Criminal Justice Center and the Moritz College of Law for this invitation and for being so welcoming. I am truly honored to be invited to give the Reckless-Dinitz lecture and humbled by the slate of scholars who have come before me at this podium. And I am even more humbled when I look around the room to see so many colleagues whose work has had such an impact on our fields, and whose work has been incredibly influential on my own.

Before I begin my talk, I'd like to just say a few words about Professor C. Ronald Huff's passing just a few short weeks ago. As you know, this was going to be a bit of a double-bill, with Ron up here to commemorate this lecture series on its 30th annual offering. He had helped found the lecture series, honoring two of his esteemed mentors and colleagues—Walter Reckless and Simon Dinitz—when he was Director of the John Glenn College here. He was so excited to be coming back to Columbus for this event, and even after he had to cancel his travel plans, he was still enthusiastically working up his comments about how important this lecture series was to him.

Ron loved UC Irvine, his last academic home. But I always suspected that he loved Ohio State even more. We all had our own ways of teasing him when he'd pull out Ohio State as the shining example of how things could or should be done. My personal favorite rib was, "Do you mean THE Ohio State University, Ron?" He'd just laugh. Ultimately, Ron loved the intellectual enterprise and community of students and scholars that comes with university life, whether in Columbus, Ohio or Irvine, California. And that community loved him back. He will be sorely missed by so many. And with that, I'd like to dedicate this talk to our shared colleague, Ron Huff.

And now, I am going to ask that you indulge me as I talk through my decade long obsession with the federal criminal system. My motivating questions for this

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talk—and for the underlying research that I have conducted on the federal system—are:

- How is the power of criminal law mobilized—and resisted—in varied, creative ways by legal actors?
- How do those variations manifest as local norms and practices that transcend individual actors and moments in time?
- Finally, and perhaps most critically, how does this “live” version of the law produce and maintain inequalities that formal law & policy explicitly aim to eliminate?

As many scholars before me have insightfully highlighted,¹ the critical policy change in the federal system was the introduction of a rigid guidelines sentencing regime in the 1980s, replacing a highly discretionary system that was said to produce extreme variations in outcomes, including troubling patterns of bias.² The story of the federal sentencing guidelines’ inception and initial development exemplifies the gap between an idealized version of law and policy and the realities of “law in action.” It reveals the irreconcilable tension between rules as imagined in an abstract form, and rules as practiced by living, breathing, motivated actors. The legislation that authorized the U.S. Sentencing Commission’s establishment (and that defined its mission) set a high bar for the reforms that were to come. In particular, the Commission was directed to establish policy that would, among other things “Provide certainty and fairness in meeting the purposes of sentencing, avoiding unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar conduct.”³

The Commission spent about 3 years constructing a system of rules governing criminal sentencing to accomplish that goal. These rules were promulgated in the federal sentencing “Guidelines Manual” and put into practice in 1987.⁴ The guidelines, as devised, essentially reduced relevant sentencing considerations to two things: past and present criminal offending by the defendant. In the process, a

¹ For example, see KATE STITH & JOSE CABRANES, *FEAR OF JUDGING: SENTENCING GUIDELINES IN THE FEDERAL COURTS* (Univ. of Chicago Press, 1998); For an account of some of the design weaknesses in the federal guideline system, see Douglas A. Berman, *A Common Law for This Age of Federal Sentencing: The Opportunity and Need for Judicial Lawmaking*, 11 STAN. L. & POL’Y REV. 93 (1999).

² The most influential critique was mounted by federal judge Marvin E. Frankel, especially as articulated in his 1972 book, *CRIMINAL SENTENCES: LAW WITHOUT ORDER* (Hill and Wang Pub. 1974). For the legislative developments following from its publication, see Kate Stith & Steve Y. Koh, *The Politics of Sentencing Reform: The Legislative History of the Federal Sentencing Guidelines*, 28 WAKE FOREST L. REV. 223 (1993).

³ Comprehensive Crime Control Act of 1984, Pub. L. No. 98–473, 98 Stat. 1837 (enacted Oct. 12, 1984).

⁴ Brent Evan Newton & Dawinder S. Sidhu, *The History of the Original United States Sentencing Commission, 1985–1987*, 45 HOFSTRA L. REV. 1167 (2017).

number of traditional sentencing factors were excised from the calculation: things like the defendant's family ties and responsibilities, mental and emotional condition, age, employment history, and so on.⁵

This narrowing of what could be considered, coupled with the intricate quantification system, was designed to tame and constrain the sentencing discretion of judges, which was seen by many as contributing to caprice and bias in outcomes.⁶ Based on the system the Commission devised, a defendant will fall into one of 258 intersections of offense level by criminal history category on the sentencing table grid that specifies the guidelines sentence range.⁷

The application of the new guideline system was mandatory in its original design, allowing only limited exceptions for judicial deviations from the prescribed ranges. While this changed in 2005, when the Supreme Court rendered the Guidelines advisory in *U.S. v. Booker*, they must still be calculated and considered in determining all sentences.⁸ And they remain a focal point at sentencing, in effect, anchoring the final determination.⁹

The Commission also built in some controls over legal actors in an effort to prevent end-runs around the system, including requiring the calculation of all crime-related "relevant conduct" even if not part of the conviction, and a robust appeals mechanism if judges deviated from the guidelines. The Commission appeared to operate with an immense amount of faith that it could tame and regulate the human relations—including the power relations—that constitute institutional operations.¹⁰

Yet, despite the incredible brainpower, institutional resources, and time devoted to developing and revising the Guidelines, they could never really approach the ideal of achieving uniformity in outcomes. Judges, prosecutors, defense counsel,

⁵ Mona Lynch & Alyse Bertenthal, *The Calculus of the Record: Criminal History in the Making of U.S. Federal Sentencing Guidelines*, 20 THEORETICAL CRIMINOLOGY 145 (2016).

⁶ *Id.*

⁷ U.S. SENTENCING GUIDELINES MANUAL CH. 5 (U.S. SENTENCING COMM'N 2018).

⁸ *United States v. Booker*, 543 U.S. 220 (2005). In *Booker*, the United States Supreme Court rendered the Guidelines "effectively advisory," giving federal judges the discretion to impose a non-Guidelines sentence as long as it is consistent with the broad purposes of punishment. *Id.* at 245. Two years later, the Court ruled in *Kimbrough v. United States* that judges are free to sentence outside of the prescribed Guidelines' range on the grounds of policy disagreements with the Guidelines. 522 U.S. 85 (2007). In *Gall v. United States*, decided at the same time as *Kimbrough*, the Court mandated deference to sentencing judges' decisions and authorized judges to use individualized assessments of cases and offenders in deciding whether and how to depart from the Guidelines. Mandatory minimums are still in force, though, so in cases in which both Guidelines and mandatory minimums apply, the mandatory minimum "trumps." 552 U.S. 38 (2007).

⁹ Mark W. Bennett, *Confronting Cognitive "Anchoring Effect" and "Blind Spot" Biases in Federal Sentencing: A Modest Solution for Reforming a Fundamental Flaw*, 104 J. CRIM. L. & CRIMINOLOGY 489, 495 (2014).

¹⁰ Mona Lynch, *The Narrative of the Number: Quantification in Criminal Court*, 44 LAW & SOC. INQUIRY 31, 35–36 (2019).

and other front-line legal actors were active agents who would resist being reduced to “automatons” under the new system.¹¹

And this was indeed what happened. Early studies of the guidelines-in-action by Stephen Schulhofer and Ilene Nagel systematically chronicled the “guideline circumvention” that was happening in practice after the implementation of the guidelines.¹² They identified the case types that were likely to prompt circumvention; the methods by which circumvention was achieved; and how legal actors created the illusion of formal compliance with the guidelines despite circumvention.

Subsequent research documented continued, “unwarranted” disparities in sentence outcomes as well: by demographic features of defendants such as race, ethnicity, and gender; and by locale. The first wave of the disparities research primarily measured differences in imposed sentence lengths for those with equal culpability according to the guidelines—while controlling for “legal” factors such as breaks for substantial assistance and reductions for “acceptance of responsibility.”¹³ More recent quantitative work has also recognized that looking only at the gaps between guideline calculations and actual imposed sentence may miss where much discretionary action happens. That is, in pre-sentencing processes where prosecutors’ arsenal of tools remained relatively unregulated by the guidelines regime.¹⁴

¹¹ Nancy Gertner, *From Omnipotence to Impotence: American Judges and Sentencing*, 4 OHIO ST. J. OF CRIM. L. 523 (2007); Joachim J. Savelsberg, *Law That Does Not Fit Society: Sentencing Guidelines as a Neoclassical Reaction to the Dilemmas of Substantivized Law*, 97 AM. J. OF SOC. 1346 (1992).

¹² Stephen J. Schulhofer & Ilene H. Nagel, *Plea Negotiations Under the Federal Sentencing Guidelines: Guideline Circumvention and its Dynamics in the Post-Mistretta Period*, 91 NW. L. REV. 1284 (1997); Ilene H. Nagel & Stephen J. Schulhofer, *A Tale of Three Cities: An Empirical Study of Charging and Bargaining Practices Under the Federal Sentencing Guidelines*, 66 S. CALIF. L. REV. 501 (1992); Stephen J. Schulhofer & Ilene H. Nagel, *Negotiated Pleas Under the Federal Sentencing Guidelines: The First Fifteen Months*, 27 AM. CRIM. L. REV. 231 (1989).

¹³ For studies that examine the role of defendant demographic characteristics on variations in sentencing outcomes, *see generally, e.g.*, Jill K. Doerner & Stephen Demuth, *The Independent and Joint Effects of Race/Ethnicity, Gender, and Age on Sentencing Outcomes in U.S. Federal Courts*, 27 JUST. Q. 1 (2010); Darrell Steffensmeier & Stephen DeMuth, *Ethnicity and Sentencing Outcomes in U.S. Federal Courts: Who is Punished More Harshly?* 65 AM. SOC. REV. 705 (2000). For studies that examine the impact of jurisdiction on variations in sentencing outcomes, *see generally, e.g.*, Paula Kautt, *Location, Location, Location: Interdistrict and Intercircuit Variation in Sentencing Outcomes for Federal Drug-Trafficking Offenses*, 19 JUST. Q. 633 (2002); Cassia Spohn, *Sentencing Decisions in Three US District Courts: Testing the Assumption of Uniformity in the Federal Sentencing Process*, 7 JUST. RES. & POL’Y 1, (2005); JawJeong Wu & Cassia Spohn, *Interdistrict Disparity in Sentencing in Three U.S. District Courts*, 56 CRIME & DELINQ. 290 (2010).

¹⁴ *See generally* Joshua B. Fischman & Max M. Schanzenbach, *Racial Disparities under the Federal Sentencing Guidelines: The Role of Judicial Discretion and Mandatory Minimums*, 9 J. EMPIRICAL LEGAL STUD. 729 (2012); Brian D. Johnson et al., *The Social Context of Guidelines Circumvention: The Case of Federal District Courts*, 46 CRIMINOLOGY 737 (2008); Marit Rehavi & Sonja Starr, *Racial Disparity in Federal Criminal Sentences*, 122 J. POL. ECON. 1320 (2014); Lauren

It's about here that I enter the empirical research scene. I was trained by the U.S. Sentencing Commission's research staff at a joint National Institute of Justice-ICPSR summer methods workshop at the University of Michigan nearly a decade ago.¹⁵ And I made my first foray into data analysis using the Commission's massive, detailed sentencing data over the next couple of years.

My first empirical deep-dive looked at how the move from a mandatory to an advisory guidelines system after the *Booker* decision impacted sentencing processes and outcomes. I suspected that the on-the-ground plea negotiation and sentencing practices likely shifted with the legal policy changes, but that the orientation of front-line legal actors would be toward maintaining outcome norms for given types of cases. Put simply, I assumed there would be localized norms that would temper dramatic changes in punishment outcomes, despite changes to the formal rules.

In that sense, I expected to find that districts would maintain some stability over time in regard to sentence norms, but that the way legal actors got to those sentences would change as a function of the formal rules that structured their daily practice. My first study, with my then-graduate student (now professor), Marisa Omori, was isolated to drug trafficking cases,¹⁶ a focus I have largely maintained in subsequent research.

One advantage of focusing on drugs (as opposed to other offense categories) was that a substantial proportion of drug cases are subject to mandatory minimum statutes, which from a conceptual standpoint added an interesting twist to how drug cases would be charged and negotiated in the post-*Booker* era.

In our first study, we asked several research questions:

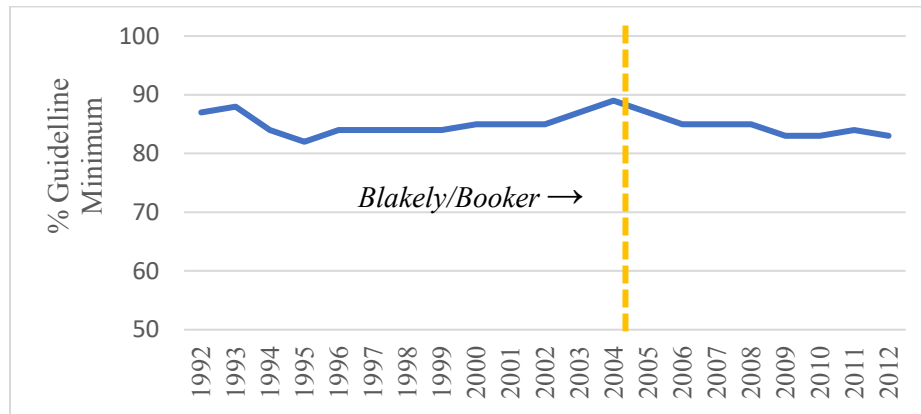
- 1). Do within-district sentencing patterns demonstrate stability across different policy periods, indicating the influence of local norms?
- 2). Are the mechanisms for getting to sentence outcomes changing in response to legal policy reforms, such as those brought by *Booker*?
- 3). Are cases that are not subject to mandatory minimums more likely to vary from the guidelines compared to those that are subject to them?

One of our primary ways of measuring sentence outcomes was a ratio measure of actual imposed sentence over the calculated guideline minimum sentences. In drug cases, actual drug sentences imposed bounced around 85% of the guideline minimum over the period we were studying.

Shermer & Brian D. Johnson, *Criminal Prosecutions: Examining Prosecutorial Discretion and Charging Decisions in U.S. Federal District Courts*, 27 JUST. Q. 394 (2010).

¹⁵ ICPSR SUMMER PROGRAM IN QUANTITATIVE METHODS OF SOCIAL RESEARCH <https://www.icpsr.umich.edu/icpsrweb/sumprog/> (last visited Oct. 26, 2019).

¹⁶ Mona Lynch & Marisa Omori, *Legal Change and Sentencing Norms in the Wake of Booker: The Impact of Time and Place on Drug Trafficking Cases in Federal Court*, 48 LAW & SOC'Y REV. 411 (2014) [hereinafter *Legal Change and Sentencing Norms*].

Figure 1: Imposed Sentence in Drug Cases as % of Guideline Minimum

This alone suggests a gap between perceived “just” sentences in drug cases by those in the trenches, and what the Commission had devised as guideline-compliant sentences (drug sentences were unfortunately anchored to draconian drug mandatory minimums in the guideline formulation). In other words, mandatory guidelines or not, there appeared to be consistent downward pressure on drug sentences in practice across policy periods.

So what specifically did we find in answer to our questions?

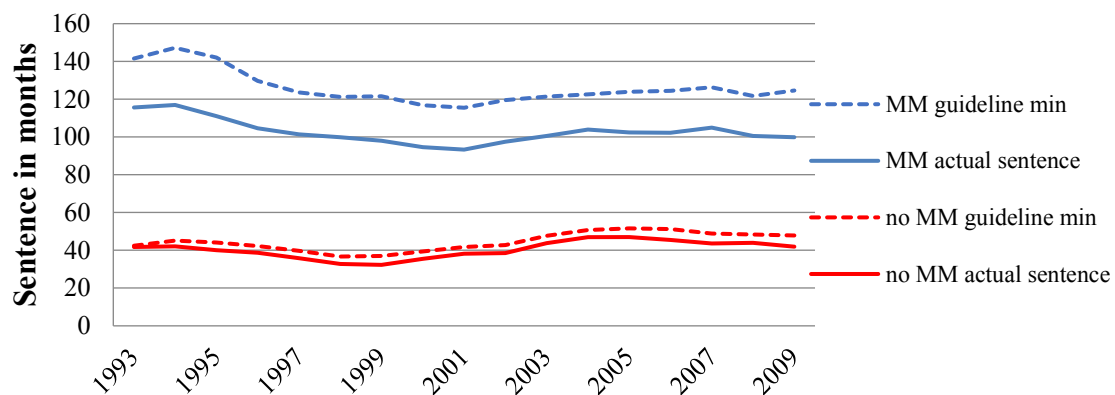
- 1) Yes, we found that districts tend to look like themselves over time, supporting the hypothesis that local norms about outcomes shape legal strategy and process. Prevailing local norms appeared to exert more pressure in districts with larger caseloads and greater caseload pressure (as a rate per judge), so those districts had more stability over time and across policy periods than did districts with smaller caseloads and less caseload pressure.
- 2) Yes, there was some indication of changing mechanisms, especially relative to the very restrictive PROTECT ACT period right before *Booker*, when the mandatory guidelines regime was at its most binding and constraining on judicial discretion.¹⁷ In particular, prosecutors appeared to use more mandatory minimums as a way of constraining judicial discretion when the guidelines were less binding, and especially after they were no longer mandatory. By the final period we studied, prosecutors filed 25% more mandatory

¹⁷ The Feeney Amendment of the 2003 PROTECT Act further restricted judges’ ability to depart downward from the guidelines under the mandatory guidelines regime, and substituted *de novo* appellate review for the abuse-of-discretion standard that was in place. See Stephanos Bibas, *The Feeney Amendment and the Continuing Rise of Prosecutorial Power to Plea Bargain*, 94 J. CRIM. L. & CRIMINOLOGY 295, 296–302 (2004).

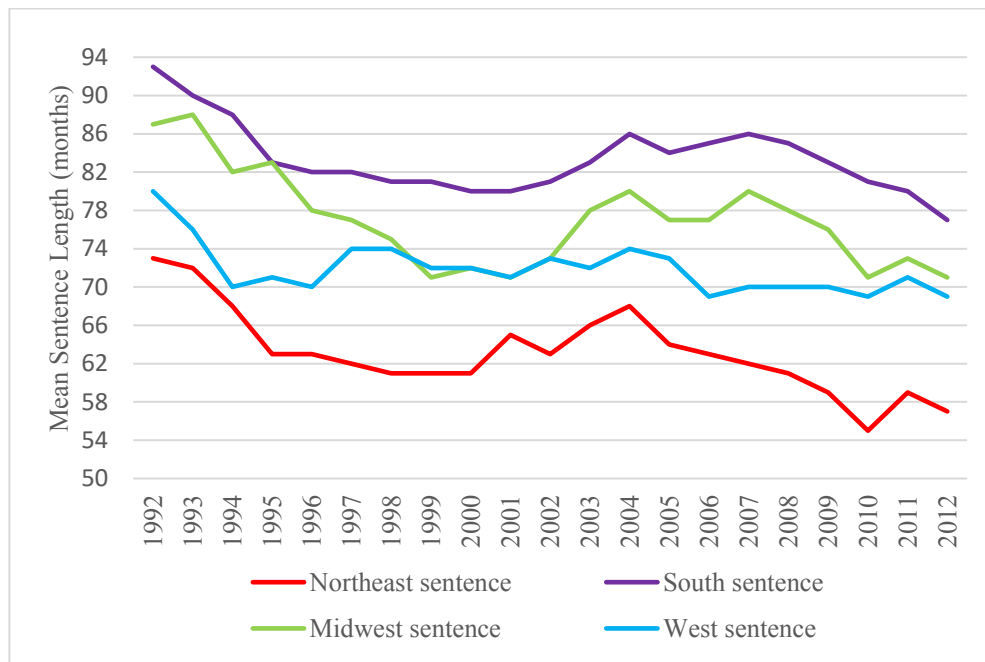
minimum-eligible drug cases than they had in the period right before *Booker*.

- 3) No, cases not subject to mandatory minimums were not more likely to vary from guideline minimums. In fact, cases subject to mandatory minimums demonstrated more downward variance from the guidelines than in those without mandatory minimums across all time periods, as illustrated in Figure 2. Specifically, over the entire period of study, drug cases subject to mandatory minimums were sentenced to 83% of the guideline minimum whereas those not subject to mandatory minimums were sentenced to 92% of the guideline minimum.

Figure 2: Sentences Imposed vs. Guideline Minimum in MM & non-MM Drug Cases



Finally, we found relatively large regional differences in sentence outcomes across policy periods. Districts in the South consistently meted out the longest drug sentences, which were also closest to the guideline minimum, whereas sentences in the Northeast were consistently the lowest in length and as a percentage of guideline minimums (see Figure 3 below).

Figure 3: Sentence Lengths by Region over Time¹⁸

This work just piqued my interest, in part because by doing the quantitative work I realized how many of the kinds of process questions I wanted to ask could NOT be answered by moving backward from punishment outcomes. I wanted to dig in deeper to see how case selection, plea negotiation, and sentencing practices actually happened in different districts. So I embarked on a comparative qualitative field research project to do just that.

After having many doors shut in my face, I was finally able to gain access to the federal system, entering through the federal defenders. I was embedded in federal defenders' offices in four very distinct districts for multiple weeks-long stretches over a two-year period. Part of my agreement with the attorneys in each office was that I not identify the district. Therefore, I labeled each by their geographic characteristics: Northeastern, Southeast, Southwestern, and Rural.

Through that access, I became a court-watcher, a fly on the wall, and an inquisitor. I had the cooperation of the attorneys and investigators within each defender's office, and I also networked in each district to get interviews with legal actors outside of those offices (mainly assistant U.S. Attorneys and some judges).

As soon as I completed this work, I realized how much I hadn't known when I started. It was fascinating, exhausting, infuriating, and depressing. Each district

¹⁸ This table is reproduced from Mona Lynch, *94 Different Countries? Time, Place, and Variations in Federal Criminal Justice*, 23 BERKELEY J. OF CRIM. L. 134 (2018).

that I went to was its own world (as were each of the divisions within the districts). While those working in each had a sense of differences between their court and others, their day-to-day practices were nonetheless governed by local norms.

Those norms extended beyond just shaping sentence outcomes. They included everything from the vernacular to describe things like change-of-plea hearings and sentencing memos, to how things like substantial assistance departures were quantified (either a percentage of time, or in actual time, or even in guideline levels off), to norms around plea agreements and whether they were binding or not, and so on.

In my interviews, I also explored how legal practice had transformed over time as a consequence of various policy changes. In a set of interviews with long-time legal actors, I discovered a much more nuanced, complex, and strategic account of how attorneys and judges adapted to the *Booker* mandates.¹⁹ *Booker* seemed to impact the day-to-day business at all stages of criminal process: charging, plea negotiations, and formal sentencing.

Indeed, I confirmed through my interviews that prosecutors did, in some kinds of cases, consciously use mandatory statutes in all sorts of creative ways to cabin judicial discretion. In some cases, they formally charged and sought convictions that invoked mandatories as a way to impose a sentencing floor on judges. For example, in child pornography cases where identical conduct could usually be charged as either possession (which does not have a mandatory minimum) or receipt (which has a 5-year mandatory minimum), prosecutors would sometimes charge the receipt to prevent a sympathetic judge from having the discretion to sentence below that minimum.

But more often, threats of filings—of things like the 851 mandatory enhancement for prior drug conviction,²⁰ the 924c gun enhancement that added a hefty consecutive mandatory minimum, and the child pornography receipt mandatory minimum—were used by prosecutors as bargaining chips to get to a desired plea agreement. These uses would not necessarily show up in the formal sentencing data, however, so their impact is not measurable in the standard way researchers have examined the *Booker* impact.

There was also much more bargaining in the shadow of the judge after *Booker*, as judicial assignment took on more importance under advisory guidelines. When

¹⁹ An analysis of the interviews on the policy change question is reported in Mona Lynch, *Booker Circumvention? Adjudication Strategies in the Advisory Sentencing Guidelines Era*, 43 N.Y.U. REV. OF L. & SOC. CHANGE 59 (2019).

²⁰ This refers to 21 U.S.C. § 851 (2012), which was authorized by a provision of the Comprehensive Drug Abuse Prevention and Control Act of 1970 requiring prosecutors to file an information indicating that they were seeking prior conviction enhancements and provide evidence of the prior conviction. This filing only applies to drug convictions under 21 U.S.C. § 841, and until December 2018 triggered a doubling of the mandatory minimum where there is one eligible drug prior, and a life without parole sentence where the mandatory minimum was 10 years and two or more eligible drug priors are present. The First Step Act, *infra* note 33, enacted in December 2018, modified those enhancements for convictions subject to a 10-year mandatory minimum.

defense attorneys were assigned judges they viewed as favorable, they could get much better soft or hard binding agreements with prosecutors. When the judge was more of a “guidelines” judge, prosecutors had even more of the upper hand in negotiations and did not need to make many concessions at all.

These strategies differed by district, and new norms appeared to have developed over time under the “new normal” of advisory guidelines. What these findings suggest is that any analysis of outcome data should not simply attribute post-*Booker* changes in sentencing outcomes to re-empowered judges. Rather, the changed rules opened up new modes of case settlement that are still hugely influenced (to varying degrees based on case types and locale) by prosecutors.

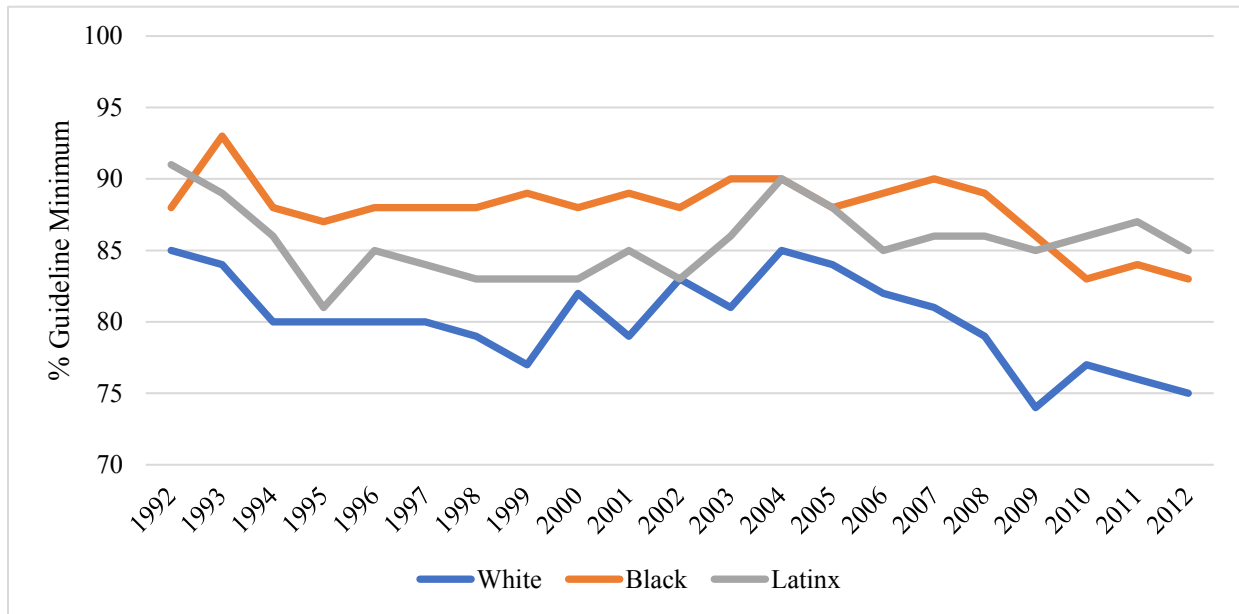
What I came away with from this work is that the question of how legal and policy change impacts outcomes is exceedingly more complex, dynamic, multi-varied, and fascinating than any straight policy impact study can tell us. Individuals matter, place matters, rules of the game matter, and these things swirl and interact and transform in all kinds of ways, both predictable and unpredictable.

I’ve now spent considerable time talking through at least parts of the answers to the first two questions that I initially posed regarding how law is mobilized in practice, and how those variations in mobilization manifest as more enduring local norms.

I want to spend the remainder of my time building on that foundation to grapple with the final, and I think most important question that I posed. That is, how does the living version of the law that I have described produce and maintain inequalities that the formal law & policy that transformed federal sentencing in the 1980s had explicitly aimed to eliminate?

As previously noted, empirical research conducted after the guidelines were implemented indicates that various kinds of demographic disparities—including by race and ethnicity—have persisted in sentencing outcomes despite the Commission’s stated goal of ameliorating them.²¹

²¹ Jeffery S. Nowacki, *An Intersectional Approach to Race/Ethnicity, Sex, and Age Disparity in Federal Sentencing Outcomes: An Examination of Policy Across Time Periods*, 17 CRIMINOLOGY & CRIM. JUST. 97 (2016)

Figure 4: Drug Sentences as % of Guideline Minimum x Race over Time

In regards to drug cases, white drug defendants have been advantaged at sentencing relative to drug defendants of color across policy periods, even when controlling for criminal history and offense level, as illustrated in Figure 4.²² It is also the case that many, many more persons of color have been federally convicted and punished for drug crimes—in absolute numbers, and relative to whites—since the guidelines regime was put into practice.²³

What do these two facts tell us about the problem of bias in the federal system? It turns out that the second one tells us at least as much as the first.

As I suggested earlier, the standard empirical approach to studying disparities in the federal system is too often focused on the wrong thing. It typically examines whether various “extra-legal” disparities are evident in actual sentence outcomes, relative to the calculated guideline sentence.²⁴ That kind of test, of course, implicitly assumes that all things leading up to and going into the guideline calculation are not biased.

²² *Legal Change and Sentencing Norms*, *supra* note 16.

²³ See for instance U.S. SENTENCING COMM’N, FIFTEEN YEARS OF GUIDELINES SENTENCING: AN ASSESSMENT OF HOW WELL THE FEDERAL CRIMINAL JUSTICE SYSTEM IS ACHIEVING THE GOALS OF SENTENCING REFORM 114 (2004) (pointing out that although the majority of federally sentenced defendants “in the preguidelines era were White, minorities dominate the federal criminal docket today.”).

²⁴ See, for example, Nowacki *supra* note 21; Doerner & Demuth, *supra* note 13.

Moreover, findings of disparity are typically theorized as the product of individual decision-makers' cognitive processes, such that, for example, judges may rely upon stereotypes, or implicit or explicit biases that they may hold about different groups to produce these differences.²⁵ I was skeptical of this approach—both empirically and conceptually, when I embarked on this line of research. Once I conducted the comparative fieldwork, I was convinced it was wrong.

The most profound insight I derived from my fieldwork was about the systemic way that the federal criminal system produces and maintains racial inequality through its discretionary, front-end legal processes. Here, too, there were considerable local variations in what that looked like, but the disproportionate impact transcended locale.

My first take on this was published in a book, *Hard Bargains*, where I tried to analytically capture these processes for federal drug cases in three of my four districts.²⁶ In two of the districts I profiled, Northeastern and Southeast, the earliest-stage processes—the decisions to arrest and then federally indict—were precisely where bias was largely produced. In urban divisions in both districts, 1990s gun and violence prevention programs were the inception point, both historically and procedurally. Local and federal law enforcement agencies came together to wield the punitive federal drug and gun laws in selected neighborhoods to address the problem of violence.

In Northeastern, there was an early commitment to NOT use the federal drug laws as a pretext to ensnare those they suspected of gun violence, but that commitment faded over time. And long after the federal funding dried up for the anti-violence initiative, federal agents, AUSAs, and local police continued to work together to target those deemed gang members and general “troublemakers” by setting them up in very small, hand-to-hand drug buy-busts.

The arrest strategies were also forward-looking to sentencing; so had consequences for that end-stage. A favored strategy was to set up buys in protected zones (near schools, public housing, and parks) to trigger a short mandatory minimum and an increased supervised release period. Those so targeted in these kinds of operations were nearly always young, African-American or sometimes Latino men, who often had drug priors that would potentially enhance their sentence. While there was a practice in this district of targeting more traditional, multi-level drug conspiracies as well, these little street cases constituted the majority share of the drug caseload.

A 1990s anti-violence joint taskforce initiative was also launched in Southeast district. But this one specifically targeted crack dealers in public housing developments where the residents were primarily African-American. There, law enforcement essentially went after everyone involved in the crack trade under the anti-violence banner—even those selling single rocks or serving as mere lookouts.

²⁵ *Id.*

²⁶ MONA LYNCH, *HARD BARGAINS: THE COERCIVE POWER OF DRUG LAWS IN FEDERAL COURT* (2016).

There was a particularly aggressive effort to get low-level dealers to cross the 5-gram line to trigger the 5-year mandatory minimum that came with such crack convictions (an option that disappeared after the 2010 passage of the Fair Sentencing Act).²⁷

Federal law enforcement, including the U.S. Attorney's office, was notoriously aggressive during and after this initiative, topping the nation in the number of federal crack prosecutions and rivaling top-status in severity of sentences meted out in those cases. Nearly everyone federally charged through this practice was African-American. And again, long after the violence initiative ended, the aggressive, proactive drug law enforcement lived on. In this district, as well, a premium was placed on federally charging even small-time street dealers when they had predicate convictions that could make them eligible for enhanced sentences. Doing so enhanced plea negotiation power for prosecutors.

Law enforcement and prosecutors in this district also cultivated an exceptionally widespread and insidious confidential informant practice, so much so that all standard drug plea agreements included a provision that defendants inform. The informant networks hit close to home—family and friends being pushed to turn on each other, typically resulting in same-race production of new drug defendants. Defendants who tried to opt out of informing were generally punished with various enhancements, like the 851 drug prior enhancement, if they were eligible.

In the third district I profiled in the book, Southwestern, the pattern was quite different but nonetheless unsettling. The district has among the highest volume of cases overall in the nation, including of drug cases. Nine out of ten drug defendants here were Latino, who more often than not entered the criminal system after being caught up in the border control regime in the district.

No matter the kind of bust, illicit substance, or mode of transport, the vast majority of drug defendants here were low-level couriers with no meaningful financial stake in the drug trafficking. As I describe in the book and in other writing, drug cases here were typically managed through the lens of immigration enforcement.

For undocumented defendants and even non-citizens with legal status, the overriding goal of both prosecutors and judges was crafting an outcome that would ensure removal after sentence completion, the elimination of any future possibility of legal entry into the country, and more severe punishment the next time around. Nearly untouched in all of this were the cartels, who profited from the drug trade and whose operations all-too-often trapped people into taking the risk of becoming couriers.

²⁷ The Fair Sentencing Act reduced the so-called “100–1” powder-crack cocaine quantity disparity to trigger the same mandatory sentence to 18–1, and mandatory minimums for simple possession of crack were eliminated. Fair Sentencing Act of 2010, Pub. L. No. 111–220, §§ 2, 3, 124 Stat. 2372 (2010).

Ultimately, my field research confirmed what legal scholars have told us for years—that the relatively unregulated prosecutorial power in charging and plea bargaining is where injustices are easily and readily produced.²⁸

In my study, it was clear that U.S. Attorneys’ ultra-discretionary use of charging power in regard to drug offenses, coupled with the ability to wield the incredibly punitive elements of statutes and guidelines in those cases during plea negotiations, was the engine of inequality in each district. At least with drug prosecutions, case selection was the single biggest driver of inequality, not only in the demographics of who was being charged, but in ultimate punishment outcomes given the sentencing strategies built into the process from the investigative stage onward.²⁹ Indeed, my field research really brought home for me how tightly intertwined *legal* behavior—as in choices made in proactively producing, then prosecuting cases—is with systemic inequality in the system.

After that project, I went back to the sentencing commission data with bold, new ideas about how we might better uncover and assess racial inequality. In particular, I wanted to examine patterns over time around crack prosecutions, given their notorious role in producing racial inequality in the federal system.

I went back to my collaborator, Marisa Omori, and we endeavored to reconfigure how to measure inequality. We rejected the individual-level approach that imagines bias in institutions resulting solely from the aberrational acts of individual bad actors, and we tried to better capture how the mobilization of criminal law itself produces inequalities, especially in the early stages of the process.

So we posed a question that came straight out of the lessons from my research. That is, “Do districts that aggressively prosecute crack cases demonstrate higher rates of black-white conviction-rate inequality across all case types compared to those districts with less aggressive crack prosecution practices?”³⁰

We used eleven years of federal court outcome data, coupled with data from the U.S. Attorney’s office and additional data sources, and we aggregated the data to the district court level to answer the question. We operationalized our independent variable, “aggressive prosecutions” as: 1) the relative share of drug caseload composed of crack cases; 2) prosecution of lower level cases (by median

²⁸ Angela J. Davis, *Prosecution and Race: The Power and Privilege of Discretion*, 67 FORDHAM L. REV. 13 (1998); Mona Lynch, *Institutionalizing Bias: The Death Penalty, Federal Drug Prosecutions, and Mechanisms of Disparate Punishment*, 41 AM. J. CRIM. L. 91 (2013). See generally, Rachel E. Barkow, *Institutional Design and the Policing of Prosecutors: Lessons from Administrative Law*, 61 STAN. L. REV. 869, 876–884 (2009), in regard to the dangers inherent in contemporary prosecutorial power.

²⁹ Using both observational and interview data, I also address the issue of how charging practices contribute to inequality in all four of my field sites in Mona Lynch, *Prosecutorial Discretion, Drug Case Selection, and Inequality in Federal Court*, 35 JUST. Q. 1309 (2018).

³⁰ This work is reported in Mona Lynch & Marisa Omori, *Crack as Proxy: Aggressive Federal Drug Prosecutions and the Production of Black-White Racial Inequality*, 52 L. & SOC’Y REV. 773 (2018).

crack drug weight in cases); 3) higher rates of crack defendants eligible for the safety valve; and 4) the relative use of several legal punishment enhancement tools.

Our conviction rate measure (our outcome measure) was designed to capture a combination of case selection and pre-sentence processes. We calculated the rate of white defendants convicted in federal court relative to the white population in the district and the rate of black defendants convicted in federal court relative to the black population across all cases.

We ran multiple regression models that included crack cases in the outcome measure to capture the direct effect of crack cases on inequality, and then we removed crack cases to assess the spillover effect on the rest of the criminal caseloads. We included several proxy variables to control for relative crack usage in each district, among a number of other controls.

Our hypothesis was confirmed. In particular, the share of crack cases prosecuted in a district in any given year predicted the degree of racial disproportionality in conviction rates for all criminal defendants. Put simply, the more crack cases, the more likely that blacks, relative to whites, were prosecuted and convicted in the district.

Figure 5: Conviction Rate Inequality x % of Crack Cases in Caseload



As illustrated in the left graph of Figure 5, the rate of inequality nearly doubled from the lowest to highest crack-prosecuting districts. It may seem like common sense to predict that crack prosecutions would directly contribute to inequality in who is charged and convicted in federal court, given that the federal crack war was infamously disproportionately waged against African-American defendants

(although I should note that in any given district-year, the data reflected the full range, from 0-100% of crack defendants being black).³¹

But even when we removed crack cases from our measures of inequality, crack prosecutions were still significantly associated with racially unequal criminal justice outcomes for all other kinds of cases. As illustrated in the right graph, black-white inequality grew by more than 20% as a function of crack prosecution rates.

This finding of a “spillover effect” suggested to us that aggressive crack prosecutions may operate as the proverbial canary in a coalmine, signaling broader institutional bias where they prevail. It also brought home one point I’ve tried to make clear in this talk—that inequality in legal systems is not simply the product of aberrational, individual bias of those who do not adhere to the rules. Rather, the rules themselves provide opportunities to produce systemic bias through their lawful application. In this case, the crack laws (and the sentencing provisions that attend them), which prosecutors can use within their lawful discretion in a tempered or profligate manner, are a direct mechanism for producing inequality.

I want to end by thinking through varied forms of inequality in federal courts that seem to be emerging under the current administration (and, no, the First Step Act³² does not wipe out my trepidation).

Before his departure as Attorney General, Jeff Sessions essentially declared a stepped-up war on the kinds of crimes that have been the most subject to racially disparate enforcement in the federal system—drugs, immigration, gangs, guns—and then he devised a set of policies to wage that war. Early in his tenure, Sessions directed federal prosecutors to prioritize “illegal immigration and violent crime, such as drug trafficking, gang violence, and gun crimes.”³³ A few months later, he issued a memorandum that laid out prosecutorial policy that, among other things, rescinded the Holder policy on more parsimonious use of drug mandatory minimums.³⁴ In 2018, he announced a “zero-tolerance” policy on illegal entry, requiring prosecutors in border districts to file criminal charges against all those suspected of attempted or completed undocumented entry into the U.S. and

³¹ See generally, DORIS MARIE PROVINE, *UNEQUAL UNDER LAW: RACE IN THE WAR ON DRUGS* (2007). See also, U.S. Sent’g Comm’n, *1995 Report to the Congress: Cocaine and Federal Sentencing Policy*, at 154 (1995), <https://www.ussc.gov/research/congressional-reports/1995-report-congress-cocaine-and-federal-sentencing-policy>; U.S. Sent’g Comm’n, *2007 Report to the Congress: Cocaine and Federal Sentencing Policy* (2007), <https://www.ussc.gov/research/congressional-reports/2007-report-congress-cocaine-and-federal-sentencing-policy>; U.S. Sent’g Comm’n, *Report to the Congress: Cocaine and Federal Sentencing Policy* (2007) available at: http://www.ussc.gov/Legislative_and_Public_Affairs/Congressional_Testimony_and_Reports/Drug_Topics/200705_RtC_Cocaine_Sentencing_Policy.pdf.

³² First Step Act of 2018, Pub. L. 115–391, 132 Stat. 5194.

³³ Press Release, U.S. Dep’t of Justice, Office of Pub. Aff., Att’y Gen. Sessions Directs Fed. Prosecutors to Target Most Significant Violent Offenders (Mar. 8, 2017), in JUSTICE NEWS, <https://www.justice.gov/opa/pr/attorney-general-sessions-directs-federal-prosecutors-target-most-significant-violent> [<https://perma.cc/6VBE-SF27>].

³⁴ See Memorandum from Att’y Gen. Jeff Sessions to All Fed. Prosecutors (May 10, 2017), <https://www.justice.gov/opa/press-release/file/965896/download> [<https://perma.cc/7WQP-6NUZ>].

encouraging the aggressive use of various criminal statutes in immigration cases.³⁵ Since Sessions' departure, there is no sign from the Department of Justice that these initiatives are being put on hold or rescinded.

And while it is still too early to fully assess how these policies have impacted case characteristics and outcomes, we are starting to get glimpses of how the federal criminal system is operating under this renewed war. The indications are that the new tough-on-crime policies are indeed over-targeting non-whites with some potentially harmful impacts.

I am back in the field in my four districts, doing a sort of *Hard Bargains* redux and I am extending the longitudinal case outcome dataset to see how these new politics and policies are trickling down into legal practice and actual case outcomes. While I cannot draw too many conclusions yet, suffice it to say that it is equally fascinating, and even more infuriating and depressing this time around. What I am seeing converges with anecdotes I am hearing from a number of districts.

Along the Southwest border, for instance, the zero-tolerance prosecutorial policy in regard to undocumented immigrants appears to have had the perverse effect of decreasing serious crime prosecutions, including of the very kinds of crimes that Sessions had publicly declared to be priorities, such as large-scale drug trafficking. The assembly line of immigration prosecutions has simply swallowed up resources.

There also appears to be a racial bifurcation as to who's being charged in federal court in response to the current opioid epidemic. This is not surprising given the administration's rhetoric³⁶ (backed up by a Sessions' memo)³⁷ that has called for the death penalty for opioid dealers where death results. The targets in this rhetoric have been portrayed by the administration in the most vile, racialized ways. In my Southeast district, for instance, I've observed that whites are disproportionately likely to be treated as the "victims" of the epidemic, and aggressive federal prosecution of persons of color who deal in even small amounts of opioids is the response.

The war on immigration has spawned some other troubling practices. In my Northeast district, the aggravated identity theft mandatory minimum (it is a 2-year consecutive add-on to the base sentence) is now being regularly used against undocumented immigrants who have used others' social security numbers for

³⁵ Press Release, U.S. Dep't of Justice, Office of Pub. Affairs, The Attorney General Announces Zero-Tolerance Policy for Criminal Illegal Entry (Apr. 6, 2018), in JUSTICE NEWS, <https://www.justice.gov/opa/pr/attorney-general-announces-zero-tolerance-policy-criminal-illegal-entry> [https://perma.cc/3FPN-47YR].

³⁶ *Remarks by President Trump on Combatting the Opioid Crisis*, WHITEHOUSE.GOV (Mar. 19, 2018), <https://www.whitehouse.gov/briefings-statements/remarks-president-trump-combatting-opioid-crisis/> [https://perma.cc/E4HM-KPHJ].

³⁷ Memorandum from Atty' Gen. Jeff Sessions to U.S. Att'ys, Guidance Regarding Use of Cap. Punishment in Drug-Related Prosecutions (Mar. 20, 2018), <https://www.justice.gov/file/1045036/download> [https://perma.cc/4WSN-CW4P].

employment. This was one of Sessions' suggested practices, being taken up differentially around the country.

These anecdotal observations from the current regime may well portend the return to the discriminatory, exceptionally punitive practices that characterized the worst of the late-20th century "war on crime." However, as my own and others' research has demonstrated, this renewed war will be waged with different intensities and will have distinct contours as a function of local legal norms and social relations.

What that means for efforts aiming to mitigate the racially harmful impacts of the criminal system is that it is not enough to just reform formal law and policy. We need to be vigilant to the myriad ways that law takes form as localized action, and encourage efforts at the local level to intervene where harms are produced. Thank you.