Tilting the Scales of Discretion: The Redistribution of Sentencing Discretion Following Mandatory Minimums

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The authority of sentencing discretion has historically resided within the judiciary;[2] however, the imposition of mandatory minimum sentences purports to reduce judicial discretion in sentencing. Mandatory minimum sentences determine the sentencing floor, establishing at least a minimum term in which a defendant must be incarcerated post-conviction.[3] As the judiciary is bound by these fixed minimums, a sentencing judge retains essentially no power to impose a sentence below the legislatively prescribed term.[4] Although the intention of mandatory minimum sentences was to promote fairness in sentencing and bolster criminal deterrence, the restriction on individualized sentences suggests that the power of discretion has simply been redistributed from the hands of the judiciary to the charging decision of the prosecution.[5] Proponents of minimum mandatory sentences profess that these measures can be used to circumscribe judicial sentencing discretion.[6] As minimum mandatory sentences set a fixed sentencing floor,[7] one would expect the standardization of sentencing disparities to follow.

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[2] *See* SARA BETH LEWIS, *Book Review: Fear of Judging: Sentencing Guidelines in the Federal Courts – Has Federal Sentence Reform Failed?*, 82 MARQ. L. REV. 901, 919 (1999) (detailing how a great degree of federal sentencing authority has been transferred from the judicial branch to the executive branch through the creation of the Sentencing Commission).

[3] 4 REFORMING CRIMINAL JUSTICE: PUNISHMENT, INCARCERATION, AND RELEASE 117 (Erik Luna ed., 2017).

[4] *Id.* at 119.

[5] *How Mandatory Minimums Perpetuate Mass Incarceration and What to Do About It,* THE SENTENCING PROJECT (Feb. 14, 2024), https://www.sentencingproject.org/fact-sheet/how-mandatory-minimums-perpetuate-mass-incarceration-and-what-to-do-about-it/.

[6] CHARLES DOYLE, CONG. RSCH. SERV., RL32040, FEDERAL MANDATORY MINIMUM SENTENCING STATUTES 1 (2013).

[7] FRED BUTCHER, AMANDA CISSNER & MICHAEL REMPEL*, When Incarceration Is Automatic: Mandatory Minimums and Race,* CENTER FOR JUSTICE INNOVATION (Dec. 16, 2022), https://www.innovatingjustice.org/resources/when-incarceration-is-automatic-mandatory-minimums-and-race/.

I. FEDERAL SENTENCING GUIDELINES POST-*BOOKER*

Under the Sentencing Reform Act of 1984, the U.S. Sentencing Commission promulgated the Federal Sentencing Guidelines in an attempt to neutralize disparity in sentencing for those convicted of similar offenses.[8] Congress chiefly attributed these sentencing disparities to boundless judicial discretion.[9] The guidelines initially imposed a mandatory structure, thereby prompting judges to sentence according to the sentencing range required for the convicted offense.[10] In *United States v. Booker*, the Supreme Court rendered the Federal Sentencing Guidelines advisory, rather than mandatory.[11] Post-*Booker*, the sentencing court may merely consider the Guidelines when making sentencing decisions, as the statutory ranges ceased to act as a mandatory bind on judicial sentencing discretion.[12] The elimination of sentencing disparity, which was unquestionably determined Congress's principal goal in adopting the Sentencing Guidelines, was not congruent with a system of mandatory sentencing.[13]

In the period following the *Booker* decision, however, the difference between the average Sentencing Guideline minimum and average sentence imposed generally increased in cases where judicial discretion could be meaningfully assessed.[14] This indicates that judicial discretion in sentencing had at least some influence on the outcome of sentencing disparities.[15] Once the Federal Sentencing Guidelines were deemed advisory, and judicial discretion in sentencing was partially

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[8] *See* CHARLES DOYLE, CONG. RSCH. SERV., R41697, HOW THE FEDERAL SENTENCING GUIDELINES WORK: AN ABRIDGED OVERVIEW 1 (2015) (discussing how the congressional intent of the Sentencing Guidelines was nation-wide consistency in sentencing for defendants with similar criminal records who were convicted of similar crimes).
[9] United States v. Booker, 543 U.S. 220, 293 (2005) (Stevens, J., dissenting).
[10] Doyle, *supra* note 8, at 1.
[11] *Booker*, 543 U.S. at 246.
[12] *Id.* at 245.
[13] *Id.* at 292 (Stevens, J., dissenting).
[14] U.S. SENTENCING COMM'N, *The Influence of the Guidelines on Federal Sentencing*, at 24 (Dec. 2020).
[15] *Id.*

restored, sentencing disparities doubled.[16] Demographic differences in federal sentencing exist particularly in cases where a sentence of imprisonment has been imposed.[17] Compared to White males, Black males receive lengths of incarceration that are 4.7 percent longer, and Hispanic males receive lengths of incarceration that are 1.9 percent longer.[18] Disparities in sentencing endure, in part, because of the discretion that is afforded to the judiciary to depart from the Sentencing Guidelines.[19] Interestingly, studies of judicial variation in sentencing suggest that the application of mandatory minimums yield the appearance of interjudge consistency.[20] Presently, the disparities in sentencing that remain may be attributed to prosecutorial discretion in charging and the reliance on mandatory minimums.[21]

II. PROSECUTORIAL DISCRETION IN CHARGING MANDATORY MINIMUMS

In the doing of justice, prosecutors maintain the power to decide whether or not to charge.[22] The prosecution decides which charges to bring against a defendant; whether or not to offer a plea; and whether to offer a sentence recommendation.[23] As Justice Breyer contends, mandatory minimums "transfer sentencing power to prosecutors, who can determine sentences through the charges they decide to bring."[24] One of the primary criticisms of mandatory minimum statutes is that the inconsistencies in sentencing, which the Federal Sentencing Guidelines were fashioned to resolve, have now been reintroduced through prosecutorial discretion rather than the former

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[16] CRYSTAL S. YANG, *Have Interjudge Sentencing Disparities Increased in an Advisory Guidelines Regime? Evidence From Booker*, 89 N.Y.U L. REV. 1268, 1333 (2014).
[17] U.S. SENTENCING COMM'N, *Demographic Differences in Federal Sentencing*, at 5 (Nov. 2023).
[18] *Id.*
[19] *Race and Sentencing*, NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS (Nov. 23, 2022), https://www.nacdl.org/Content/Race-and-Sentencing.
[20] Yang, *supra* note 16 at 1312.
[21] *Id*. at 1323.
[22] Memorandum from Att'y Gen. Kathleen Jennings to Deputy Att'ys Gen. and Staff (Feb. 15, 2019) (available at https://news.delaware.gov/files/2019/02/Memo-Internal-Policy-Changes-2.15.pdf).
[23] *Id.*
[24] Harris v. United States, 536 U.S. 545, 571 (2002) (Breyer, J., concurring).

judicial discretion in sentencing.[25] The prosecutor chooses whether or not to charge a defendant with a mandatory-eligible crime and a sentencing judge must adhere to the statutorily prescribed minimum.[26] As our justice system operates through an exchange of checks and balances, there is concern that sentencing power has been removed from neutral judges and placed into the hands of adversarial prosecutors.[27]

Despite the adoption of minimum mandatory sentences, which were pledged to reinstate fairness and congruence in sentencing, disparities in sentencing still remain.[28] Specifically, Black people tend to receive sentences tacked with mandatory minimums more frequently than White people.[29] Moreover, the majority of those that receive sentences for federal drug-related offenses, which typically are subject to mandatory minimums, are Black and Hispanic.[30] Beyond statistical deviations, critics of mandatory minimums assert that these statutes contribute to mass incarceration, prison overcrowding, and cause far-reaching harm to families and communities.[31]

III. INTERNAL POLICIES AROUND MANDATORY MINIMUMS

Clearly, this shift in sentencing power did not invite the eradication of disparity; however, hope for improvement remains through recent policies adopted by the United States Attorney General's office. At the federal level, the Office of the Attorney General has recognized the disproportionality in sentencing caused by the proliferation of mandatory minimum sentences and has since advised its federal prosecutors to tailor their charging discretion.[32] When exercising

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[25] Harris, 536 U.S. at 571 (Breyer, J., concurring).
[26] *How Mandatory Minimums Perpetuate Mass Incarceration and What to Do About It, supra* note 5.
[27] BARBARA S. VINCENT & PAUL J. HOFER, *The Consequences of Mandatory Minimum Prison Terms: A Summary of Recent Findings*, FEDERAL JUDICIAL CENTER, at 21 (1994).
[28] *How Mandatory Minimums Perpetuate Mass Incarceration and What to Do About It*, *supra* note 5.
[29] *Id.*
[30] *Id.*
[31] *Id.*
[32] Memorandum from Att'y Gen. Merrick Garland to All Federal Prosecutors (Dec. 16, 2022) (https://www.justice.gov/d9/2022-12/attorney_general_memorandum_-_general_department_policies_regarding_charging_pleas_and_sentencing.pdf).

charging discretion, the charges which carry mandatory minimums should "ordinarily be reserved for instances in which the remaining charges would not sufficiently reflect the seriousness of the defendant's criminal conduct, danger to the community, [or] harm to victims."[33] Other routine evaluations have been implemented to check prosecutorial discretion and ensure consistency, such as requiring charging and plea agreements to be reviewed by a supervising attorney.[34]

The Attorney General's approach to drug-involved offenses has been refined in recent years to accommodate the social criticisms of mandatory minimum sentences.[35] Mandatory minimum charges, with a distinct force, apply to drug offenses under Title 21 of the United States Code: sentences are determined based on drug type and quantity, and have resulted in disproportionately severe sentences and racial disparities.[36] In response, federal policy instructs prosecutors to refrain from charging a defendant with a mandatory-eligible offense if the defendant satisfies a list of criteria.[37] The criteria include the defendant's use of violence, lack of participation in a criminal organization, trafficking, or violent gang, and the defendant's relevant criminal history.[38] If a prosecutor determines that some but not all of the criteria are satisfied, they are discouraged from automatically charging the mandatory-eligible offense before consulting with their supervisors and carefully determining the appropriate charge.[39] Similarly, state-specific internal policies to reverse these trends of disparity include a mandatory presumption not to charge multiple minimum mandatory crimes, the requirement for supervisor approval to declare a

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[33] Memorandum from Att'y Gen. Merrick Garland to All Federal Prosecutors (Dec. 16, 2022) (available at https://www.justice.gov/d9/2022-12/attorney_general_memorandum_-_additional_department_policies_regarding_charges_pleas_and_sentencing_in_drug_cases.pdf).
[34] *Id.*
[35] Memorandum from Att'y Gen. Merrick Garland to All Federal Prosecutors (Dec. 16, 2022) (available at https://www.justice.gov/d9/2022-12/attorney_general_memorandum_-_additional_department_policies_regarding_charges_pleas_and_sentencing_in_drug_cases.pdf).
[36] *Id.*
[37] *Id.*
[38] *Id.*
[39] *Id.*

defendant a habitual offender (which increases sentencing outcomes), and encouraging alternatives to prosecution for misdemeanor possession of marijuana.[40]

IV. CONCLUSION

Discretion remains an integral part of our justice system. The essence of discretion rests in the personal decision making of judges and prosecutors, composed of their own experiences, acquaintance with the facts of a case, and at times, their bias. The cost of discretion is the disparity that arises from prosecutorial charging decisions and judicially imposed sentences. The cost of uniformity in a system that eradicates all discretion, however, is the sacrifice of individualized judgements. As it stands, prosecutors remain with the power to charge, while judges have the ultimate authority in sentencing. The forces that perpetuate an inequitable and disparate system scarcely lend themselves to one targeted solution. An improved criminal justice system may be one that focuses on eliminating bias among those that wield the power of discretion. Bias in charging decisions may be upended by implementing racial, socioeconomic, and implicit bias trainings as prosecutors continue to exercise discretion. This proposed fairness may also be achieved through the frequent review of uniform office policies and their documented effectiveness. As such, internal policies may be assessed for their ability to insulate charging discretion from bias and whether they have demonstrated a reduction in sentencing disparities among certain demographics. Above all, the efforts taken to achieve a justice system that operates upon equity must not lose sight of the value of discretion.

[40] Memorandum from Att'y Gen. Kathleen Jennings to Deputy Att'ys Gen. and Staff, *supra* note 22.