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Abstract

As the US prison population continues to rise despite the significant decrease in crime rates, scholars and social activists are demanding comprehensive reforms to the penal system that disproportionately affects minorities and the poor and has become a significant burden on the taxpayers. This paper examines some of the processes that contributed to the rise of the modern day carceral state, such as the determinate sentencing reform and the proliferation of mandatory minimum sentencing. It also explores the unintended consequences of these penal developments and traces the reaction and subsequent resistance to these sentencing schemes from the judiciary, as well as other sources. Finally, this paper examines the dynamics of power between various actors in the struggle for meaningful reforms in the penal system and argues for a concerted action aimed at stimulating meaningful action from the legislature that has so far largely abstained from major efforts at reforming the criminal justice system.

Keywords

penal system reform, mandatory minimum sentences, determinate sentencing

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Abstract

As the US prison population continues to rise despite the significant decrease in crime rates, scholars and social activists are demanding comprehensive reforms to the penal system that disproportionately affects minorities and the poor and has become a significant burden on the taxpayers. This paper examines some of the processes that contributed to the rise of the modern day carceral state, such as the determinate sentencing reform and the proliferation of mandatory minimum sentencing. It also explores the unintended consequences of these penal developments and traces the reaction and subsequent resistance to these sentencing schemes from the judiciary, as well as other sources. Finally, this paper examines the dynamics of power between various actors in the struggle for meaningful reforms in the penal system and argues for a concerted action aimed at stimulating meaningful action from the legislature that has so far largely abstained from major efforts at reforming the criminal justice system.

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Introduction

Harsh mandatory minimum sentences are not unique to the US justice system, nor are they a recent development. From the “eye for an eye” justice of the Hammurabi’s Code (Johns, 1904) to the US federal laws of 18th century that prescribe a “mandatory 10-year minimum prison term for causing a ship to run aground by using a false light” (Luna & Cassell, 2010, p. 9), harsh mandatory punishments have been a feature of justice systems throughout the world. What is unique in the modern US justice system is the extent of the use of mandatory minimum sentences, the vastness of the array of crimes that are covered by mandatory minimum statutes, and the effect that these laws have had on the incarceration rates and the size of prison population over the last four decades. As the negative consequences of these laws became increasingly severe and both social and economic costs mounted, social advocacy groups and academia have responded with increasing criticism and demand for changes to the justice system. Among this backlash, a peculiar pattern of judicial activism has emerged with courts striving to restore judicial discretion in sentencing and establishing a new system of collaborative courts that aim to divert offenders from incarceration and into treatment programs. This ongoing contest between the legislative and judicial branches is particularly interesting when viewed through the prism of a larger struggle for policy and law making powers between these two branches of the government. As Horowitz (1977) argued in his examination of the judicial powers, courts have greatly expanded their policy making capacity through a series of key Supreme Court decisions that have affected countrywide policy changes, infringing on the domain of the legislative branch and its sole capacity for law making.

Mandatory Minimum Sentences

Mandatory minimum sentences are a product of legislative statutes that prescribe sentences for particular offenses and oftentimes force judges to impose harsher sentences for particular sets of aggravating circumstances, such as gun possession or gang affiliation. With over 170 mandatory minimum penalties in the Federal Criminal Code alone (U.S. Government Printing Office, 2010) and countless similar statutes passed by state legislatures, mandatory minimum sentences have come to dominate the penal system and cover a wide variety of criminal offenses. Some mandatory minimum sentencing statutes, like the Rockefeller Drug Laws in New York and the Federal Anti-Drug Abuse Act of 1986, automatically trigger prescribed mandatory sentences for simple possession and possession with intent to distribute certain legislatively determined and codified amounts of various illicit substances. Other statutes deal with issues such as gang membership, like the Illinois Unlawful Possession of a Firearm by a Street Gang member law, by imposing additional penalties on gang members for carrying a firearm outside of their homes (Kizer, 2012). Though varying in severity and scope, these statutes have one common theme, in that they leave little room for judicial discretion and effectively place sentencing power in the hands of the legislature that creates these statutes and the prosecutors who choose which charges to file against the offender.

One of the earliest examples of a radical shift away from the rehabilitation approach to solving social problems, and towards a mandatory sentencing framework, was the adoption of the Rockefeller Drug Laws in New York (Mann, 2013). Proposed by Nelson Rockefeller, who at that time was the governor of New York, and passed by the state legislature in

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1973, these laws established harsh mandatory minimum sentences for drug possession and distribution, and created sentence enhancements for offenses committed under the influence of illicit substances. Even though Governor Rockefeller had previously viewed drugs as a social, rather than a criminal problem, the passage of these laws came in the wake of the declaration of the war on drugs by President Nixon and the rise in popularity of the “tough on crime” approach that accompanied the shift to the determinate sentencing model (Mann, 2013).

Determinate Sentencing Reform

The determinate sentencing reform that shifted penal practices towards mandatory minimum sentences was a response to the widespread criticism of the vast discrepancies in sentencing under the previous indeterminate model of sentencing and a call for a more just system characterized by consistency and fairness (Frankel, 1972). Since judicial discretion was viewed as a cornerstone of the system that allowed similarly situated offenders to be sentenced to drastically different punitive terms, the Sentencing Reform Act of 1984 completely overhauled federal sentencing procedures, imposing strict limits on judicial discretion in sentencing (Cassidy, 2009).

The supporters of the determinate sentencing model have argued that the system of legislatively prescribed sentences effectively punishes, incapacitates, and deters offenders from committing future crimes (Lowenthal, 1993). For instance, Tittle and Rowe (1974) found that certainty of imprisonment deters the commission of offenses. These findings indicate that a system of harsh mandatory punishment creates a greater general deterrent effect and sends a message to all potential criminals that crimes would be punished in a certain, predictable and harsh manner

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without exceptions and hope for leniency from the judge. Mandatory minimum sentences are also viewed by their supporters as useful tools for prosecutors and law enforcement officials. The potential of a harsh mandatory sentence can induce cooperation from the offender in exchange for reducing the charges and can lead to greater success in complex investigations as well as induce plea bargaining that avoids costly trials and saves time and money for the justice system and taxpayers (Luna & Cassell, 2010).

Prior to the determinate sentencing reform, the indeterminate sentencing model coupled with the rehabilitative approach to corrections allowed prison and parole officials to exercise their discretion in releasing inmates who were sentenced to an indeterminate sentence that ranged from a lower to an upper limit imposed by a judge. While this model allowed for a greater flexibility of the system and for an individual examination of each offender's case and personal circumstances, criticism of the disparity in sentencing of similar offenders as well as that of the rehabilitative model of corrections led to a series of reforms and a move towards the determinate sentencing model dominated by mandatory minimum sentencing statutes. This transition effectively transferred discretionary powers from the judicial branch and corrections departments to the legislation passing these statutes and the executive-prosecutorial side of the system that implemented them (Luna & Cassell, 2010).

Although the seeds of the reform had already been planted with various laws such as the Crime Control and Safe Streets Act of 1968 that included mandatory sentencing enhancement for gun possession, the dismantling of the rehabilitation model of corrections can be traced to Martinson's report on the efficacy of the rehabilitative programs in prisons

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entitled *What works? Questions and answers about prison reform* (Martinson, 1974). Also known as the “nothing works” report, this examination of 231 studies of the efficacy of rehabilitation in prisons did not find any tangible results produced by these programs. The report’s findings allowed critics of the disparity in sentencing that hinged on offenders’ alleged rehabilitation and subsequent early release to launch a legislative campaign that ushered in an era of determinate sentencing and major reductions in funding for rehabilitative programs in prisons. In 1989, the Supreme Court affirmed the legitimacy of this shift in its decision in *Mistretta v. United States* (1989), determining that the possibility of rehabilitation should not be a factor in sentencing. This decision also upheld the legitimacy of the Sentencing Reform Act of 1984 that established the US Sentencing Commission as an expert agency designed to significantly curb judicial discretion in sentencing through the creation of the Sentencing Guidelines.

These guidelines came into effect in 1987 and were designed to provide sentencing judges with a prescribed sentence depending on the circumstances of the case. Punishment was effectively limited to the ranges offered by the guidelines and the rigidity of the compulsory nature of these guidelines significantly curbed judicial discretion. While the Supreme Court upheld the constitutionality of the Sentencing Commission in *Mistretta*, many critics questioned the alleged expertise of the Commission, as well as its legitimacy given the fair amount of legislative power that was transferred to it by Congress (Luna & Cassell, 2010).

Ironically, while the Sentencing Guidelines were intended by the legislative branch to curb judicial discretion, they also contained a unique check on the possible abuse of the

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executive power. While the new sentencing structure transferred discretionary authority in sentencing from the judicial to the executive branch by allowing prosecutors to determine which charges to pursue, it also endowed judges with the authority to serve as the fact finding body which enabled them to impose sentences harsher than those that were prescribed for the charges filed by the prosecutors (Starr & Rehavi, 2013). Designed to limit prosecutorial power used to coerce defendants into pleading guilty by threatening to file harsher charges at trial, this power of fact finding has not only failed its purpose, but on the contrary, has led to instances of judges imposing unjustifiably harsh sentences.

While the departure from the indeterminate sentencing model, which gave broad powers of discretion to sentencing judges and parole boards, is often justified by claims of resulting standardization of sentencing of similarly situated offenders, the extreme severity of the newly emerged determinate sentencing model based on legislatively prescribed harsh mandatory minimum sentences can, in large part, be attributed to the portrayal of crime in national media and the subsequent effects of media coverage on the public's perception of crime.

Media and Mass Hysteria

As major networks and their news programming faced stiffer competition in the late 1980s and early 1990s from an explosion of new channels, all-news networks, and later the internet, economic pressures and a drive for profits pushed them away from "hard news" and towards a greater emphasis on sensationalist reporting of crime stories (Beale, 2006). As a result, despite the falling crime rates, crime became the leading topic covered in the evening news shows in the 1990s. While fewer than 100 murder stories per year were featured on the

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news between 1990 and 1992, that number rose to 511 between 1997 and 1999, with greater prevalence of criminal trials and investigations in the news coverage than of political and social issues (Beale, 2006). This drastic increase in crime coverage created an atmosphere of fear through which various civil liberties have been curtailed by the enhanced power of the government and the increased ease of prosecution (Simon, 2007).

Along with the increased coverage of crime in the news, crime-themed programming that Wacquant (2010) referred to as “crystallization of law-and-order pornography” (p. 206) has also permeated commercial media. Hamilton’s (1998) exploration of this phenomenon reveals that the level of violence in television programming is directly related to broadcasters’ attempts to attract particular audiences and is also dependent on the products to be advertised. As specific brand identities are established and promoted to specific audiences, violence levels in the media are adjusted to maximize programming attractiveness to advertisers with little regard for accurate representation of societal issues (Beale, 2006).

News media’s presentation of violent crime as a widespread phenomenon directed public attention to crime as a perceived social issue of great importance, and greatly influenced the criteria by which the public judges proposed and existing public policies, as well as how it views its officials and candidates for office (Beale, 2006, Simon 2007). Politicians responded to this mass hysteria with “tough-on-crime” slogans, and by 1992, political debate on the relative merits of punishment and rehabilitation had all but disappeared, as the consensus of “law and order” was reached by both political parties (Platt, 2011). With political rhetoric echoing

disproportionate coverage of crime on television and in print, the United States justice system embarked on an unprecedented punishment spree that helped to make America “the single most punitive Western nation and the world’s imprisonment leader” (Luna & Cassell, 2010, p. 22).

The Federal Anti-Drug Abuse Act of 1986 that established federal mandatory minimum sentences for drug offenses was enacted by Congress as a response to the mass hysteria over the crack cocaine epidemic (Luna & Cassel, 2010). This rise in public concern was flamed by the media during a decade-long campaign that painted a picture of crack as being widespread, highly addictive, and a major cause of violent crimes despite the lack of evidence to support such claims (Reinarman & Levine, 2004). Adding to the hysteria and the calls for drastic measures was the “crack babies” myth, largely based on limited and questionable research that failed to take into account compounding factors, such as malnourishment, lack of prenatal care, alcohol and tobacco abuse, as well as personal medical histories. Presented to the public without any empirical evidence, the myth persists today despite substantial amounts of research showing that crack cocaine does not cause extensive damage as claimed by various experts on television shows, and that the damage that can be attributed to the use of crack cocaine can be reversed with proper medical care and a stable home environment (Reinarman & Levine, 2004).

Some magazines and newspapers later published retractions and articles admitting that the crack cocaine problem had been greatly exaggerated (Reinarman & Levine, 2004). Yet, the 100 to 1 sentencing disparity between cocaine and crack cocaine created by the Anti-Drug Abuse Act in 1986 persisted until 2010 when the Fair Sentencing Act lowered this

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discrepancy to 18 to 1. The influence of the media's inaccurate and greatly exaggerated portrayal of the crack cocaine epidemic can be seen in the failure of the Fair Sentencing Act to reduce sentencing disparity to the intended 1 to 1 ratio, with some opposing politicians predicting the return of inner city violence that would endanger children (Luna & Cassell, 2010).

Similar media-fueled hysteria has led to a significant reform of the juvenile justice system. Despite national crime statistics indicating a decline in crime rates, several academics created and promoted an idea of an upcoming generation of juvenile "super-predators" (Pizarro, Chermak & Gruenewald, 2007), who were "radically impulsive, brutally remorseless youngsters, including ever more pre-teenage boys, who murder, assault, rape, rob, burglarize, deal deadly drugs, join gun toting gangs and create serious communal disorders" (Bennett, Dilulio, & Walters, 1996, p. 27). Although Dilulio later admitted to being wrong about the emergence of these "super-predator" juveniles (Becker, 2001), the damage had been done. Overestimating the volume and seriousness of the crime for which the juvenile offenders were responsible, almost all states passed legislation allowing the transfer of juvenile offenders to adult justice systems and subjecting them to mandatory minimum sentences, including sentences of life in prison without possibility of parole (Roberts, 2004).

Driven by political ambition, moral panic, and diminishing discussion of social issues in the media, determinate sentencing reforms and mandatory minimum sentences triggered an unprecedented growth of the correctional and justice system in the United States. With academics arguing that the modern penal system creates, and subsequently subjugates, a new underclass of the poor and minorities through selective

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enforcement and negative stigmatization (Alexander, 2012), or controls a surplus of workforce population through increased criminalization and reduction in social welfare programs (Wacquant, 2010), the consequences of the determinate sentencing reform have been scrutinized and critiqued at great length.

Consequences and Efficacy of Mandatory Minimum Sentences

One of the most tangible consequences of the determinate sentencing reform and the increased severity of punishments has been the significant increase in prison populations across the United States. Federal prison population has increased tenfold since 1980, while the average length of a federal sentence doubled and the average length of a federal drug sentence tripled (Luna & Cassell, 2010). According to the Bureau of Justice Statistics, there were approximately 6,937,600 offenders under some form of correctional supervision in the United States in 2012, of which 2,228,400 were incarcerated in prisons and local jails (Glaze & Herberman, 2013). At the same time, the spending on both the federal and states' correctional systems has increased 660% between 1982 and 2006 (Seiter, 2011). This increase is considerably greater than the increase in the police and judicial spending combined (Seiter, 2011). With estimated costs of incarcerating an offender being between \$20,000 and \$40,000 per year (Spelman, 2009), the federal corrections costs alone increased by 925% between 1982 and 2007 to an annual budget of \$5.4 billion (U.S. Government Printing Office, 2010).

Proponents of the system of severe punishment have argued that increased incapacitation of violent offenders creates a specific deterrent effect by limiting offender's ability to

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recidivate (Shinnar & Shinnar, 1975; Mueller, 1992). This argument, however, ignores the current lack of rehabilitative programs in prisons, which in turn may lead to inmates picking up criminal activities and skills from other inmates and furthering their criminal careers upon their release. It also fails to account for the possibility of incapacitated criminals being replaced on the street by other individuals in the community (Piehl, Useem & Dilulio, 1999). In the particular case of drug offenders, the argument for further prison expansion runs contrary to the principle of diminishing returns. As Piehl, Useem and Dilulio (1999) demonstrated, when the most serious offenders are apprehended, “prison growth requires the criminal justice system to reach deeper into the pool of prison-eligible offenders, such that increases in incarceration are less and less cost-effective” (p. 12). The increase in sentence severity for violent crimes – as well as drug offenses – has created a net widening effect that increased the punitiveness of the justice system as a whole, with many offenders serving jail and prison sentences when the severity of their crime does not warrant such harsh sentences (Morris & Tonry, 1991).

The increasing costs of maintaining a large prison population, and the judicial apparatus required to process large numbers of offenders have drained state budgets and caused a decrease in numbers of law enforcement officers on the job. Corman and Mocan (2000) demonstrated in their research that putting more officers on the street led to a significant reduction in crime rates. Their study examined records from a crime analysis unit of the New York Police Department, as well as records from various other city agencies for a 30-year period since 1970. They compared crime rates with numbers of police officers employed by the city and revealed that increases in

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numbers of police officers corresponded with significant reduction in robberies, burglaries, and motor vehicle theft, as well as minor reduction in murder and assault rates. They supplemented their study with research examining the effect of economic factors on crime rates (Corman & Mocan, 2005). Using the data from their previous research, they looked at the relationship between crime rates and unemployment rate, as well as minimum wage and prison population. The study also examined the effect of arrests regardless of whether they resulted in convictions. They found that a decline in unemployment rate corresponded to declining rates for burglaries and motor vehicle theft. Increased numbers of arrests corresponded to decreases in crime rates and were consistent with increases in the numbers of police officers employed by the city. Combined with the results from their previous research, these findings indicate that increased certainty of punishment through increases in police presence and arrests, along with improved economic conditions, can effectively lower crime rates. Their findings, with regards to a lack of a relationship between crime rates and prison population, however, suggest that increases in prison population do not have a deterrent effect and do not contribute to decreasing crime rates (Corman & Mocan, 2005). The above referenced research and findings are supported by similar research by Evans and Owens (2006), who examined the effect of the Community Oriented Policing Services program aimed at increasing the number of police officers by providing federal funding to state and local agencies for hiring and training purposes. Their examination of 2074 cities and towns in the 11 year period starting in 1990 revealed significant reductions in motor vehicle theft, burglaries, robberies and aggravated assaults, which

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corresponded to the increase in number of police officers on the job (Evans & Owen, 2006).

The critiques of increased use of incarceration as a means of increasing general deterrence have also been supported by Durlauf and Nagin (2011), who demonstrated that California's Three Strikes Law has managed to reduce the felony crime rate by only 2%. They also argued that the declining crime rates were not a direct result of such laws, since the analysis of annual data demonstrated not only that crime rates have begun to decline prior to their existence, but also that the rate of the decline has remained constant and has appeared to be unaffected by these laws and statutes (Durlauf & Nagin, 2011).

In addition to sapping the resources from law enforcement, the increased spending required to support long sentences and large numbers of prison inmates created by the determinate sentencing reform have also contributed to the underfunding of the prosecutors. As Gershowitz and Killinger (2011) pointed out, due to the lack of funding, most prosecutors are overburdened with caseloads. Such conditions have resulted in prosecutors committing inadvertent mistakes that may have led to the incarceration of an innocent person, or a not guilty verdict for a guilty one. This lack of resources and manpower has also led to trial delays, which often results in guilty pleas by innocent people in exchange for a sentence of time already served while awaiting trial. Although underfunded and undermanned, the prosecutors remain one of the most powerful court agents. While judicial discretion has been severely limited by the determinate sentencing reform and the introduction of mandatory minimum sentences and mandatory enhancements, prosecutors still have the ultimate decision power over which

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charges are going to be filed and which crimes are to be prosecuted.

Despite the fact that prosecutors are oftentimes motivated to bring harsher charges and achieve higher conviction rates due to their career ambitions (Boylan & Long, 2005), some prosecutors began exercising their discretion and charging offenders with lesser crimes to avoid lengthy sentences of incarceration in response to the introduction of California's Three Strikes laws (Gershowitz & Killinger, 2011).

Overwhelmed and overworked, prosecutors are forced to circumvent the existing mandatory sentencing laws in order to restore the element of justice to the current system of punishment. However, while prosecutorial discretion can serve as a safeguard for the justice system, it can also result in a violation of one of the fundamental rights guaranteed by the constitution, the right to trial. As Marvell and Moody (2000) demonstrated in their comprehensive study of the effect of determinate sentencing laws on trial delay and rates, determinate sentencing laws increase court delays and generally cause a decline in the rates of jury trials. Mandatory enhancements and charge-based sentencing also allow the prosecution to decide the degree of leniency that courts may consider. As Lowenthal (1993) pointed out,

Prosecutors can charge mandatory enhancement allegations in all cases in which there is a factual basis for doing so, even when sufficiently mitigating circumstances indicate that the enhancement provisions should not be enforced. The mandatory sentencing consequences of a guilty verdict pressure defendants, who otherwise might test the state's evidence, into accepting guilty pleas. Indeed, a legislature can make

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charge-based mandatory punishment so commonplace and severe that few if any defendants will be willing to chance a trial. (p. 78)

And as Luna and Cassell (2010) concluded in their review of mandatory minimum sentencing scheme:

... [A] number of studies suggest that the use of federal mandatory minimums has tended to generate disparate sentences among similarly situated offenders. The claim of crime reduction has been contested as well, with most researchers finding no deterrent effect from mandatory sentencing laws. The statistics also seem to belie categorical assertions of government necessity. The rate of cooperation (or “substantial assistance”) in mandatory minimum cases is comparable to the average in all federal cases, while most recipients of federal drug minimums are couriers, mules, and street-level dealers, not kingpins or leaders in international drug cartels. (pp. 19-20)

Restoring Judicial Discretion in Sentencing

While testifying before the Congressional Subcommittee on Crime, Terrorism, and Homeland Security in the hearing on mandatory minimum sentences and their unintended consequences in 2009, Chief Judge Julie Carnes, speaking on the behalf of the Judicial Conference of the United States, stated that mandatory provisions

...[S]weep broadly, sweeping in both the egregious offender as well as other less culpable offenders who may have violated the statute. Necessarily, the sentence that may be appropriate for the most egregious offender will often be excessive for this less culpable person. (U.S. Government Printing Office, 2010, p. 35)

Her statement was seconded by Texas Judge Ted Poe, who stated that “Congress cannot, even in its great wisdom, pass appropriate legislation to cover every type of criminal case that there is because there are no two cases alike” (U.S. Government Printing Office, 2010, p. 33). Both of these statements reflect a growing judicial frustration with mandatory minimum sentencing schemes and their effect on sentencing structure. This frustration has led to judicial activism that resulted in a series of Supreme Court cases that amended the role of the Sentencing Guidelines and restored a measure of judicial discretion in sentencing.

In the early 2000s, the U.S. Supreme Court began redefining its Sixth Amendment jurisprudence with *Apprendi v. New Jersey* (2000) and *Blakely v. Washington* (2004). Although the Court did not discuss the Sentencing Guidelines at length, it held in both cases that any fact that increases a defendant’s sentence must be proven beyond a reasonable doubt to a jury despite its previous refusals to extend trial phase procedural protection to sentencing hearings (Cassidy, 2009). Similarly to *Apprendi* and *Blakely*, *United States v. Booker* (2005) dealt with the issue of fact-finding authority of judges and the provision of the Sentencing Guidelines that mandated judges to impose sentences within the specified ranges. While the jury found Booker guilty of possessing at least 50 grams of crack cocaine, the sentencing judge found additional evidence and, following the Sentencing Guidelines, increased his minimum sentence by 20 years. The Court ruled that since this provision of the Guidelines was mandatory and binding on all judges, it violated the Sixth Amendment. The Court’s decision made Sentencing Guidelines effectively advisory and allowed district courts to deviate from them during sentencing. In addition to confirming

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its new interpretation of its Sixth Amendment jurisdiction in *Booker*, the Court also reintroduced the role of judicial fact-finding during sentencing, by allowing judges to deviate from the Sentencing Guidelines necessitating further clarifications of this decision.

In *Rita v. United States* (2007), the Court reiterated its position on the advisory nature of the Guidelines by stating that courts of appeals may, although not required to, presume that a sentence within the Guidelines is reasonable. It also stated that appellate courts must treat judges' choice of sentence with deference (Cassidy, 2009). In *Kimbrough v. United States* (2007), the Supreme Court overturned the vacating of a sentence by the Court of Appeals and ruled that a sentence outside the guidelines range was reasonable, even when based on the district judge's disagreement with the 100:1 sentencing disparity in crack cocaine vs. cocaine cases. The Court further promoted district judges' discretion in *Gall v. United States* (2007) by ruling that an appellate court may not reverse a sentence based on the fact that it might have reached a different conclusion. The Court reaffirmed that deference must be given to district judges' discretion and that the totality of all circumstances must be taken into consideration during the sentence review by an appellate court (Cassidy, 2009). Following *Kimbrough* and *Gall*, district courts were free to exercise their discretion in sentencing crack and powder cocaine offenders, and to deviate from the 100:1 ratio established by the Sentencing Guidelines and the Anti-Drug Abuse Act in 1986.

This restoration of judicial discretion in sentencing remains a controversial issue. In his dissent in *Booker*, Justice Stevens predicted the return of the sentencing disparities that necessitated the Sentencing Reform Act of 1984, and the 2010

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and 2013 reports of the U.S. Sentencing Commission appears to support his opinion, finding that the black-white sentencing gap among similarly situated offenders has quadrupled since the *Booker* decision (Sessions et al., 2010). However, a study conducted by Bourassa and Andreescu (2009) to examine sentencing disparities and racial inequality in Kentucky, demonstrated that 34% of interracial differences in sentencing can be explained by the characteristics of each case, with the use of public attorneys being one of the most significant variables contributing to these differences. While these findings demonstrate the existence of systemic problems that go beyond judicial discretion in sentencing, Starr and Rehavi (2013) found that pre-sentencing decisions of prosecutors have substantial consequences on the disparity in sentencing and find that racial disparity in sentencing did not increase since *Booker*.

The Rise of the Collaborative Courts

Born out of judicial frustration with the cyclical nature of treatment of drug offenders, as well as the mentally ill and the homeless by the justice system, collaborative courts aim to emphasize cooperation between all courtroom agents involved in promoting treatment and rehabilitation of offenders to achieve meaningful resolutions of social problems. These courts include specialized courts for veterans, drug users, delinquent juveniles, domestic violence cases, and for addressing many other social problems that a conventional justice system is ill equipped to deal with.

Convinced of the justice system's failure to adequately address social problems, state courts began to deviate from imposing harsh prison and jail sentences in the late 1980s. Encouraged by the success of the experimental Miami-Dade Drug Court established in 1989, judges in other states began

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establishing their own versions of such diversionary programs within state courts' administration (Wolf, 2005). While the legislature remained unwilling to tackle the problem of inefficient and ineffective drug enforcement practices in the justice system, despite several reports from the Sentencing Commission urging reform, state judiciaries have organized a concerted effort to bring together drug users and treatment programs. The California Drug Court Task Force appointed by Chief Justice George brought together judges, prosecutors, defense attorneys, probation staff and treatment providers to facilitate the coordination of services to those in need of them (Wolf, 2005).

As collaborative courts have decreased caseloads and diverted non-violent offenders from state prisons and local jails, there is a growing movement towards adapting the practices of collaborative courts to the conventional adversarial courts (Farole, Puffet & Rempel, 2005).

However, despite the successes of collaborative courts illustrated by a study that found Stanislaus County drug courts to produce a 1:13 cost-benefit ratio (Carey, Crumpton, Finigan & Waller, 2005), they are not a perfect solution to the variety of social problems that the justice system has been forced to deal with. As Leon and Shdaimah (2012) pointed out, collaborative courts can have a negative effect on those they strive to serve by coercing them into compliance with the program, which forces them to either plead guilty or assume a stigma of deviance in order to receive services. The practice of coercion that is used to facilitate participation in more cost-effective collaborative courts raises concerns over the due process rights of defendants who are threatened with harsher punishment if they choose to fight their cases. Additionally, collaborative courts rely on the threat of

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future punishment in order to ensure compliance with court mandated treatments and supervision programs. Quinn (2009) pointed out that amidst the stories of success, stories of people who fail out of these programs get overlooked, despite the fact that these people oftentimes get sent to prison to serve longer sentences than they would have if they went through the conventional justice system. While an imperfect solution, the collaborative courts have been forced to attempt reforms from inside the justice system, in the absence of meaningful legislative action, and have contributed to the growing awareness of alternative solutions to various social problems.

Recent Changes: Who's Got the Power?

As discussed earlier, despite the criticism of the determinate sentencing scheme from academics, the Judicial Conference of the United States, and various non-profit organizations such as the Families Against Mandatory Minimums (FAMM), American Civil Liberties Union (ACLU), and Law Enforcement Against Prohibition (LEAP), legislatures have been reluctant to implement significant changes to the justice system. As Graham (2011) pointed out, instead of amending flawed statutes, “political forces typically place upward pressure on criminal punishments or encourage adherence to the status quo” (p. 769). Although the passage of the Fair Sentencing Act of 2010 might appear to be the rare case of legislative initiative to amend the justice system, the examination of underlying forces behind this reform reveals a persistent pattern of reluctance to implement changes.

As judges and academics began to speak out against the 100:1 sentencing disparity between cases involving crack cocaine and powder cocaine in the 1990s, the Sentencing Commission began an investigation into the efficacy of this

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sentencing policy. Drafted as a response to the congressional demand to examine cocaine sentencing policy, Sentencing Commission's 1995 report found that, "1) the 100:1 ratio was disproportionate to the harms associated with the two drugs; 2) courts could address the harms associated with crack through specific non-drug-related enhancements; and 3) crack penalties fell disproportionately on lower-level participants, most often African-Americans" (Cassidy, 2009, p. 114). These findings, along with the recommendations for reform, were echoed in three subsequent reports in 1997, 2002, and 2007, but received no response from Congress. Following the 2007 report, the Commission took action itself and implemented changes to the Sentencing Guidelines that retroactively reduced average crack cocaine sentence by 15 months. In addition to the actions taken by the Sentencing Commission, a concerted lobbying campaign by the coalition of advocacy groups, such as the National Association for the Advancement of Colored People (NAACP), ACLU, and The Sentencing Project – as well as some of the Christian conservative and law enforcement organizations that joined the movement – have prodded Congress to implement changes that were demanded by President Obama and Attorney General Holder (Gotsch, 2011).

Among other notable recent changes in sentencing policy are Colorado Amendment 64 and Washington Initiative 502, both of which legalized recreational use of marijuana despite federal classification of the drug as a schedule one substance. Supported by state government officials, lawyers, clergy members, and health officials, both of these reforms were passed by popular vote during statewide referenda, indicating a growing trend to bypass legislature in achieving criminal justice reforms.

This trend is also evident in recent changes to California's justice system with Proposition 36 amending the state's Three Strikes law in 2012, and the recently passed Proposition 47 reducing punishments for some non-violent offenses and permitting retroactive resentencing. Proposition 36 was supported by several county district attorneys, law professors, NAACP, and the Democratic party and passed with 69.3% of the vote. Proposition 47 passed with 59.3% of the vote, but received a much greater bipartisan support. While many district attorneys and sheriffs opposed Proposition 47, its supporters included, among many others, both Democratic and Republican politicians, as well as the NAACP, ACLU, The Sentencing Project, Victim/Survivors Networks, and various women's, religious, and health organizations. Although these changes were not brought forth by state legislatures, the increase in the number and diversity of supporters for meaningful changes in criminal justice has the potential to spur legislatures to action, as was the case with Congress' passage of the Fair Sentencing Act of 2010.

Courts have also demonstrated their ability to force action from the legislature. In *Brown v. Plata* (2011), the Supreme Court declared that California's prison overcrowding violated the Eighth Amendment to the Constitution. The Court ordered the state to reduce its prison population to 137.5% of its correctional system's design capacity, but allowed the state to decide on the means by which it would be done (*Brown v. Plata*, 2011). Forced to take action, California's legislature responded to this decision by passing the Assembly Bill (AB) 109 and AB117, also known as the Realignment Legislation. Under the policy introduced by these bills, the newly sentenced non-violent felony offender will now serve their sentence in county jails

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rather than state prisons, and persons found to be in technical violations of their probation can no longer be returned to state prisons and must be sanctioned to county jails or other alternative sanctions, such as house arrest and intensive probation. Although realignment reform did decrease California's state prison population by nearly 30,000 people, it has merely shifted the focus of correctional control to county probation departments and jails (Quan, Abarbanel & Mukamal, 2014), demonstrating the inability of courts to force meaningful changes without supportive legislative action.

Conclusion

As Rosenberg (2008) pointed out, without significant political and administrative support, courts are limited in their capacity to enact sweeping changes to social institutions. The controversy of the *Booker* decision, coupled with certain negative aspects of using collaborative courts to solve social problems, indicate the lack of suitability of the court system to be the source of comprehensive justice reforms. Court initiatives, however, combined with the growing movement of social advocacy groups and non-governmental agencies can influence legislative action and bring about constructive changes to the justice system. The persistence of lobbying by non-governmental groups and courts' demonstrations of plausible alternatives to the mass incarceration policy have prompted the Department of Justice review of all phases of the criminal justice system. Following this review, Attorney General Holder launched the Smart on Crime campaign aimed at reforming the justice system through amending Department of Justice's policies and practices, as well as seeking political support and action from Congress (Department of Justice, 2013). Now, more than ever, there appears to be some political support for meaningful reforms.

In August of 2013, a bill was introduced in the senate called the Smarter Sentencing Act. If passed, this legislation will make the Fair Sentencing Act of 2010 retroactive, reduce mandatory minimum sentences for drug offenses, and expand the existing “safety valve” exception for federal drug offenses that allows judges to sentence offenders below the mandatory minimum sentence if they meet certain criteria (H.R. 3382, 2013). The proposition of this bill in Congress, however, is not enough, as similar bills have been voted down before. A concerted rigorous campaign by advocacy groups, judges, and social movements must persist and continue to prod legislatures to take action.

State and federal legislatures have the ultimate power to create and fund alternative institutions that can address various social problems. While legislatures failed to exercise a measure of restraint when dealing with moral panics in the past, only they have the power to correct their mistakes through meaningful legislative reform. However, where Horowitz (1977) sees an ongoing struggle for policymaking between the courts and legislatures, and where Rosenberg (2008) denies courts the power to enact changes on their own, there exists a much more intricate power dynamic. While legislatures do hold the true power to change the system, courts can greatly influence and empower reluctant politicians. Through their decisions in legal cases, courts provide legitimacy and empower social advocacy groups, while the successes of the collaborative courts strengthen their demands for alternative means of dealing with social problems. These advocacy groups, along with the courts, increase societal awareness of both the problem and the possibility of reform. It is that awareness and the changes in public opinion that can create a tipping point and force

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politicians to abandon the old adage of “tough on crime” and embrace smarter and more efficient policies and practices.

Societal changes do not occur overnight, nor do they occur in a vacuum of legislative action. All social agents and institutions hold a measure of power to bring forth meaningful changes in the criminal justice reform. The real change, however, will only happen when, and only if, all of these actors play their parts in an intricate scheme of power distribution in today’s society.

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