

# A Commentary on Judicial Discretion, Mandatory Minimums, and Sentencing Reform



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Now that we have seen a decade since the Supreme Court decided *United States v. Booker*,<sup>1</sup> it is fair to ask just what impact *Booker* has really had on federal sentencing. Studies have been conducted looking at every angle of the post-*Booker* world—from measuring the amount of racial disparity that remains in sentencing,<sup>2</sup> to the rate at which district judges continue to give within-Guidelines sentences.<sup>3</sup> The underlying message is that judicial discretion in an advisory Guidelines world could possibly result in drastically changed sentencing outcomes. However, what is often the missing piece in the post-*Booker* analysis is the handcuffing role of mandatory minimum sentencing laws. Even as the Supreme Court says that sentencing judges are free to disagree with the policies set forth in the Sentencing Guidelines and to sentence according to their own views of what makes a sentence reasonable under the factors found in 18 U.S.C. 3553(a),<sup>4</sup> Congress has put limitations on that discretion by mandating minimum sentences for several offenses. Over the years, there has been mounting criticism of these mandatory minimums from several stakeholders, including judges, policymakers, legislators, and defense attorneys.<sup>5</sup> Removing mandatory minimum laws in order to reduce incarceration has become a theme in sentencing reform discussions.<sup>6</sup> There is a link, then, between sentencing reform and judicial discretion. When one talks about how sentencing has changed with the theoretical increase of judicial sentencing discretion post-*Booker*, one must also acknowledge the role that mandatory minimum sentencing has played in curbing that discretion. Further, when one talks about reducing the use of mandatory minimum sentencing laws, one should acknowledge the increased sentencing freedom that such a move will grant to district court judges. In this way, the reform of sentencing laws has the potential to heighten the impact that *Booker* will have on federal sentencing in the next decade.

Current economic conditions tell us that sentencing reform is inevitable. Just as many states are feeling the consequences of costly over-incarceration, so too is the federal government aware of the fiscal burden of over-reliance on prisons. In its *FY 2014 Annual Report*, the United States Sentencing Commission explained:

In light of the increasing costs of incarceration and the ongoing overcapacity of the federal prison system, beginning in fiscal year 2014, the Commission

made implementing its mandate at Section 994(g) of the Sentencing Reform Act, which requires that the guidelines “minimize the likelihood that the federal prison population will exceed the capacity of the federal prisons,” an overarching policy priority.<sup>7</sup>

According to the report, the Bureau of Prisons was 32 percent overcapacity in FY 2014, with a majority of inmates being drug offenders.<sup>8</sup> Consequently, federal sentencing reform has focused heavily on adjusting the sentences applicable to drug trafficking offenses.<sup>9</sup>

Of course, when drug sentencing is at issue, so are mandatory minimum laws. The U.S. Sentencing Commission has reported that “[i]n 23.6% of all cases in 2014, the offender was convicted of an offense carrying a mandatory minimum penalty.”<sup>10</sup> Over two-thirds of these cases—67.8 percent, to be exact—were drug trafficking offenses.<sup>11</sup> In 2014, just over half (52%) of federal drug offenders were convicted of an offense carrying a mandatory minimum sentence.<sup>12</sup> Although not all of those offenders were ultimately sentenced to a mandatory minimum penalty, 46 percent were, which is still a hefty proportion of drug offenders.<sup>13</sup> The actual sentencing outcomes were meaningful, with drug offenders subject to a mandatory minimum penalty and receiving an average sentence of 127 months, which was 87 months longer than the average sentence for a drug offender not convicted of an offense carrying a mandatory minimum sentence.<sup>14</sup>

Mandatory minimums make an impact outside of drug offenses as well. For example, 77.5 percent of 924(c) firearms offenders<sup>15</sup> were subject to a mandatory minimum penalty at sentencing.<sup>16</sup> The number was 78.0 percent for Armed Career Criminals.<sup>17</sup> Some might say that such mandatory sentencing is appropriate, given a concern about gun violence. Whatever your position on this subject, what is clear is that the applicable sentences are quite lengthy for a high percentage of offenders—an average 171 months for 924(c) offenders and 206 months for Armed Career Criminals.<sup>18</sup>

Although it’s unknown what judges would do if these mandatory minimum sentences were repealed, it is obvious that the mandatory minimum sentences have a real bearing on the sentences imposed. Of course, we already live in an age where not all offenses are subject to a mandatory minimum sentence, so in those cases, judges arguably already have wide sentencing discretion. However, as

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already explained, current mandatory minimum sentencing laws affect a large number of cases, and either a majority or nearly a majority of cases in specific categories. If those mandatory laws did not apply, the world of applicable sentences would open greatly for judges sentencing those offenses. What is unclear is to what extent judges would take advantage of this freedom.

Although it might be obvious that removing or reducing mandatory minimum sentencing laws would increase judicial discretion, it is worth stressing that the sentencing reform efforts should make room for the development of alternative resources to inform judicial discretion. This is especially significant in the case of drug crimes—a category of offenses for which reform calls are the loudest. If mandatory minimum sentencing laws were no longer an issue in many cases, judges would be left with the Federal Sentencing Guidelines as their sole source of formalized sentencing information. However, in this decade post-*Booker*, judges are slowly increasing their discretion to sentence outside of the Guidelines range. In 2013, 51.2 percent of all cases were sentenced within the applicable Guidelines range.<sup>19</sup> This number dropped to 46 percent in 2014.<sup>20</sup> Whereas most (78.5%) of the sentences imposed in 2014 were in accord with requests from the Government, the Sentencing Commission reported that, “[i]n fiscal year 2014, 21.4 percent of the sentences imposed were departures or variances below the guideline range other than at the government’s request, compared to 18.7 percent in fiscal year 2013.”<sup>21</sup>

Apparently, judges are (slowly) becoming more willing to impose sentences that neither the prosecution nor the Sentencing Guidelines recommend. It is important, then, to have other sources of data to inform judges on how to best accomplish sentencing goals and purposes. If a prior mandatory minimum sentencing law was too long, and the advisory Guidelines range is not reasonable under the 3553(a) factors, then how should a judge decide what sentence is actually appropriate? We could return to pre-Sentencing Reform Act days, when judges used their own intuitions about punishment to make these decisions. However, if sentencing reform is going to truly reform the practice of sentencing, there must be a focus on sentencing purposes and goals.<sup>22</sup> One way of doing this is to develop and use sentencing resources—experts, studies, data, and the like—that will give judges relevant information on available types of sentences and their likely impacts on individuals, families, communities, and other offenders.

Removing mandatory minimum sentences may be the last barrier in fully unleashing judicial discretion in the manner allowed by *Booker*. In this way, reforming sentencing laws could play a meaningful role in shaping the impact of the *Booker* decision and the reach of judicial sentencing discretion. The question is, if the abolition of

many of the mandatory minimum sentences is realized (which this author believes would be a good thing), what will become the new guide for judges in fashioning reasonable sentences? One hopes this inquiry will not be lost as sentencing reform efforts gain traction.

## Notes

- <sup>1</sup> *Booker*, 543 U.S. 220 (2005).
- <sup>2</sup> See William Rhodes, Ryan Kling, Jeremy Luallen, Christina Dyou, *Federal Sentencing Disparity: 2005–2012*, Bureau of Justice Statistics (October 2015), [www.bjs.gov/content/pub/pdf/fsd0512.pdf](http://www.bjs.gov/content/pub/pdf/fsd0512.pdf).
- <sup>3</sup> See United States Sentencing Commission, *Annual Report Fiscal Year 2014*, available at <http://www.ussc.gov/research-and-publications/annual-reports-sourcebooks> [hereinafter *FY 2014 Annual Report*].
- <sup>4</sup> *Kimbrough v. United States*, 552 U.S. 85, 91 (2007); *Spears v. United States*, 555 U.S. 261, 265–67 (2009) (per curiam).
- <sup>5</sup> For a comprehensive look at the arguments against mandatory minimum sentences and those making such arguments, visit the website of Families Against Mandatory Minimums, at <http://famm.org/>.
- <sup>6</sup> See, e.g. Lauren-Brooke Eisen and Greg Torres, *Mandatory minimum sentences—Time to end counterproductive policy*, South Coast Today, June 9, 2015, <http://www.southcoasttoday.com/article/20150609/OPINION/150609441>; see also Brennan Center for Justice, *103 Top Police Chiefs and Prosecutors Urge End to Mass Incarceration* (October 21, 2015), <http://www.brennancenter.org/press-release/130-top-police-chiefs-and-prosecutors-urge-end-mass-incarceration>; see also Imani M. Chettiar, Michael Waldman, Nicole Fortier, and Abigail Finkelman, *Solutions: American Leaders Speak Out on Criminal Justice*, Brennan Center for Justice, April 27, 2015, <https://www.brennancenter.org/publication/solutions-american-leaders-speak-out-criminal-justice>.
- <sup>7</sup> *FY 2014 Annual Report* at A-2.
- <sup>8</sup> *Id.*
- <sup>9</sup> *Id.* at A-2–A-3.
- <sup>10</sup> United States Sentencing Commission, *Quick Facts: Mandatory Minimum Penalties 1* (2014), [http://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Quick\\_Facts\\_Mand\\_Mins\\_FY14.pdf](http://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Quick_Facts_Mand_Mins_FY14.pdf).
- <sup>11</sup> *Id.*
- <sup>12</sup> *Id.* at 2.
- <sup>13</sup> *Id.*
- <sup>14</sup> *Id.*
- <sup>15</sup> Offenses under 18 U.S.C. § 924(c) involve the use or carrying of a firearm during and in relation to a crime of violence or drug trafficking crime, or the possession of a firearm in furtherance of those crimes.
- <sup>16</sup> *Id.*
- <sup>17</sup> *Id.*
- <sup>18</sup> *Id.*
- <sup>19</sup> *FY 2014 Annual Report* at A-5.
- <sup>20</sup> *Id.*
- <sup>21</sup> *Id.*
- <sup>22</sup> For a more developed argument about incorporating sentencing purposes into sentencing practice, see my article, *Forget Sentencing Equality: Moving from the “Cracked” Cocaine Debate Toward Particular Purpose Sentencing*, 18 Lewis & Clark L. Rev. 95 (2014).