Prosecutorial Discretion across Federal Sentencing Reforms: Immediate and Enduring Effects of Unwarranted Disparity

by

Mario V. Cano

A Dissertation Presented in Partial Fulfillment
of the Requirements for the Degree
Doctor of Philosophy

Approved November 2015 by the
Graduate Supervisory Committee:

Cassia C. Spohn, Chair
Xia Wang
Kevin A. Wright

ARIZONA STATE UNIVERSITY

December 2015

ABSTRACT

Contemporary research has examined the relationship between determinate sentencing reforms and unwarranted punishment disparities in states and the federal criminal justice system. Recent investigations suggest that legal developments in federal sentencing—namely, the High Court's rulings in *U.S. v. Booker* (2005) and *Gall/Kimbrough v. U.S.* (2007) which rendered and subsequently reaffirmed the federal guidelines as advisory—have not altered disparities associated with imprisonment outcomes. Punishment disparities following *Booker* and *Gall*, particularly racial and ethnic disparities, have been linked to Assistant U.S. Attorneys' (AUSAs) use of substantial assistance departures. What remains unanswered in the literature is whether the changes in AUSAs' decision making following the landmark cases has enduring effects and whether the effects are conditioned by defendants' race/ethnicity and the type of case (guidelines cases or mandatory minimum cases), and whether the use of substantial assistance varies across U.S. District Courts.

Accordingly, these questions are examined using sentencing data from the U.S. Sentencing Commission, coupled with data from the National Judicial Center, U.S. Census Bureau, Uniform Crime Reports, and Interuniversity Consortium for Political and Social Research. This study looks at 465,476 defendants convicted from fiscal year 2001 to fiscal year 2010 across 89 federal districts. A series of multilevel discontinuity regression models are estimated to assess the short-term and long-term effects of the *Booker* and *Gall/Kimbrough* decisions on AUSAs' use of substantial assistance departures, accounting for contextual differences between federal district courts.

The results show that AUSAs are less likely to seek motions for substantial assistance immediately and in the long term in the post-*Booker* period but are more likely to seek substantial assistance in the long term in the post-*Gall/Kimbrough* period. These effects, however, are restricted to the models that include all cases and guidelines cases. The interaction models show that Hispanic defendants facing a mandatory minimum sentence are less likely to receive a substantial assistance departure immediately and in the long term following the Court's *Booker* decision. Moreover, the use of substantial assistance varies across federal districts. The results are discussed in relation to their implications for theory, courts and sentencing policy, and future research on punishment outcomes.

ACKNOWLEDGMENTS

Completion of this project would not have been possible without the support and dedication of many people. In addition to the support given by my family, particularly my mother, there are many other amazing individuals deserving of recognition. Foremost, I would like to express my sincere gratitude to my chair, Dr. Cassia Spohn, for her patience, guidance, and immense knowledge, especially her support during the difficult times. I could have not asked for a better mentor. My sincere thanks also goes to dissertation committee member, Dr. Xia Wang, for her expertise, advice, and patience over the last few years. I am also very grateful to committee member, Dr. Kevin Wright, for his support and dedication.

A special thank you to Dr. Scott Decker for his leadership and support of my doctoral education and career. In 2008, Dr. Decker and Dr. Spohn gave me an opportunity for which I am profoundly grateful. I am equally thankful to Dr. Travis Pratt for his mentorship, especially for his friendship during the most challenging time of my life. I would also like to extend my sincere appreciation to Dr. L. Thomas Winfree for his friendship, mentorship, and encouragement over the last decade. I am exceptionally grateful to Dr. Robert Fornango for his patience and guidance during the first few years of my doctoral education. I give thanks to Shannon Stewart for her support of my education and the dissertation process. I also thank Dan Zorich and his staff for their support during the summer of 2014. I would like to extend my appreciation to the Department of Sociology at Kansas State University.

I would like to acknowledge my fellow doctoral students and colleagues at Arizona State University who also made completion of this project possible. I am

indebted to Andrea Borrego, Jillian Turanovic, and Bryan Eisentraut. I do not have the words to express what your friendship and support has meant to me during the most difficult and uncertain time of my life. I also wish to thank my friends, Marc Ruffinengo, Natalie Ortiz, Rick Moule, Laura Beckman, Chantal Fahmy, Clair White, and Alyssa Borrego for being so supportive during my extensive recovery. A warm thanks to Byung Bae Kim for his friendship, the intense discussions on theory, and his guidance during my research. I want to give a special acknowledgement to the extremely talented guys from my doctoral cohort—David Pyrooz, Scott Wolfe, and John Cooper. You all embody the true meaning of kindness and friendship.

TABLE OF CONTENTS

Page

LIST OF TABLES viii

LIST OF FIGURES x

CHAPTER

1 INTRODUCTION 1

Federal Sentencing Context 6

Research Issues and Gaps 11

Theoretical Justification for Change in Prosecutorial Discretion 12

Temporal Effects of Unwarranted Punishment Disparities 16

Contextual Variation in Courts and Sentencing Outcomes 19

The Current Study 21

Organization of the Dissertation 23

2 BACKGROUND 25

Thirty Years of Federal Sentencing Reforms 25

Determiante Sentencing Era 25

Legislative Directives and Case Law in Federal Sentencing 35

Mandatory Minimum Penalties, Substantial Assistance Downward Departures, and Racial and Ethnic Disparities 42

Sentencing Research 52

Prosecutorial Discretion and the Circumvention of Mandatory Sentences 52

CHAPTER Page

Federal Sentencing Reforms and Unwarranted Disparities.....59

Social Contexts of Sentencing and Substantial Assistance Departures.....65

3 THEORETICAL PERSPECTIVES AND RESEARCH HYPOTHESES 73

Assistant U.S. Attorneys' Decision Making Across Reforms 75

Racial and Ethnic Disparities in Assistant U.S. Attorneys Decision Making.....78

Contextual Variation in Assistant U.S. Attorneys' Decision Making 84

4 DATA AND METHODS 88

Data 88

Empirical Measures.....91

Dependent Variable 91

Defendant-Level and Case-Level Variables 92

Time-Level and District-Level Variables 94

Analytic Strategy 98

Plan of Analyses 103

5 RESULTS 105

Descriptive Statistics 105

Predicted Probabilities.....111

Case-Level Effects.....112

Change in Assistant U.S. Attorneys' Decision Making.....114

CHAPTER Page

Racial and Ethnic Disparity Effects 119

Social Contextual Effects 121

6 DISCUSSION 128

Summary of Findings 131

Policy Implications 136

Directions for Future Research 138

Conclusion 141

REFERENCES 142

LIST OF TABLES

Table Page

1A. Correlation Matrix, Key Defendant-Level, Time-Level, and District-Level Variables, All Cases……..97

1B. Correlation Matrix, Key Defendant-Level, Time-Level, and District-Level Variables, Guidelines Cases……..97

1C. Correlation Matrix, Key Defendant-Level, Time-Level, and District-Level Variables, Mandatory Minimum Cases…….....97

2. Descriptive Statistics...……...106

3. Hierarchal Generalized Linear Models of Substantial Assistance Departures, Case-Level Variables……..113

4. Multilevel Discontinuity Regression Models of Sentencing Reforms on Substantial Assistance Departures...…….115

5. Multilevel Discontinuity Regression Models of Defendants' Race/Ethnicity and Sentencing Reforms on Substantial Assistance Departures……...…118

6. Unconditional Hierarchal Generalized Linear Models of Substantial Assistance Departures……..122

7. Multilevel Discontinuity Regression Models of Substantial Assistance Departures, Time-Level and District-Level Variables……..123

Table Page

8. Multilevel Discontinuity Regression Models of Substantial Assistance Departures, Time-Level and District-Level Variables, Control for U.S. Courts of Appeals…….124

9. Summary of Findings, Effects of *U.S. v. Booker* (2005) and *Gall/Kimbrough v. U.S.* (2007) and Social Contexts on Substantial Assistance Departures……..…132

LIST OF FIGURES

Figure Page

1. Substantial Assistance Departures, All Cases 51

2. Substantial Assistance Departures, Mandatory Minimum Cases.....51

3. Multilevel Hierarchical Nature of Sentencing Data..... 99

4. Predicted Probabilities of Receiving a Substantial Assistance Departure, All Cases……111

CHAPTER 1

INTRODUCTION

The advent of sentencing policy reforms across states and the federal criminal justice system—in the form of determinate schemes, such as presumptive guidelines and mandatory minimum and habitual offender statutes—has spawned a long-standing debate. The discussion stems from arguments on the effectiveness of such reforms aimed at heightening uniformity in sentencing practices by targeting and constraining the parameters of judicial discretion, reducing crime and drug offenses, and carrying out punitive sanctions for serious, violent offenders. Arguably the most important concerns encompassing the policy innovations are the broad, untamed authority afforded to already powerful prosecutors and the potential reintroduction of unwarranted disparity, particularly at the entry point of the criminal process: extralegal disparity that, in theory, the modern punishment reforms specifically sought to eliminate.[1] Reforms undertaken at the federal level are excessively restrictive and retributive relative to any other determinate structure concurrently enacted by a state legislature, for instance, guidelines sentencing schemes in Minnesota, Pennsylvania, and Washington State (Stith and Cabranes, 1998; Tonry, 1996). Indeed, critics contend that the shift to a determinate approach, epitomized by sentencing guidelines and the proliferation of mandatory minimum penalties, has transformed the course of charge and plea bargaining,

[1] While warranted disparity corresponds to the variation in sentencing resulting from legal characteristics (e.g., offense severity, criminal history, and sentence enhancements), unwarranted disparity encompasses the variation in sentencing that, independent of legal characteristics, results exclusively from extralegal characteristics, for instance, defendants' race and ethnicity, gender, age, or citizenship status (Blumstein, Cohen, Martin, and Tonry, 1983; Bushway and Piehl, 2001; Spohn, 2000; Stolzenberg and D'Alessio, 1994; see also Unnever, 1982). Unwarranted disparity and extralegal disparity are used interchangeably throughout this dissertation.

positioning the Assistant U.S. Attorney (AUSA) or prosecutor as the "driving force" of the federal criminal process (Weinstein, 2003: 98; see also Forst, 1999, Reitz, 2001; Stith and Cabranes, 1998; Tonry, 1992).

The rapid ascent of prosecutorial discretion in an era of formalized punishment schemes, which are particularly vulnerable to circumvention, may contribute to extralegal disparity, and thus enhance the disparate treatment of defendants. Early on, Blumstein and colleagues' (1983: 220) investigation of the effects of sentencing reforms on legal decision making uncovered "adaptive responses by officials who alter case-processing methods in order to circumvent new rules and procedures for some categories of offenders." This early finding is echoed by other courts and sentencing scholars' assessments of the association between legal reforms and racial and ethnic disparities (Bjerk, 2005; Engen and Steen, 2000; Farrell, 2003; Lacasse and Payne, 1999; Merrit, Fain, and Turner, 2006; Nagel and Schulhofer, 1992; Schulhofer and Nagel, 1997; Ulmer, Eisenstein, Johnson, 2010; Ulmer, Kurlychek, and Kramer, 2007).

Inquiries on whether unwarranted disparities persist following the inception of sentencing reforms have come to relatively different conclusions. The empirical literature on the effects of legal reforms demonstrates that sentencing guideline schemes across states—namely Minnesota, Ohio, and Pennsylvania—have led to modest but lower inconsistencies in charging, plea bargaining, and sentencing practices, especially disparities associated with race, ethnicity, gender, and parenting status (Blackwell, Simms, and Finn, 2008; Gorton and Boies, 1999; Griffin and Wooldredge, 2006; Koons-Witt, 2002; Miethe and Moore, 1985; Stolzenberg and D'Alessio, 1994; Wooldredge, 2009; Wooldredge and Griffin, 2005; Wooldredge, Griffin, and Rauschenberg, 2005).

Similarly, in federal district courts, although the determinate sentencing approach has considerably increased sentence severity, reductions in extralegal disparities, in judicial decisions particularly, have been linked to cases processed subsequent to the passage of the U.S. Sentencing Guidelines (Anderson, Kling, and Stith, 1999; General Accounting Office, 1992; Heaney, 1991; Hofer, Blackwell, and Ruback, 1999; Karle and Sager, 1991; U.S. Sentencing Commission, 1991; Waldfogel, 1991), although the extent of success (if successful at all) is largely governed by the type of offense, court jurisdiction, and outcomes at earlier stages of criminal case processing (Anderson et al., 1999; Hofer et al., 1999; Lacasse and Payne, 1999; Payne, 1997).

In the last decade, the study of discretion and disparity in the federal justice system has become complicated in wake of a series of legislative and administrative directives and U.S. Supreme Court decisions, most salient being the High Court's rulings in *U.S. v. Booker* (2005), *Gall v. U.S.* (2007), and *Kimbrough v. U.S.* (2007), which challenged the U.S. Sentencing Guidelines' legality. In the end, the wave of legal contingencies framed and subsequently reaffirmed the federal guidelines as discretionary or "effectively advisory" rather than mandatory as a result, reallocating to judges the discretion rescinded almost two decades earlier. With the exception of cases that remain under the purview of legislative mandatory minimums and thus under the auspices of prosecutors, judges were "liberated" from the long-running determinate sentencing scheme.

The recent punishment landscape has called on and drawn researchers to "identify and quantify the effects of this change and to learn whatever lessons this natural experiment might tell us about the federal sentencing system" (Hofer, 2007: 437; Engen,

2009, 2011; Frase, 2007; Spohn, 2011). Accordingly, an emerging body of literature has aimed to evaluate the sweeping changes in federal sentencing policy, focusing on whether the expansion of judicial discretion has led to an upsurge in extralegal disparity. Recent studies concluded that inequities in imprisonment, imprisonment severity, and judge-initiated departures (sentence discounts) have remained stable but have risen *modestly* for certain defendants, particularly Black and Hispanic males in the aftermath of the *Gall/Kimbrough v. U.S.* decisions (Farrell and Ward, 2011; Hofer, 2007, 2011; Schanzenbach and Tiller, 2008; Scott, 2009, 2010; Tiede, 2009a, 2009b; Ulmer and Light, 2010, 2011; Ulmer, Light, and Kramer, 2011a, 2011b; U.S. Sentencing Commission, 2010b, 2011a, 2012; see, however, USSC, 2006). Essentially, extralegal disparity in incarceration outcomes has remained relatively constant across reforms.

At the same time, the literature has examined the effects of determinate sentencing reforms on legal outcomes that precede final imprisonment decisions. Overall, these studies inexplicably found that the imposition of substantial assistance downward departures (i.e., 5K.1 departures)—discretionary sentence discounts exclusively at the hands of AUSAs—characterize the "locus of disparity in the wake of *Booker* and *Gall*" (Ulmer, Light, and Kramer, 2011b: 1102; see also Hofer, 2007; Ulmer and Light, 2010), to the extent that "greater disparity affecting Black and Hispanic males characterizes departure decisions heavily influenced by prosecutors more than judge-initiated departures" (2011a: 1107). That is, while extralegal inconsistencies in imprisonment and judicial downward departure decisions remained relatively stable over time, federal prosecutors were significantly less likely to seek sentence discounts through substantial

assistance departures for minority male defendants convicted post-*U.S. v. Booker* (2005) and post-*Gall v. U.S.* (2007).

The stream of evidence unequivocally demonstrates that the surge in disparity in the existing reform era is situated at the presentencing phase of the legal process. Thus, in the current federal sentencing context, a large part of unwarranted disparity stems from forces, to a certain extent, external to judicial discretion—AUSAs' decision making. What is more, the extralegal effects observed in sentencing outcomes, including the rise in incarceration severity, are most pronounced in cases marked by legislative mandatory minimums, cases well beyond the scope of federal judges' discretion (Maxfield and Kramer, 1998; USSC, 1991, 2004; 2011a; see also Anderson et al., 1999). Recent studies confirmed a positive relationship between racial minority groups and mandatory sentencing outcomes (Fischman and Schanzenbach, 2012; Rehavi and Starr, 2014; Starr, 2012; Starr and Rehavi, 2013; USSC, 2011a). Fischman and Schanzenbach (2012: 257), for instance, found that a statutory minimum was more likely for Black defendants following *Gall/Kimbrough v. U.S.*, but argued that the disparity effect may be attributable to changes in prosecutorial discretion, reflecting the "increased relevance of mandatory minimum penalties under a system of advisory Guidelines." A recent leading study of initial charging decisions and charge reductions in U.S. District Courts prompted courts and sentencing research on the key sentencing policy changes to place emphasis downstream of the criminal process. The conclusions that were reached suggested that "it is likely that such a dramatic policy shift would have important ripple effects through earlier stages of criminal case processing" (Johnson 2014: 115).

These findings speak to the allocation of discretion in a dual punishment scheme—the U.S. Sentencing Guidelines and statutory mandatory minimums. This raises the obvious possibility that the upsurge in AUSAs' discretion subsequent to the inception of the determinate sentencing era (1987 to 2005) may have been strictly confined to cases involving statutory mandatory sentencing. Considered together, the empirical evidence lends credence to the notion that substantial assistance departures and mandatory minimum penalties, both of which are within the domain of prosecutors' discretion, distort the criminal punishment process in the modern sentencing reform era and are, therefore, at the heart of unwarranted disparity.

The section below briefly reviews the modern sentencing policy reforms in the federal criminal justice system. Then, current research issues and gaps in the literature are addressed, including a description of the proposed study. Lastly, the structure of the dissertation is laid out.

FEDERAL SENTENCING CONTEXT

Four decades earlier, Andrew von Hirsch (1976: 98) articulated that, "Wide discretion in sentencing has been sustained by the traditional assumptions about rehabilitation and predictive restraint. Once these assumptions are abandoned, the basis for such broad discretion crumbles." In no other era of the American criminal justice system was this philosophy more central than during the latter half of the 20th century. Despite the popularity of determinate sentencing policies across the U.S. during the 19th century and first part of the 20th century, punishment throughout the 1950s and 1960s came under the dominance of the "medical model" and ushered in a series of landmark

U.S. Supreme Court decisions that compromised the "hands-off doctrine" that had characterized adjudication and correctional practices—due process and inmates' access to the courts (Lowenthal, 1993; Walker, 1997). What is more, judges, those practicing in the federal criminal justice system in particular, exercised unfettered discretion to tailor sentences to fit defendants and their offenses (Frankel, 1972; Tonry, 1996).

Individualized sentencing, which served as the major foundation of indeterminate sentencing, however, was relatively short lived. Opponents, calling on the states and the federal government to devise presumptive sentencing guidelines, sought to restrain judicial discretion and thus ensure uniformity in sentencing and eliminate unwarranted sentencing disparity (Frankel, 1972; von Hirsch, 1976). In addition to public resentment over leniency in sentencing practices and furor over public safety and soaring violent crime rates (Hatch, 1993; U.S. Department of Justice, 1996: 58), drug use, especially the consumption of crack cocaine (Musto, 1987: 274-277; Substance Abuse and Mental Health Services Administration, 2006: 21) was mounting during the mid-1980s. Furthermore, indeterminacy in custodial sentences—that is, sentences that are uncertain and quantifiably defined by a parole authority—was criticized as "cruel" and "degrading" (Frankel, 1972: 39). Soon thereafter, federal lawmakers passed the Sentencing Reform Act (SRA) of 1984. The SRA created the United States Sentencing Commission (USSC), which was charged with developing a guidelines scheme that, with few exceptions for modifications or circumvention, framed presumptive sentences based on offense severity and criminal history, removing the majority of discretion from judges while leaving prosecutors' discretion mostly untouched (Stith and Cabranes, 1998).

The federal sentencing process was further muddled, as two years later, Congress passed the Anti-Drug Abuse Act of 1986 (Pub. L. 99-570, 100 Stat. 3207), and, two years after that, the Omnibus Anti-Drug Abuse Act of 1988 (Pub. L. 100-690, 102 Stat. 4181). This unprecedented legislation created a series of unduly severe mandatory minimum penalties for drug trafficking, conspiracy to traffic drugs, simple possession of drugs, weapon use, and repeat offenses. Thus, the presumptive sentencing guidelines and mandatory minimums coexist in the federal criminal justice system. The simultaneous administration of mandatory minimums and guidelines, however, mandates judges to impose the sentence reflected in the mandatory minimum if the sentence is higher than the penalty specified under the federal guidelines (Hofer, 2000), as is typically the case (U.S. Government Accountability Office, 2003: 12; Schwarzer, 1992). This process has further eliminated judicial discretion, shifting most decision making to the charging and plea bargaining stages of adjudication. In fact, legal and sentencing scholars strongly contend that the enactment of mandatory minimums, and the guidelines scheme to a lesser extent, has steadily displaced discretion downstream from judges to prosecutors (Albonetti, 1997; Bjerk, 2005; Blumstein et al., 1983; Heaney, 1991; Nagel and Schulhofer, 1992; Schulhofer and Nagel, 1997; Stith and Cabranes, 1998; Tonry, 1996). This is of particular relevance in light of the federal sentencing policy reforms, as approximately 347,000 individuals are currently under the correctional supervision of the federal justice system (U.S. Department of Justice, 2014).

Although mandatory minimum penalties are compulsory by statute, three mechanisms exist by which defendants may sidestep the mandatory sentence. The first mechanism, outside the scope of this study, encompasses a reduction in charges (or an

absolute dismissal of charges) or "de-mandatorizing," as AUSAs may charge defendants with conduct that does not trigger a mandatory minimum penalty; for example, charging defendants with a lesser quantity of drugs (Kramer and Ulmer, 2009; Schulhofer and Nagel, 1997; O'Neill Shermer and Johnson, 2010; Ulmer et al., 2007; Wilmot and Spohn, 2004). Second, a defendant may be relieved of a mandatory sentence by the safety valve provision, enacted by Congress in 1994.[2] Defendants who meet the qualifications for a downward departure under the safety valve amendment, primarily first-time offenders, are sentenced below the applicable minimum at the discretion of the judge.

The final and most complex mechanism by which defendants avoid being subjected to punishment under a mandatory sentencing statute or the U.S. Sentencing Guidelines, which stems from the Anti-Drug Abuse Act of 1986, is a downward departure for providing substantial assistance or a 5K1.1 departure (USSC, 2011b: 464). The federal criminal code specifies that, "Upon motion of Government, the court shall have the authority to impose a sentence below a level established by statute as a minimum sentence so as to reflect a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense" (18 U.S.C. § 3553 (e)). According to Section 5K1.1 of the *U.S. Sentencing Guidelines Manual*, the judge's decision with respect to the appropriate sentence reduction may reflect the significance and usefulness of the defendant's assistance; the truthfulness, completeness, and

[2] The safety valve amendment may be applied by a judge when a defendant facing a mandatory minimum sentence meets the following criteria: (1) the defendant has no more than one criminal history point; (2) the defendant abstained from using violence, threats, or a dangerous weapon during the commission of the offense; (3) the offense did not result in death or serious bodily harm to the victim; (4) the defendant did not engage in the role of organizer, leader, manager, or supervisor during the offense and is not involved in a continuing criminal enterprise; and (5) the defendant provided the government with assistance ((18 U.S.C. § 3553 (f); see also U.S.S.G. § 5C1.2, USSC, 2008).

reliability of the information provided; the nature, extent, and timeliness of the defendant's assistance; and any danger or risk that resulted from the defendant's assistance (USSC, 2011b: 464; 2011a).

Only the AUSA may file and pursue a motion for a downward departure for substantial assistance, which must then be accepted by the court (judge), as is typically the norm (Cano and Spohn, 2012). And once the motion is granted by the court, the magnitude of the sentence reduction recommended by the federal prosecutor is formulated by the judge, resulting in a sentence that may be substantially lower than the sentence stipulated by the statutory minimum and presumptive sentence under the federal guidelines. While the legal elements that shape the incarceration decision, such as offense severity, criminal history, and statutory sentencing enhancements, are relatively clear, there is not one set criterion for what constitutes "assistance" to the federal government that leads to the investigation or prosecution of other offenders (Stith and Cabranes, 1998). In contrast to the "statement of reasons" requirement for federal judges who sentence outside of the guidelines range (see Hofer, 2007), there is no mandate for AUSAs to document their reason(s) for filing a motion for a substantial assistance departure or removing a charge that triggers a mandatory minimum. The availability of the substantial assistance motion, invoked in slightly more than 60 percent of drug convictions across U.S. District Courts (USSC, 2011a), affords prosecutors the flexibility to offset the statutory minimums that judges would otherwise be compelled to impose. To this end, the reality and intersection of these two dynamics—laws that require a mandatory sentence and Assistant U.S. Attorneys' capacity to seek a downward departure to remove a mandatory minimum penalty—assume a pivotal role in the prosecution of

cases, as they disadvantage and exacerbate punishment outcomes for non-violent, racial and ethnic minority defendants such as African Americans and Hispanics.

As briefly mentioned above, it is of paramount importance to note, however, that a wave of U.S. Supreme Court decisions—most significant, *United States v. Booker* (2005) and *Gall/Kimbrough v. United States* (2007)—struck down the U.S. Sentencing Guidelines and rendered them "effectively advisory," thus "liberating" judges from the long-reigning presumptive sentencing scheme championed by Congress. In a similar vein, recent amendments passed by the USSC and the enactment of the Fair Sentencing Act of 2010 (e.g., 21 U.S.C. §801(2) (a) (b), (3)), including their retroactive application (USSC, 2008, 2011c, USSC), have significantly altered the landscape of federal sentencing, in that they consequently reduced, and, in some circumstances, eliminated the draconian sentences long required by mandatory minimum statutes. These noteworthy sentencing policy reforms and landmark High Court decisions are discussed in the following chapter on the development of federal sentencing practices in the last 30 years.

RESEARCH ISSUES AND GAPS

Since the late 1970s, sociologists, criminal justice researchers, and economists have embarked on several theoretical and empirical traditions that have driven the study of the relationship between sentencing policy reforms and criminal justice outcomes, particularly assessments of guideline schemes and unwarranted disparities based on race and ethnicity, among other defendant considerations. Despite the meaningful work that has systematically examined the legal and extralegal effects that shape sentencing practices, and to a lesser degree, plea and charging practices (Johnson, 2014; Kutateladze,

Andiloro, Johnson, and Spohn, 2014; Miethe, 1987; Starr and Rehavi, 2013; Wooldredge and Griffin, 2005), the current status of the research warrants further theoretical development and methodological attention (Baumer, 2013; Ulmer, 2012). Therefore, focusing explicitly on punishment outcomes within the sentencing reform context—before and after the federal guidelines' transition to advisory status—three major gaps in the literature are addressed. The first of these important research gaps comprises the framework developed to explain changes in legal actors' discretion, followed by discussions on temporal effects of sentencing practices and the social context of courts and sentencing.

Theoretical Justification for Change in Prosecutorial Discretion

The dominant theoretical approach taken by studies on the effects of determinate sentencing emphasizes the transference of discretionary power across several domains of criminal case processing. According to the "hydraulic displacement" or "zero sum" thesis, discretion constrained at one stage of the criminal process simply resurfaces at a different stage of the process (Alschuler, 1978, Clear et al., 1978; Nagel and Schulhofer, 1992; Packer, 1968). Because they were premised on neutrality and uniformity in sentencing outcomes, primarily restraining judicial discretion and thus reducing unwarranted disparity (see 19 U.S.C. § 3553 [b]), it has been argued that sentencing reforms largely "ignored" the enormous discretion associated with prosecutors' charge and plea bargaining practices (Miethe, 1987: 156; see also Blumstein et al., 1983; Fischman and Schanzenbach, 2012; Hartley, Maddan, and Spohn, 2007; Spohn and Fornango, 2009). In terms of modern sentencing innovations, the assumption is that the determinate provisions have gradually shifted discretion from judges toward prosecutors,

who exercise relatively unconstrained decision-making power from post-arrest to final sentencing outcomes. Unlike the decisions rendered by judges, prosecutors' charging and plea bargaining practices are characterized by limited pubic visibility (Forst and Bushway, 2010; Eisenstein and Jacob, 1977; Kramer and Ulmer, 2009) and are, for the most part, absent of checks and balances as decisions are rarely subject to appellate review or any other form of external legal oversight (Alschuler, 1978; Forst, 1999; Frase, 2000; Stith and Cabranes, 1998; Tonry, 1996). Prosecutors, who exercise "independence and discretionary privilege unmatched in the world" (Albonetti, 1987: 292), determine whether initial charges will be sought, whether pending charges are dismissed or reduced, and whether specific charges stand as a result of plea bargaining. Their unconstrained power extends to other domains of the criminal process, for instance, the presentence detention decision, the punishment phase in capital cases, and grand jury proceedings (Free, 2002). In fact, researchers have overwhelmingly concluded that significant changes in sentencing outcomes and disparities linked to charging and plea bargaining capture "displacement effects or that a backward transference of discretion to prosecutors and other officials is simply an inevitable consequence of determinate sentencing" (Miethe, 1987: 156-157).

Although the "hydraulic displacement" thesis has garnered considerable backing in the legal and criminal justice literature, empirical assessments of the discretion hypothesis are sparse, implying that "most researchers begin with the assumption that the displacement of discretion exists" (Miethe, 1987: 155; see also Engen, 2009; Johnson, 2014). Due in part to the limited accessibility of data on charging and plea bargaining, investigations of the transference of discretion from judges to prosecutors have, by and

large, focused on judicial sentencing outcomes (Ulmer, 2012). The few systematic assessments of prosecutorial discretion under guidelines schemes have shown little evidence of heightened disparities in charging decisions (Miethe, 1987; Wooldredge and Griffin, 2005).

The dearth in the literature on the shift in discretion amid sentencing reforms underscores the complexity in the coexistence of sentencing laws and sentencing structures (guidelines schemes and mandatory statutes). Legislative sentencing reforms passed during the 1980s led the way for new and more powerful avenues of prosecutorial discretion beyond traditional charging practices, for instance, the invocation of mandatory minimum penalties, substantial assistance motions (5K.1 departures), and other government-sponsored downward departures in the federal justice system. Theoretically, these prosecutor-controlled provisions should have remained relatively unaffected by the "liberation" of judicial discretion. But this is not the case according to the recent empirical literature on the effects of sentencing reforms on unwarranted disparities. Consequently, the expansion of prosecutor-led disparity in the modern era may reflect a *partial hydraulic displacement effect*, as AUSAs maintain and enhance their thorough grasp of a large number of cases unaffected by the U.S. Supreme Court's recent rulings (i.e., mandatory minimum cases). The general lack of support for a full-scale displacement effect, coupled with the recent research that effectively shows a modest rise in racial and ethnic disparity in the exercise of judicial discretion in the wake of *U.S. v. Booker* and *Gall/Kimbrough v. U.S.*, demonstrates that the redistribution of discretion among legal actors and their domains is not absolute. This points to a *nonuniform* distribution of discretion among legal actors. As Engen (2009: 328-329) noted, "Laws

that limit judicial discretion do not literally increase prosecutorial discretion; instead, they affect prosecutors' ability to *control sentencing indirectly* by manipulating the factors that determine presumptive sentences" (see also Reitz, 1998: 390; Ulmer et al., 2011b: 1108).

In line with the theoretical limitation, conceptual issues emerge from studies that have examined disparity prior and subsequent to the implementation of the federal guidelines. First, earlier studies that have attributed the dramatic reduction in extralegal disparities to the federal guidelines may have simply captured alterations to charge and plea bargaining practices by prosecutors or effects from the abolition of parole or the reduction in the number of federal trials in wake of the dramatic changes to sentencing policies (Frase, 1993; Schulhofer and Nagel, 1997; Stith, 2008; Stith and Cabranes, 1998; Tonry, 1996; USSC, 1991; Wright, 2005). Similarly, the federal guidelines' fact finding and "real-offense" sentencing provisions make an accurate pre- and post-assessment of disparity unlikely (the "real offense" sentencing structure will be discussed in Chapter 2) (Schulhofer and Nagel, 1997; Stith, 2008). Therefore, traditional pre-guideline and post-guideline assessments might simply constitute "apples and oranges comparisons" (Tonry, 1996: 40). The new wave of sentencing reform evaluations must take into account explicitly the transformation in punishment policies, as well as prosecutors' response to those changes.

In addition, the federal sentencing literature has yet to fully capture the effect that the punishment setting exhibits on charging and imprisonment outcomes—whether the defendant was convicted of an offense subject to the federal guidelines or a mandatory minimum statute. Thus, parsing out the effects between the two sentencing schemes is

especially important as judges and AUSAs' guidelines departures, coupled with the type of sentencing provision, are qualitatively diverse. To show more clearly, prosecutor-enacted guidelines departures are most prevalent among defendants facing mandatory minimum penalties (Nagel and Schulhofer, 1992; USSC, 2011d), while judicial downward departures are most pronounced in cases that fall within the federal guidelines (Hofer, 2007). Courts and sentencing researchers have failed to examine punishment outcomes across settings (see, however, Everett and Wojtkiewicz, 2002; Hartley, 2008; Hartley et al., 2007; Kautt and Spohn, 2002; Kautt and DeLone, 2006; Lacasse and Payne, 1999). This reality was highlighted by Nagel and Schulhofer (1992: 557), suggesting that "because circumvention is particularly pronounced in cases involving a mandatory minimum sentence, one must take care to distinguish between circumvention prompted by a desire to evade the guidelines and that promoted by a desire to avoid mandatory minimums" (see also Anderson et al., 1999; Engen. 2009; Schulhofer and Nagel, 1997).

Temporal Effects of Unwarranted Punishment Disparities

The second research gap in the pre-guideline and post-guideline research turns attention to the temporal effects of discretion and legal and extralegal disparity. Largely absent from this growing body of work is a focus on the immediate and enduring effects of recent policy reforms on punishment outcomes. Although researchers have examined and confirmed the salience of guidelines schemes in reducing sentencing disparities in state and federal jurisdictions, investigations on the long-term impact of such reforms, however, are scarce. The limited research on the trajectory of extralegal disparities following sentencing reforms has yielded mixed and inconsistent findings.

In fact, the extant work on the long-term effects of sentencing guideline schemes is restricted to one recent analysis of U.S. District Courts and studies of final sentencing outcomes in two states. Starr and Rehavi's (2013) month-to-month assessment of charging, plea bargaining, judicial departure, and imprisonment decisions in federal district courts found a sharp and continuing elevation in guidelines offense levels (offense severity) of all defendants sentenced post-*Booker*. More importantly, they observed that the stark increase in unwarranted disparity after the *Booker* decision was confined to AUSAs' charging practices, in that mandatory minimum penalty rates were significantly higher for Black defendants in relation to White defendants. Nevertheless, the disparity effect failed to exert a long-term influence, as racial disparities in mandatory sentencing reverted to previous trends three months into the advisory guidelines era (Starr and Rehavi, 2013: 64). To date, three known studies have investigated the stability and change of extralegal disparity in light of determinate sentencing reforms in two states. Assessments of the long-term impact of Minnesota's rigid and inflexible sentencing structure found that the decline in disparity—that is, a lesser likelihood of imprisonment for White defendants and female defendants with dependent children—subsequent to the implementation of guidelines schemes diminished gradually over time (Koons-Witt, 2002; Stolzenberg and D'Alessio, 1994). Stolzenberg and D'Alessio's (1994: 304) time series analysis of imprisonment decisions, for instance, concluded that "inequality levels began to revert to pre-guideline levels as time passed." In contrast, the reduction in disparity under Ohio's more relaxed sentencing structure assumed relative stability over time (Wooldredge, 2009).

Empirical research that has assessed the effects of sentencing reforms on unwarranted disparity has relied heavily on designs with limited observation periods—before and after policy changes—making comparisons and strong conclusions based on *averages* between extensive periods of time, like year-by-year or time frames between reforms (e.g., Kramer and Ulmer, 2009; Myers, 1989; Peterson and Hagan, 1984; Stolzenberg and D'Alessio, 1994; Ulmer et al., 2011a, 2011b; USSC, 2010b). This strategy may prove misleading as it has the potential to produce a biased estimation that fails to capture abrupt and continuing trends (or events) following the intervention (Anderson et al., 1999; Hofer et al., 1999; Scott, 2010; Tonry, 2006; for discussion on immediate changes, see Hofer, 2006, 2007). To illustrate, a steady increase in unwarranted disparity after 2005 would exert a higher average of disparity in the post-*Booker* (2005) and post-*Gall/Kimbrough* (2007) eras relative to any time period prior to 2005, whether or not the rise in disparity was attributed to the High Court's rulings. Thirty years earlier, Blumstein and colleagues (1983: 221-222) voiced their concern with this type of experimental design, charging that, "Such designs do not permit distinguishing discrete changes or effects associated with a reform from the continuation of preexisting trends" (see also Starr and Rehavi, 2013; Tonry, 1996).

Although innovative, Starr and Rehavi's (2013) analysis of the short-term and long-term disparity impact on federal sentencing outcomes after the dramatic policy changes has several shortcomings. First, despite evidence that shows AUSAs' motions for substantial assistance comprise the leading source of disparity in district courts, analyses of downward departures following sentencing reforms are limited to judge-initiated sentencing departures (see, however, USSC, 2006). Second, even though the

study period extended through fiscal year 2009, the study failed to capture potential disparity in sentencing decisions beyond *U.S. v. Booker* (2005), overlooking the significance of the *Gall/Kimbrough v. U.S.* (2007) decisions—a series of consecutive rulings which ultimately affirmed the federal guidelines' "advisory" status, including judicial downward departures stemming from disagreements with sentencing policies. Third, addressed by Rahavi and Starr (2013) as a limitation due to a lack of initial case processing data on offenders' ethnicity (see also Johnson, 2014), analyses of extralegal inconsistencies are restricted to racial disparity, focusing explicitly on White-Black defendant comparisons. An investigation of ethnic disparity is important, as recent studies have shown that sentencing decisions are especially punitive toward Hispanic defendants, in some circumstances, to a greater extent than Black defendants (Demuth, 2003; Demuth and Steffensmeier, 2004; Feldmeyer and Ulmer, 2011; Spohn and Holleran, 2000; Steffensmeier and Demuth, 2000, 2001; Ulmer et al., 2007; see also Light, 2014; Light, Massoglia, and King, 2014). The final limitation of Starr and Rehavi's study, lack of attention to social contextual variation, encompasses the last major research gap addressed in this dissertation.

Contextual Variation in Courts and Sentencing Outcomes

In theory, punishment in the federal justice system, aside from the federal guidelines being rendered advisory, embodies a uniform scheme of procedures and policies—a criminal code uniformly implemented across 94 federal districts. It has long been argued, however, that far from being uniform, the criminal process is shaped by courts' local structure, cultural norms, and courtroom workgroup (Eisenstein and Jacob, 1977; Eisenstein, Flemming, and Nardulli 1988; Nardulli, Eisenstein, and Flemming,

1988; see also Dixon, 1995; Ulmer, 1997). Charging and imprisonment decisions, then, are meted out based on courts' and court jurisdictions' social context, for instance, federal districts' racial and ethnic minority population, caseload, crime rate, political climate, or level of concentrated disadvantage.

Researchers have indeed amassed evidence of jurisdictional variation, showing that substantial assistance departures and imprisonment decisions vary across federal districts (Feldmeyer and Ulmer, 2011; Hartley et al., 2007; Johnson, 2014; Johnson et al., 2008; Kautt, 2002; Ulmer, 2005; Ulmer et al., 2010; Ward, Farrell, and Rousseau, 2009a, 2009b) and between courtroom actors, specifically judges and ASUAs (Anderson and Spohn, 2010; Kim, Spohn, and Hedberg, forthcoming; Scott, 2010; Spohn and Fornango, 2009). Earlier pre-assessments and post-assessments of the federal guidelines and unwarranted disparity were limited to no more than three federal districts or circuits (e.g., Karle and Sager, 1991; Kempf-Leonard and Sample, 2001; Payne, 1997; Wolfagel, 1991). And, with few exceptions (Farrell and Ward, 2011; Fischman and Schanzenbach, 2012; Scott, 2010; Ulmer et al., 2011b; USSC, 2006), recent studies on the impact of *Booker* and *Gall/Kimbrough* have ignored the role that social context may exhibit on federal sentencing practices, relying on large aggregated data sets—at times, nationwide data sources—that ignore the nested nature of cases. What is more, the few pre-guideline and post-guideline comparisons looked at judicial departures and imprisonment outcomes but have yet to fully capture the contextual effects of substantial assistance motions across federal courts. This is a major challenge to the empirical status of research on disparity and *Booker* and *Gall/Kimbrough* and corresponds with Ulmer's (2005: 275) argument that, "Analyses that continue to pool jurisdictions into nationwide statistical

models, without attending to their potential variation, obscure important knowledge about criminal justice in context…Understanding local variation in court community contexts is essential for understanding federal sentencing and sentencing in general." And equally notable, earlier works have emphasized that the mass aggregation of data over extensive timespans may "mask" significant trends in sentencing practices (Blumstein et al., 1983: 17; Hagan and Burnstein, 1979).

Overall, what is absent from the courts and sentencing literature is whether these game-changing reforms—the definite restoration of judicial sentencing discretion, including the realignment of downward departure policies—have influenced AUSAs and their districts' treatment of defendants subjected to punishment under mandatory minimums and the federal guidelines. The next section advances to a discussion of the current study, including the research objectives that will be addressed in this dissertation.

THE CURRENT STUDY

The purpose of this study is to test whether the recent federal punishment reforms that resulted from decisions handed down by the U.S. Supreme Court have contributed to racial and ethnic disparities. More specifically, the purpose is to assess the impact of *U.S. v. Booker* (2005) and *Gall/Kimbrough v. U.S.* (2007) on AUSAs' decisions to petition the court for substantial assistance downward departures. The primary focus is the trajectory of unwarranted disparities—in the short term and in the long term—subsequent to legal innovations in the federal criminal process. This is accomplished by exploring whether racial and ethnic inequality effects are driven by the type of punishment domain—

sentences under the federal guidelines or mandatory minimums—and to what degree prosecutors' decisions vary across federal district courts.

Research hypotheses on prosecutorial discretion and unwarranted punishment disparity are drawn from contemporary organizational and social-psychological perspectives, namely uncertainty avoidance/causal attribution and focal concerns theories, and conflict perspectives. Data for this study come from the U.S. Sentencing Commission (USSC) for FY 2000 to FY 2009, which consist of 465,476 convicted cases across 89 U.S. District Courts. To investigate social context, the USSC data are linked with measures compiled from the U.S. Census Bureau, Uniform Crime Reports, National Judicial Center, and the County Characteristics, 2000-2007 data set compiled by the Interuniversity Consortium for Political and Social Research (ICPSR). A hierarchical regression discontinuity design (Singer and Willett, 2003) is used to examine the *immediate* and *enduring* effects of AUSAs' use of substantial assistance guidelines departures following *Booker* and *Gall/Kimbrough* within and between federal districts.

This dissertation has four core research objectives. First, the study examines whether there were changes in the prevalence of AUSAs' motions for substantial assistance downward departures following the *Booker* and *Gall/Kimbrough* decisions—changes in the short term and long term. The second objective encompasses an analysis of change in racial and ethnic disparities in prosecutors' decision making. If changes are present in AUSAs' likelihood to file motions for substantial assistance guidelines departures following *Booker* and *Gall/Kimbrough*, did the changes disadvantage Black and Hispanic defendants? Thus, this study examines whether substantial assistance departure decisions are conditioned by defendants' race and ethnicity—in the short term

and long term. Specifically, the analyses test whether reductions in substantial assistance motions are greater for Black and Hispanic defendants than for White defendants following the High Court decisions. The third objective assesses the potential influence of *Booker* and *Gall/Kimbrough* on AUSAs' substantial assistance decisions based on the punishment setting. The analyses determine whether overall change and change in disparities for Black and Hispanic defendants relative to White defendants in the likelihood for substantial assistance departures are more pronounced in cases guided by the federal guidelines or mandatory minimum statutes. Substantial assistance decisions are therefore estimated separately in models distinguished by mandatory minimum cases and guidelines cases. The fourth research objective controls for whether AUSAs' likelihood for motions for substantial assistance departures varies across federal districts and whether the likelihood of a substantial assistance departure is influenced by federal districts' organizational and social contexts. Overall, this study responds to Ulmer, Light, and Kramer's call for future research to "evaluate sentencing outcomes post-*Booker* and *Gall* for specific types of offenders and specific offenses" (2011b: 832) and to "explore how prosecutorial and defense practices have adapted to the post-*Booker* regime" (2011b: 833; see also Engen, 2009; Hofer, 2007).

ORGANIZATION OF DISSERTATION

The remainder of this dissertation proceeds as follows: Chapter 2 develops a historical perspective of sentencing practices by reviewing the advent of and alterations in significant federal sentencing reforms enacted from the early 1980s to 2011. Then, the second part of the chapter turns attention to the empirical status of sentencing outcomes,

primarily the extralegal predictors of mandatory sentences and substantial assistance departures, across sentencing reforms, within and between court jurisdictions. Chapter 3 lays out the theoretical framework on which the research hypotheses are based, with a focus on the role of prosecutorial discretion. Chapter 4 draws out the methodology, that is, the data, empirical measures, and analytic strategies employed to test for change in unwarranted disparity in motions for substantial assistance departures across sentencing reforms. Chapter 5 is organized into three sets of analyses. The first set examines whether the likelihood of substantial assistance departures has been altered in cases processed subsequent to *U.S. v. Booker* and *Gall/Kimbrough v. U.S.* The next set examines whether racial and ethnic disparities in motions for substantial assistance departures have been altered in cases processed subsequent to *Booker* and *Gall/Kimbrough*. The influence of contextual differences is also examined. Chapter 6 discusses the overall findings, implications for courts and sentencing theory, research, and policy, caveats, and lays out the course for future research.

CHAPTER 2

BACKGROUND

A succinct review of punishment policies and legal developments is important, as it is difficult to understand the extent of unwarranted disparity in incarceration and incarceration severity without first understanding the *varying* legal roles that prosecutors' discretion has played in the federal criminal justice system during the last thirty years. As demonstrated by the past and emerging research, the evolutionary changes in the determinate sentencing approach has the potential to reshape punishment in U.S. District Courts. The next section commences with a discussion of punishment practices in the 1970s.

THIRTY YEARS OF FEDERAL SENTENCING REFORMS

Determinate Sentencing Era

Characterized by the "nothing works" rhetoric promoted during the 1970s (Martinson, 1974), which called into question the efficacy of the rehabilitative model of punishment (Beckett and Sasson, 2004; Casper, 1984), an indeterminate sentencing system, operating in full force across state and federal court systems, faced relentless criticism from the public, political pundits, and researchers at both ends of the political spectrum. On the one hand, conservatives expressed concern over leniency in sentencing procedures, parole authorities' ineffectiveness in assessing defendants' amenability to rehabilitation and predicting recidivism, and judges' reluctance to sentence "marginal" or borderline defendants to prison terms (defendants whose offense, coupled with criminal history, fluctuated between a jail or prison sentence; Casper, 1984: 236-237; Hatch, 1993,

Zimring, 2005). On the other hand, liberals expressed concern over the declining status of rehabilitation, the extent of "uncertainty" in custodial detention, variation in punishments imposed on similarly situated defendants, and the threat that discrepancies in sentencing outcomes posed to the principles of fairness and equality in punishment and administration of law (Stith and Kohl, 1993: 227; Tonry, 1996).

Among the most vocal and influential opponents of indeterminacy or "lawlessness" in sentencing was the late federal judge and law professor, Marvin E. Frankel. According to Judge Frankel (1972: 49), legal decisions should be applied in a uniform fashion using a system structured by legislators, not subjected to the "varying tastes" of judges (see also Frankel, 1973). As he argued, "Given the sure combination of substantially unbounded discretion and decision-makers unrestrained by shared professional standards, it is not astonishing that the commonplace worry in any discussion of sentencing concerns 'disparity'" (Frankel, 1972: 7). In his proposal for a determinate punishment scheme, Judge Frankel envisioned the establishment of a federal commission on sentencing. More specifically, he called for the creation of an administrative body of government comprised of experts in sentencing who were not subjected to external political pressure. The anticipated sentencing commission would serve three primary functions: conduct research on sentencing, corrections, and parole practices; design laws and regulations that reflect the results of the aforementioned research; and adopt presumptive sentencing guidelines that were subject to congressional approval (Frankel, 1972: 51, see also Reitz, 2001).

Accordingly, public sentiment and a bipartisan initiative by members of Congress, led by late Senators Edward Kennedy and Strom Thurmond, channeled the passage of the

Sentencing Reform Act (SRA) of 1984, a key piece of legislation that emerged from the Comprehensive Crime Control Act of 1984 (for a complete history of sentencing reform during the 1980s and early 1990s, see Froyd, 1999; Sterling, 1995). The SRA established the United States Sentencing Commission (USSC) and directed the independent commission to design guidelines that would ensure certainty and fairness in sentencing, and therefore, reduce unwarranted disparity (28 U.S.C. § 991 (a)). The objectives of the newly-adopted U.S. Sentencing Guidelines (or federal guidelines) were to: reflect the seriousness of the offense, promote respect for the law, and provide just punishment for the offense; afford adequate deterrence to criminal conduct; protect the public from further crimes of the defendant; and provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner (18 U.S.C. § 3553 (a)).

The federal guidelines scheme was formally adopted on November 1, 1987 and ultimately implemented in 1989 (Stith and Cabranes, 1998). Despite the inclusion of rehabilitation as a "purpose" of punishment, penalties under the guidelines are exceptionally stiffer relative to sentencing policies and patterns preceding their enactment and explicitly preclude deferment to judges in most circumstances. What is more, the determinate sentencing structure is largely founded on philosophies of deterrence and incapacitation. Indeed, this led Tonry (2005: 41-42) to opine that the federal guidelines were crafted for "an era of technocratic and rationalistic policymaking" and "a time when people in positions of political influence doubted that changes in punishment could have much effect on crime," but, in contrast, were enforced "in an era of politicized and

symbolic policymaking…a world in which many people believed that tougher penalties could reduce crime rates."

The demise of the rehabilitation model, a driving force of the indeterminate punishment approach, is emphasized in the federal guidelines in a number of ways. The guidelines' "real-offense sentencing" structure, or the recommended sentence, is shaped by the seriousness of the offense or base offense level (Stith, 2008). The base offense level is calculated alongside criminal history, adjustments for "acceptance of responsibility" (when a defendant enters a plea of guilty or plays a mitigating or aggravating role), "relevant conduct" (discussed below), and downward departures (see Stith and Cabranes, 1998: 66-77). Sentencing ranges are reflected in a matrix of 43 levels of offenses delineated by severity that correspond to one of 6 criminal history categories (Stith and Cabranes, 1998). Until the High Court's decision in *U.S. v. Booker* (2005), the presumptive sentencing structure prevented judges from doling out sentences that fit the characteristics of a particular defendant (Alschuler, 1991, Simon, 2012); rather, sentences under the federal guidelines "reflect the general inappropriateness of considering the education, vocational skills, employment record, family ties and responsibilities, and community ties of the defendant" (18 U.S.C. § 994 (e)). More specifically, circumvention from the federal guidelines is prohibited "unless the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines" (18 U.S.C. § 3553 (b)).

The criminal process governed by the federal guidelines has been characterized as rigid, inflexible, and exceptionally punitive (Alschuler, 1991; Tonry, 1996). What has

generated the most discourse is that judges are compelled to frame sentences based on defendants' "relevant conduct," behavior beyond that prescribed in the present charge(s) or conviction (U.S.S.G. §1B1.3, USSC, 2011b; see also Lowenthal, 1993: 65-66). The "relevant conduct" rule encompasses countless mechanisms by which legal facts may be applicable to the commission of an offense, including acts the defendant personally committed or in which the defendant aided, abetted, or counseled. Moreover, the directive on "relevant conduct" requires judges during the sentencing phase to consider conduct for which the defendant was never charged or convicted, or was acquitted for at trial (U.S.S.G. §1B1.3, USSC, 2011b). With the exclusion of plea agreements, "relevant conduct" frames the base offense level and adjustment in sentences. These elements, fundamental to the guidelines scheme, the "relevant conduct" rule in particular, have been significantly altered in the wake of U.S. Supreme Court case law that is the following section.

The shift to a determinate sentencing approach during the 1980s and 1990s spawned three major policy innovations in sentencing beyond presumptive guideline schemes—mandatory minimum statutes, chronic offending statutes or "three strike" statutes, and truth-in-sentencing statutes (Tonry, 2011: 23; see also Beckett and Sasson, 2004; Zimring, 2005). Arguably the most important discussion on the inception of mandatory sentencing legislation concerns the penalties provided for drug offenses. As Beckett and Sasson (2004: 166) noted, "Mandatory minimums aimed at drugs have had the most impact on the 'nature and scope' of criminal punishment." For instance, legal scholars contend that while mandatory minimum laws for violent and drug crimes are more prevalent in state jurisdictions (Lowenthal, 1993: Miller, 1996; Tonry, 1996),

federal mandatory minimums have gained notoriety for their excessively harsh punishments that have doubled in the last 20 years (USSC, 2011a: 71-72).

The process that characterized the passage of the mandatory sentencing schemes was unprecedented. The heightened media fury and public uneasiness concerning violent crime and drug use during the 1980s, coupled with the highly-publicized, cocaine-related death of NCAA basketball player, Len Bias (e.g., Inciardi, James, Pottieger, and Surrat, 1996; Lockwood, Pottieger, and Inciardi, 1995), led Speaker of the U.S. House of Representatives, Thomas P. O'Neill, Jr. to announce that Democratic members of the House would sponsor anti-drug legislation (Sterling, 1995: 408).[3] The anticipated bill

[3] As observed by a number of crime and punishment scholars (e.g., Garland, 2001: 132; Mauer, 2006; Tonry, 1995: 81), the escalating rate of drug use from the early 1980s began to decline by the end of the decade. The "moral panic" of drug abuse spiraling out of control was bolstered by associating crack cocaine use with other ills of society, for example, crack cocaine and the AIDS virus (Musto, 1987: 274-275). This included the heightened public visibility of addiction among "dangerous" groups of individuals of a lower socioeconomic status, including expecting mothers, all residing in deteriorating urban ghettos (Beckett, 1997; Lockwood et al., 1995; Provine, 2007; Reinarman and Levine, 1997; USSC, 1995a). For instance, an analysis by Vincent and Hofer (1994: 14) found that, "Trends in criminal victimization rates and drug availability for the periods before and after the mandatory minimums took effect fail to demonstrate any reduction in crime that can be attributed to the mandatory minimums." To be sure, a series of trend studies suggest that the prevalence of drug use has considerably fallen over the last two decades. The National Household Survey on Drug Abuse, encompassed by analyses of a birth cohort, uncovered a "declining trend" in cocaine use from 1985 to 1990, and estimated that the use of cocaine peaked in 1982 (SAMHSA, 2006: 21); the prevalence of cocaine use had fallen from 5.7 million users in 1985 to 1.5 million users in 1995 (SAMHSA, 2008). A household survey of Americans aged 12 and older, conducted by the Substance Abuse and Mental Health Services Administration (SAMHSA), reported that, in 2002, one quarter of the estimated individuals who consumed cocaine were specifically crack cocaine users (SAMHSA, 2011; see also SAMHSA. 2003a). During the period between 2002 and 2010, the survey found that the perceived availability of crack cocaine had declined over time, and the estimated number of individuals who initiate the use of crack cocaine also dropped from 337,000 to 83,000 (SAMHSA, 2011: 52). Results from Monitoring the Future (MTF), a survey conducted among 8th, 10th, and 12th graders, showed a reduction in crack cocaine use in all respondents, 12th graders in particular (Johnston, O'Malley, Bachman, and Schulenberg, 2012). Interestingly, when compared to trends during the early 1980s, the MTF survey found a "precipitous drop" in crack cocaine use among 12 graders following 1986 (Johnston, O'Malley, Bachman, and Schulenberg, 2012: 20; see also Mieczkowski, 1996: 373). Despite the steep decline in drug use over the last two decades, the use of cocaine in particular, cocaine-related incidents continue to dominate admissions for drug emergency and treatment services (USSC, 2002a). For instance, the Drug Abuse Warning Network (DAWN), a survey that collects data on emergency room admissions

garnered extensive support among members from both houses of Congress, including a large majority of African American legislators (Kennedy, 1997: 372; Provine, 2007). The legislation was expected to target mid-level dealers and key players or "kingpins" in the drug distribution network by designating 5-year and 10-year minimum penalties for drug trafficking (USSC, 2002a).[4]

In contrast to the comprehensive process that typically characterizes the enactment of such game-changing legislation, passage of the anti-drug bill was expedited. In fact, lawmakers failed to appoint more than one subcommittee to discuss the bill,

---

nationwide, estimated that cocaine-related emergencies—the most widely reported illicit drug in substance abuse episodes—increased by approximately 30 percent between 1995 and 2002 (SAMHSA, 2003b: 50). Furthermore, slightly more than one fifth of cocaine incidents were specifically associated with crack cocaine (SAMHSA, 2003b: 26). Researchers, however, note the difficulty in differentiating between accounts involving powder cocaine or crack cocaine. More recently, Dawn reports indicated that substance abuse incidents involving cocaine continue to be at the forefront of emergency room admissions (SAMHSA, 2010, 2012). In a similar vein, cocaine abuse represents the primary reason for admission into residential treatment programs. A survey conducted by SAMHSA (2007: 3-4), for example, showed that among admissions to substance abuse treatment, from 1995 to 2005, smoking of cocaine modestly declined, while inhalation of the cocaine increased at an accelerated rate. Researchers who conducted the surveys (Mieczkowski, 1996; USSC, 2007) caution that the estimates on drug use may be underrepresented, in that participation in the majority of surveys discussed above was extended to individuals who reside in a household, attended school, or were members of a research cohort.

[4] Scholars argue that the swift process that characterized the passage of the Anti-Drug Abuse Act was embedded with racial and ethnic undertones (Provine, 2006, 2007; Sklansky, 1995). Provine (2007) encapsulated a series of themes drawn from the racial- and ethnic-explicit information in news articles introduced before the Congressional Record, subsequently leading to the prompt, uncontested passage of the anti-drug bill. The first theme emphasizes the threat to neighborhoods and personal safety, as the increasing accessibility and consumption of crack cocaine by Whites suggests that the distribution of crack is "moving from the Black ghetto to the White suburbs of America" (Provine, 2007: 113-114). The second theme reflects that the crack distribution network is comprised predominantly of young, Black or Hispanic, unemployed males, alluding to crack dealing as the most common profession in the urban ghetto. Lastly, a recount of the detrimental effects that crack cocaine use has on the social capital of productive citizens leads to the conclusion that, "Promising (white) individuals are at risk" (Provine, 2007: 114).

conduct an amendment and reintroduction process of the proposed bill, consult with the executive branch, and hold hearings or seek the guidance of experts, such as the Federal Bureau of Prisons, the U.S. Parole Commission, the Judicial Conference, or the U.S. Sentencing Commission (Sterling, 1995; USSC, 2002b; Mauer, 2006). The subcommittee proceedings failed to take into account the "relative harmfulness" of crack cocaine compared to other types of drugs and drug distribution patterns (Sterling, 1995). What is more, the membership of the committee held the inaccurate assumption that judicial discretion remained unrestrained and that the practice of parole persisted in the federal justice system, although parole and judicial discretion, for the most part, had been abolished by the passage of the Sentencing Reform Act of 1984 (Sterling, 1995: 410).

In light of overwhelming support from members of Congress, public furor over a violent crime wave, the reemergence of cocaine as crack in a form that could be smoked and thus produce a more rapid and potent physiological effect than other forms of cocaine (Musto, 1987: 274; Reinarman and Levine, 1997: 19), and an approaching bid for reelection, President Ronald Regan signed the Anti-Drug Abuse Act (ADAA) into law in 1986. The law was designed to incapacitate serious offenders, deter individuals sentenced under the minimum as well as potential offenders, eradicate sentencing disparity, and induce cooperation and guilty pleas among defendants (USSC, 1991: 15-16). As previously noted, the ADAA of 1986 prescribed a 5-year mandatory minimum sentence for defendants convicted of trafficking in 5 grams of crack cocaine or 100 grams of heroin, whereas distribution of at least 500 grams of powder cocaine was required to trigger the same mandatory penalty (21 U.S.C. § 841 (b)).

A moral panic fueled by a relentless media and ongoing public discourse on drug use and escalating urban violence during the late 1980s (Provine, 2007: 115-116; see also Hartley and Miller, 2010; Tonry, 1995, 2001; Zimring, 2005) led to the passage of the Omnibus Anti-Drug Abuse Act of 1998, hardline legislation focused on crack cocaine offenses. The anti-drug legislation mandated a 5-year statutory minimum for simple possession of five grams or more of crack cocaine (21 U.S.C. § 844 (a)) and introduced an enhanced sentence for engaging in a "continuing drug enterprise," increasing the statutory minimum from 10 to 20 years (21 U.S.C. § 848). The law established a 10-year minimum sentence for simple possession of 50 grams or more of crack cocaine, 5,000 grams or more of powder cocaine, or 1,000 grams or more of heroin (21 U.S.C. § 841 (b)). Moreover, the unparalleled legislative directive places conspiracy of drug distribution within the scope of the mandatory sentencing scheme (21 U.S.C. § 846), which accounts for the largest fraction of mandatory convictions in federal courts (USSC, 2011a: 74).

The discernible disparity between polices designated by Congress for crack cocaine and powder cocaine offenses has led the USSC (1991, 1995a, 1997, 2002b, 2007; see also Spohn, 2009), lawmakers (Hatch, 1993), and members of the federal judiciary (Breyer, 1999; Rehnquist, 1993) to publicly advocate for the streamlining of mandatory minimum sentencing legislation. Despite the dismay expressed by the public, politicians, and members of the judiciary, until 2010 Congress unanimously upheld the disparate penalties for crack and powder defendants and had been reluctant to reform the

mandatory punishment scheme on several grounds (Tison, 2003).[5] First, because of its method of ingestion—consumed by smoking, not intranasally as powder cocaine—crack cocaine is elevated to a higher level of "dangerousness," as its physiological potency is associated with a higher risk of addiction, prenatal exposure, and death (USSC, 2002a: 9-10). Second, the consumption and distribution of crack cocaine relative to other controlled substances has been closely associated with young individuals engaging in drug crime as well as other violent criminal behavior (USSC, 2002a: 10). Third, the purity of crack cocaine enables inexpensive and efficient distribution, which in turn leads to widespread consumption (USSC, 2002a: 10, see also Kennedy, 1997), which is concentrated among individuals in urban ghettos and barrios with "fewer bonds to conventional society, less to lose, and far fewer resources to cope with or shield themselves from drug-related problems" (Reinarman and Levine, 1997: 19; Sklansky, 1995). For instance, legal scholar Randall Kennedy (1997: 383-384) noted, "One of the

[5] Inquests on public opinion have led to the conclusion that the majority of the American citizenry and courtroom actors, independent of political affiliation, disapprove of stringent mandatory minimum penalties designated for drug offenders, especially penalties for crack cocaine offenses (Families Against Mandatory Minimums, 2008; Lock, Timberlake, and Rasinski, 2002). For instance, a nationwide survey conducted by Families Against Mandatory Minimums (FAMM) (2008: 4) revealed that approximately 60 percent of Americans oppose mandatory minimum penalties for nonviolent offenses (see also Pew, 2012). Moreover, 78 percent of respondents agreed that the judicial system, not the legislature, is "best qualified" to account for the defendant's role in the offense, including the prediction of future criminality (FAMM, 2008: 9). Most recently, and consistent with previous studies of opinion on mandatory minimums among courtroom officials (e.g., Johnson and Gilbert, 1997; Maxfield, 2003; Maxfield, Martin, and Kitchens, 1997; Rossi and Berk, 1997; USSC, 1995b), a survey of federal judges undertaken by the USSC (2010a: 5) found that whereas current mandatory minimum penalties for powder cocaine and methamphetamine distribution were supported by 52 percent and 53 percent of respondents, respectfully, only 23 percent of respondents approved of the current minimum penalty for crack cocaine distribution. Furthermore, more than half of the respondents agreed that judges should be permitted to depart from mandatory minimums when defendants provide substantial assistance, independent of whether a motion is filed by the AUSA (USSC, 2010a: 18). Most notably, one third of respondents (or judges) branded charging practices and mandatory minimums as the foremost contributors to sentencing disparities (USSC, 2010a: 19; see also Ulmer and Light, 2010).

strongest reasons *favoring* the crack-powder distinction is precisely that crack is more accessible and, for that reason alone, more dangerous…Because it is relatively inexpensive, crack helped tremendously to democratize cocaine use, a dubious 'achievement' that the government should surely be able to 'reward' with a punitive response without eliciting the charge that doing so is racially discriminatory" (for further discussion on crime control policies and race politics, see Kennedy, 1994).

In a similar vein, the executive branch's unwillingness to intervene and support reform of mandatory minimum legislation during the 1990s and the inception of the Bush Administration was made patently clear. Testimony by former Deputy Attorney General Larry D. Thompson (2002) before the USSC affirmed that cocaine sentences—most salient, the 1-to-100 distinction between powder and crack cocaine penalties—were "proper," as crack cocaine is more psychologically addictive and generates more emergency room visits than powder cocaine, can be manufactured and distributed at a low cost, and disproportionally affects the most vulnerable members of society. Furthermore, Thompson's testimony suggested elevating the penalty for offenses involving powder cocaine and charged that the U.S. Department of Justice would "oppose any effort by the Commission to issue guidelines that do not adhere to the congressionally enacted statutes that define and prescribe penalties for federal cocaine offenses."

Legislative Directives and Case Law in Federal Sentencing

Measures carried out by the USSC to reform mandatory sentencing legislation throughout the 1990s and most of the following decade proved fruitless. In 1995, at the request of Congress, as directed by the Omnibus Violent Crime Control and Law

Enforcement Act of 1994, the USSC (1995a) issued a report with recommendations on federal cocaine sentencing policies. Contrary to its prior stance on the "harmful" effects of crack and powder cocaine and the disparity between sanctions for the two drugs (USSC, 1991), the USSCs' new report charged that, "Penalties clearly must be racially neutral on their face and by design" (1995a: xii). In line with its conclusions, the USSC ratified amendments to the federal guidelines (embedded within the mandatory minimum statutes) that established a 5-year mandatory minimum for the distribution of 500 grams or more of both powder and crack cocaine and abolished the 5-year mandatory minimum for simple possession of crack cocaine. The amendments, however, were subsequently rejected by Congress in legislation signed by former President Bill Clinton (see Tonry, 2011: 79).

More recently, and without an amendment process, a report by the USSC (2007: 8), yet again, recommended that Congress elevate the 5-year and 10-year mandatory minimums to reflect penalties for "serious and major traffickers," abolish the mandatory minimum for simple possession of crack cocaine, and reject the 1-to-100 cocaine penalty differential. Despite opposition to mandatory sentencing schemes from conservative leaders (Hatch, 1993; Rehnquist, 1993), vocal but inactive support for reform from Congress, President George W. Bush's administration (Luna and Cassell, 2010), and USSC initiatives, reform efforts were largely ineffective during the first seven years of the 21st century (changes to these policies discussed in the section that follows).

Although the federal guidelines passed constitutional muster soon after their implementation (*Mistretta v. United States*, 1989), a series of recent legal developments that took place from 1996 to 2007 significantly altered sentencing in U.S District Courts,

in due course leading to the downfall of the federal guidelines' mandatory status. The discretion of federal judges to depart from the presumptive guidelines scheme ebbed and flowed amid the intervention of Congress and the U.S. Supreme Court. In *Koon v. United States* (518 U.S. 81, 1996), the High Court, in a modest attempt to restore the discretion removed from federal judges with the passage of the guidelines scheme and a plethora of mandatory minimum statutes, established an "abuse of discretion" standard to be used in the appellate review of judges' decisions to depart from the guidelines.

Congress subsequently responded with the enactment of the Feeney Amendment to the PROTECT Act (Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today) (Pub. L. No. 108-21, 117 Stat. 650) of 2003. The Feeney Amendment reinstated a "de novo" standard for appellate review (18 U.S.C. § 3742 (e)), which had been momentarily stamped out by *Koon v. U.S.*, and again provided Assistant U.S. Attorneys' with greater oversight of judges' sentencing decisions. More importantly, the PROTECT Act, specifically designed to reduce the ascending rate of judicial downward departures (see however, Bailey, 2004; Freeborn and Hartmann, 2010), directed judges to specify the reasons that justified departures from the federal guidelines and directed the federal government (AUSAs) to specify the reasons for failing to pursue cases that may have resulted in a successful appellate review (18 U.S.C. § 3553(c), 18 U.S.C. § 3742(g)). All considered, the legislation was "aimed at reinvigorating the role of the appellate process in sentencing and enhancing appellate oversight of the use of departures by lower courts" (USSC, 2003: 56).

The legislative victory, demonstrated by the passage of the Feeney Amendment (2003), however, was relatively brief. This was due to the fact that constitutional scrutiny

of Washington State's sentencing guidelines scheme—eventually declared unconstitutional for its "relevant conduct" provisions—was slowly moving through the appellate review process, in route to the U.S. Supreme Court (*Blakely v. Washington*, 2004). Accordingly, with *Blakely v. Washington* serving as precedent, the High Court's landmark decision in *U.S. v. Booker* (2005), and its companion case, *U.S. v. Fanfan* (2005) (hereinafter, *U.S. v. Booker*), rendered the federal guidelines "effectively advisory" rather than mandatory. In its reasoning, the U.S. Supreme Court reaffirmed the jury's role in the sentencing process and held that sentence enhancements based on facts not considered by a jury at trial were in violation of the Sixth Amendment to the U.S. Constitution. The *Booker* decision, to a certain extent, conserved enforcement of the federal guidelines. Specifically, the Court invalidated the "de novo" provision in the federal sentencing code that had been applied to the appellate review of sentences that depart from the guidelines. The ruling introduced an unclear standard of "reasonableness" and "abuse of discretion" for review of criminal sentences that failed to conform to the guidelines. Although *U.S. v. Booker* reinstated federal courts' appellate jurisdiction over sentences imposed below the guidelines, what is of greater significance is that the decision dismantled key components of the federal guidelines scheme that had been in practice for approximately 18 years. That is, judges were no longer bound by but would simply seek guidance from the federal guidelines.

A series of U.S. Supreme Court rulings since 2005 has more clearly defined the meaning of "advisory" and "reasonableness" of the "abuse of discretion" doctrine specified for the appellate review of sentences that deviate from the federal guidelines range (for a complete review of federal guidelines case law, see Cassidy, 2009). An

assessment of the advisory guidelines scheme in *Rita v. U.S.* (2007) somewhat clarified the doctrine of "reasonableness." The Supreme Court compelled federal appellate courts to apply a presumption of "reasonableness" to any sentence that conforms to the guidelines, but clearly articulated that, "A nonbinding appellate presumption that a Guidelines sentence is reasonable does not require the sentencing judge to impose that sentence." That is, a sentence that falls within the federal guidelines range may be presumed to be reasonable.

The affirmative interpretation of *U.S. v. Booker*—judges' discretion to defect from the federal guidelines—was again confirmed in the Court's ruling in *Gall v. U.S.* (2007), in which the Court reasoned that, "Assuming that the district court's sentencing decision is procedurally sound, the appellate court should then consider the substantive reasonableness of the sentence imposed under an abuse-of-discretion standard." The Court essentially ruled that appellate courts should not consider sentences unreasonable simply because they fall outside of the federal guidelines. Finally, in *Kimbrough v. U.S.* (2007), the High Court further expanded judicial discretion by holding that departing from the federal guidelines scheme was permissible on grounds of a policy disagreement. In this case, the Court ruled that a sentence could be designated as "unreasonable" as a result of disagreement with the disparity in federal mandatory minimum penalties situated for powder cocaine and crack cocaine offenses. The Court made clear that, "It would not be an abuse of discretion for a district court to conclude when sentencing a particular defendant that the crack/powder disparity yields a sentence 'greater than necessary.'" Thus, the series of High Court decisions further restricted AUSAs' discretion to appeal sentences where judges' departed from the federal guidelines.

To date, the U.S. Supreme Court's standing on the expansion of judicial discretion has remained static. Preliminary analyses of sentencing outcomes in the aftermath of the Court's rulings, however, found a modest increase in judicial decisions outside of the federal guidelines (USSC, 2006, 2010b). What is more, as previously noted, the series of landmark rulings has heightened concerns about unwarranted disparity in certain sentencing outcomes, in particular Assistant U.S. Attorneys' motions for substantial assistance downward departures (e.g., Ulmer and Light, 2010; Ulmer, Light, and Kramer, 2011a, 2011b).

As the succession of legal mandates ultimately confirmed the federal guidelines as advisory, streamlining of the draconian mandatory minimum penalties long prescribed for crack cocaine offenses was underway through the USSC guidelines' amendment process, culminating in comprehensive legislative action. In May 2007—invoking a process that proved unsuccessful in 1995—the USSC ratified amendments to federal crack cocaine penalties (see 28 U.S.C. § 994 (a) (p)), that, absent of legislative action for repeal, took effect on November 1, 2007 (USSC, 2011e). The Crack Cocaine Amendment, which was formally adopted as Amendment 706, restructured the base offense level for the distribution of crack cocaine by adjusting the quantity threshold downward by two levels. Accordingly, first-time offenders convicted of distributing at least 5 grams of crack cocaine faced an amended guidelines sentence of 51 to 63 months that had previously corresponded to a 63- to 78-month sentence. Similarly, the amended guidelines range reduced the penalty for first-time offenders convicted of the distribution of at least 50 grams of crack cocaine from 121 to 151 months to 97 to 121 months. Moreover, the USSC ratified Amendment 713 in December 2007, which rendered the

application of the Crack Cocaine Amendment retroactive on March 3, 2008 (USSC: 2011e). As of June 29, 2011, 25,736 defendants had petitioned the district courts for a sentence reduction of which 64.2 percent of motions for retroactive application were approved (USSC, 2014: 2).

That same year, in a widely-noted speech delivered at Howard University's convocation, then-Senator Barack Obama (2007) explicitly stated, "Let's not make the punishment for crack cocaine that much more severe than the punishment for powder cocaine when the real difference between the two is the skin color of the people using them." A major overhaul of mandatory sentencing legislation for crack cocaine drug offenses soon pursued in the wake of new congressional leadership (a Democratic majority) and presidential administration, which symbolized a "tipping point" for mandatory minimum penalties (Luna, 2010). For instance, newly-appointed Attorney General Eric Holder (2009) remarked that, "This Administration firmly believes that the disparity in crack and powder cocaine sentences is unwarranted, creates a perception of unfairness, and must be eliminated. This change should be addressed in Congress."

Indeed, the Sentencing and Corrections Working Group was convened by the U.S. Department of Justice to investigate federal sentencing policies and thus make recommendations for policy changes (see Breuer, 2010, 2011). On August 3, 2010, the Fair Sentencing Act (FSA) (Pub. L. 111-220, 124 Stat. 2372), authored by Senator Dick Durbin and co-sponsored by Senators Patrick Leahy and Jeff Sessions, was signed into law by President Barak Obama. The FSA of 2010 abolished the mandatory minimum penalty set by the Omnibus Anti-Drug Abuse Act of 1988 for simple possession of crack cocaine (21 U.S.C. §801 (3)) and upped the quantity of crack cocaine needed to trigger a

mandatory penalty for distribution. Specifically, the FSA elevated the quantity of crack cocaine needed for a 5-year mandatory penalty from 5 grams to 28 grams and the quantity of crack cocaine needed for a 10-year mandatory penalty from 50 grams to 280 grams, consequently reducing the 1-to-100 quantity distinction between powder and cocaine penalties to a 18-to-1 quantity distinction (21 U.S.C. §801 (2) (a) (b)). After careful deliberation, the USSC voted unanimously to render the FSA provisions retroactive (sentence reductions for crack cocaine offenses). A press release by the USSC (2011c) estimated that the average sentence reduction under the FSA, taking into consideration the amendment for retroactivity, is 37 months, which is expected to remain constant for approximately 10 years. And most importantly, members of the USSC (2011e) emphasized that the retroactivity of the FSA was based on "significant deliberation and many years of research on federal cocaine sentencing policy." The following section includes a discussion on how mandatory minimum penalties and substantial assistance departures have exacerbated unwarranted disparities in the federal criminal process.

MANDATORY MINIMUM PENALTIES, SUBSTANTIAL ASSISTANCE DOWNWARD DEPARTURES, AND RACIAL AND ETHNIC DISPARITIES

To understand the salient role of mandatory minimum penalties in the federal criminal justice system, it is important to discuss the impact mandatory sentences have on legal and extralegal disproportionality, the prison population, and sentencing practices in general. Punishment under two competing legal structures—U.S. Sentencing Guidelines and statutory mandatory minimums—is complicated. As previously noted, mandatory minimum sentences trump the federal guidelines.

Mandatory minimum legislation has elicited legitimate criticism on several dimensions. From a theoretical stance, mandatory sentencing is incompatible with the U.S. Sentencing Guidelines' expressed goals that are premised on uniformity, proportionality, and consistency (Nagel and Schulhofer, 1992; Oliss, 1994; Schwarzer, 1992; Tonry, 1996, 2005; USSC, 2004, 2011a). In a similar vein, legal researchers and policy makers argue that mandatory sentences obstruct individualized sentencing practices, as judges are precluded from taking into consideration mitigating circumstances concerning the offense or defendant, and thus perpetuate sentences that are "excessively harsh" (USSC, 2011a: 90-103; Cassell, 2004; Hatch, 1993; Sculhofer, 1993; Weinstein, 2003). The criticism is more relentless for penalties instituted for drug trafficking, drug trafficking conspiracy, and simple drug possession. As discussed further below, mandatory minimums for drug offenses—the epitome of the federal government's war on drugs and violent crime during the 1980s—are fashioned exclusively on the "weight" or "mixture" of the drug (e.g., 21 U.S.C. § 841 (b)).

From a practical stance, critics charge that mandatory penalties exert no deterrent effect on crime and drug use (Caulkins, Rydell, Schwabe, and Chisea, 1997; Tonry, 1996; Vincent and Hofer, 1994). In addition, they contend that drug minimums focus on offenders who play a relatively minor role in the drug trafficking network (Froyd, 1999; Sevigny and Caulkins, 2004; Vincent and Hofer, 1994). Indeed, mandatory sentencing legislation was drafted for violent, serious offenses but is "frequently applied" to non-violent drug offenses (Beckett and Sasson, 2004: 166-167). For instance, a recent government report showed that fewer than 7 percent of convictions under a federal mandatory minimum statute were for a violent offense (USSC, 2011a: 73; see also

Vincent and Hofer, 1994). Moreover, from the mid-1980s through the 1990s and beyond, the imposition of enhanced sentences has exacerbated the growth rate of the federal prison population, a trend also witnessed in states' correctional institutions (Blumstein and Beck, 1999; Mauer and Hauling, 1995; Pratt, 2009; USSC, 2004; Zimring, 2005). An analysis of sentencing practices under the federal guidelines' first fifteen years of implementation reported that the "major cause" of growth in the federal inmate population between the 1984 and 2002 reflects the escalation in sentence severity for drug trafficking defendants (USSC, 2004: 48; see also Mauer and Huling, 1995: 5). To illustrate this point, from 1990 to 2010, the federal caseload, as well as the number of defendants convicted under a mandatory minimum penalty, increased threefold (USSC, 2011a: 66).

Aside from the significant rise in the federal inmate population, the overarching concern is that federal mandatory minimum legislation has had unparalleled negative consequences for racial and ethnic minority defendants, mainly African Americans and Hispanics. Some argue that minimum statutes target specific offenses, such as drug possession and trafficking, and enhance penalties for repeat offenses disproportionally concentrated among racial and ethnic minority groups (Beckett and Sasson, 2004; Massey, 2007; Mauer, 2006; Tonry, 1992, 1995, 2011; Tonry and Melewski, 2008; USSC, 2011a: 182; Western, 2006). Mandatory penalties heighten inequality at earlier stages of processing and at imprisonment between White, Black, and Hispanic defendants (Beckett and Sasson, 2004; McDonald and Carlson, 1994: 225; Tonry; 1996, 2011; USSC, 2007, 2011a), reflecting the war on drugs' "malign neglect of its implications for Black [and Hispanic] Americans" (Tonry, 1995:105).

Crime and justice scholars have found that unwarranted disparities—especially racial, ethnic, and gender inconsistencies—occur more frequently and are more pronounced in non-violent drug cases when compared to other non-violent offenses (Albonetti, 1997; Chiricos and Bales, 1991; Crawford, Chiricos, and Kleck, 1998; Johnson et al., 2008; Mitchell, 2005; Myers, 1989; Spohn and DeLone, 2000; Spohn and Fornango, 2009; Steffensmeier and Demuth, 2000; USSC, 2004). The bulk of the attention garnered by drug mandatory sentencing is centered on the conspicuous punishment disparities for cocaine-related offenses. As discussed earlier, this is reflected in the 1-to-100 quantity distinction, that until the passage of the Fair Sentencing Act in 2010, guided sentences prescribed for the trafficking of powder cocaine and crack cocaine (21 U.S.C. § 841 (b)).[6] In addition, passage of the Omnibus Anti-Drug Abuse Act of 1988 broadened the applicability of mandatory minimums. In fact, mandatory penalties were extended to offenses involving conspiracy to distribute drugs. Furthermore, as previously discussed, crack cocaine offenses were singled out for more punitive punishment, as the revamped mandatory minimum statute of 1988 prescribed a 5-year minimum sentence of imprisonment for possession of more than 5 grams of crack cocaine, whereas the penalty for possession of any other controlled substance (e.g., powder cocaine or heroin) triggers a punishment of no more than one year of imprisonment (21 U.S.C. § 844 (a)). Further insight into the contentious debate

[6] As of 1993, the USSC (2007: 2), to apply the U.S. Sentencing Guidelines consistently with the drug mandatory minimum statutes, defines "cocaine base" as crack cocaine, generated by processing cocaine hydrochloride and sodium bicarbonate into a "rocklike" substance. Consequently, as stipulated by the federal guidelines, the remaining forms of cocaine, for example, cocaine paste, are officially classified as powder cocaine (USSC, 2007: 2-3).

concerning disparity in federal drug policies can be gleaned in that crack cocaine, until 2010, was the only drug that carried a mandatory minimum penalty for first-time simple possession.

In addition to the stark penalty differences between crack cocaine offenses and all other drug offenses, the coexistence of the guidelines scheme with statutory mandatory minimums fostered sentencing disparity between similarly situated defendants by producing a "cliff effect" (Luna and Cassell, 2010: 15; Schulhofer, 1993; Tonry, 1996). Schulhofer (1993: 209), for example, demonstrates the impact of the "cliff effect" by showing that a conviction for trafficking 495 grams of powder cocaine may result in a 2-year to 4-year prison sentence, as the volume of drugs, slightly below the applicable mandatory minimum, fails to trigger a stricter penalty (see also Tonry, 1996). Conversely, a conviction for trafficking 500 grams of powder cocaine would trigger a 5-year mandatory minimum penalty.

To emphasize the offense type and racial and ethnic disparities encompassing mandatory sentences, in 2010, 51 percent of the 209,771 inmates under federal jurisdiction were convicted of a drug offense (Guerino, Harrison, and Sabol, 2011: 1; see also Simon, 1993). And, as of 1998, defendants convicted of trafficking in or possession of crack cocaine comprise the largest group of drug offenders housed in federal correctional institutions (USSC, 2011a: 185; see also King and Mauer, 2006). Furthermore, during fiscal year 2010, while rates of incarceration have gradually declined for African Americans and risen abruptly for Hispanics (Guerino, Harrison, and Sabol, 2011; Tonry, 2011), 82 percent of crack cocaine defendants, of which almost four fifths were African American, were convicted of an offense that carried a mandatory penalty

(USSC, 2011a: 191-192). Likewise, 80 percent of powder cocaine defendants, of which approximately three fifths were Hispanic, were convicted of an offense that triggered a mandatory minimum penalty (USSC, 2011a: 173).

Prior research on drug punishment outcomes has shown greater inequities in mandatory minimum cases, cocaine offenses in particular, relative to cases sentenced strictly under the federal guidelines (Hartley, et al., 2007; Kautt and DeLone, 2006; Lacasse and Payne, 1999; Payne, 1997). Assessing a recent survey of federal judges (USSC, 2010a) and a report to Congress by the USSC (2011a) on mandatory minimums and inequity in sentencing, Law Professor Douglas Berman's (2012) written statement to the USSC contended that disparities in federal courts are "principally attributable to the operation of mandatory minimum sentencing provisions as impacted by the exercise of prosecutorial discretion." In support of this position, U.S. Supreme Court Associate Justice Stephen Breyer (1999: 32) pointedly argued that, although the federal guidelines were designed by the USSC to constrain judicial discretion and promote fairness and consistency in the criminal process, prosecutors' discretion, the primary contributor to unwarranted disparity, is deeply rooted in two "nonessential" and "peripheral" features of the federal sentencing scheme—mandatory minimums and substantial assistance downward departures.

Similar to mandatory sentences, the application of downward departures (sentence discounts), particularly substantial assistance or 5K.1 departures initiated by AUSAs, has stirred debate. Like the "cliff effect," the use of substantial assistance downward departures has been associated with extralegal punishment disparities. To be sure, the use of substantial assistance, granted for cooperation with the government in the prosecution

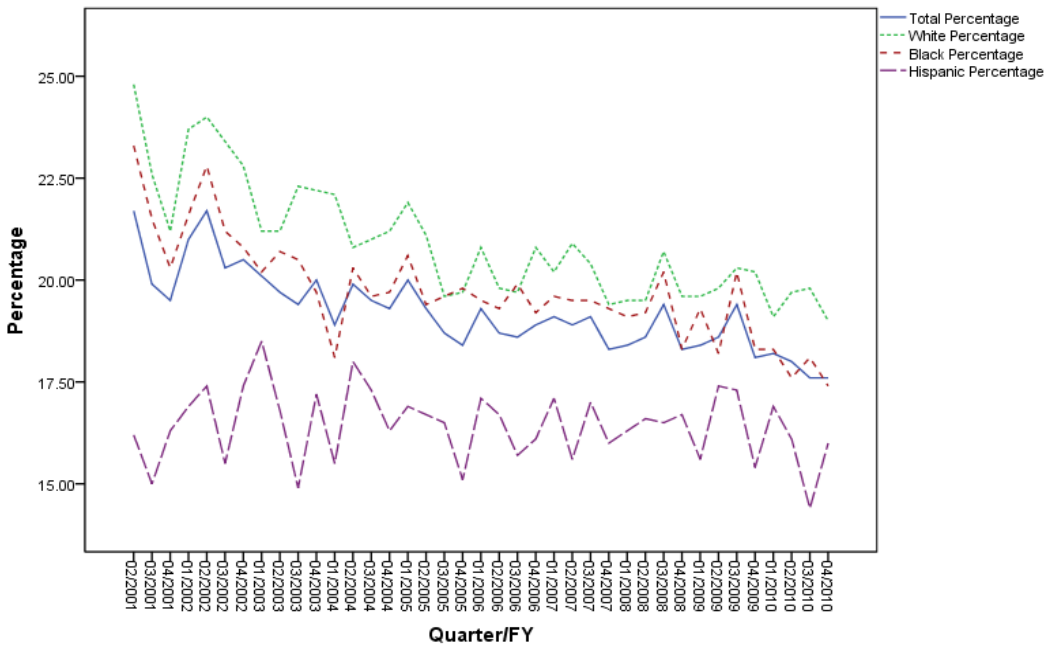
of other defendants, comprises the leading source of disparity in federal sentencing outcomes (Albonetti, 1997, Farrell, 2004; Kempf-Leonard and Sample, 2001; Mustard, 2001; Steffensmeier and Demuth, 2000; USSC, 2004). What is more, the disparity effect is more pronounced in cases where defendants are granted substantial assistance specifically from mandatory penalties, not the federal guidelines (Fischman and Schanzenbach, 2012; USSC, 2004; 2011a). Consider, for example, when immigration offenses are excluded, drug convictions collectively account for 46 percent of the caseload before federal district courts (USSC, 2010c). In fiscal year 2010, two thirds of drug defendants were convicted of offenses that carried a statutory mandatory minimum (USSC, 2011a: 153), while 28 percent of drug defendants were granted relief from the mandatory penalty at the request of the prosecution, in that they provided "substantial assistance" to the government (USSC, 2011a: 196).

The impact of mass imprisonment, to a greater degree for racial minorities who are incarcerated at disproportionate rates, transcends the American criminal justice system. The punitive incarceration boom stemming from the determinate sentencing era has served as a catalyst for creating and sustaining racial and ethnic stratification with dramatic economic and personal costs (Pettit and Western, 2004; Wakefield and Uggen, 2010; Western, 2006). Specifically, incarceration diminishes prospects for meaningful employment, and employment opportunities in general (Massey, 2007; Pager, 2003, 2007; Pettit and Lyons, 2009; Western, 2006; Western, Kling, and Weiman, 2001), fosters family disruption and social disenfranchisement, predominantly in minority neighborhoods (Clear, 2007; Western, 2006; Turanovic et al., 2012), and leads to higher rates of crime and neighborhood deterioration (Rose and Clear, 1998; Tonry, 2011).

Evidence of racial and ethnic stratification is found when looking at federal sentences meted out during the first decade of the 21st century. Using data from the USSC from FY 2001 to FY 2010, descriptive analyses conducted for this dissertation highlight the significant role that substantial assistance departures play in engendering racial and ethnic disparities in mandatory minimum drug trafficking cases in U.S. District Courts. The first trend displayed in Figure 1 shows a significant decline in between-group racial and ethnic disparities over time in the distribution of substantial assistance departures for all drug trafficking defendants—defendants convicted under the federal guidelines or a mandatory minimum penalty. The second trend analysis presented in Figure 2 is restricted to the distribution of substantial assistance departures in cases where drug trafficking defendants were facing a mandatory minimum penalty. Unlike the assessment presented in Figure 1, the data in Figure 2 show that between-group racial and ethnic inequality remains stable over time. Although the prevalence of substantial assistance motions is substantially lower for Black and Hispanic defendants relative to White defendants, the use of substantial assistance is even lower for Hispanic defendants. The trends uncovered reveal that whereas the overall use of motions for substantial assistance departures has exerted relative stability over time, the extent of racial and ethnic disparities varies across sentencing schemes—while racial and ethnic disparities have declined across all drug trafficking cases, racial and ethnic disparities have increased over time and become more aggravated in drug trafficking mandatory minimum cases.

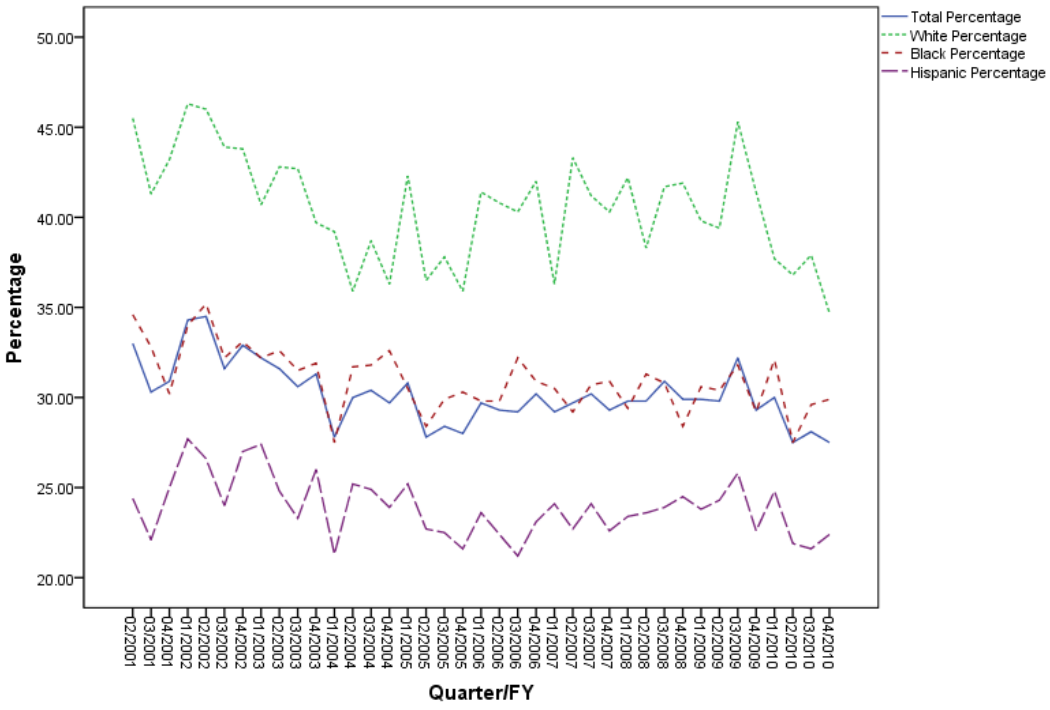
....The reality and intersection of these two dynamics—laws that require a mandatory sentence for drug trafficking or possession and AUSAs' capacity to seek a downward departure to remove a mandatory minimum penalty—assume a pivotal role in

the prosecution of cases, as they aggravate sentencing outcomes for non-violent offending, racial and ethnic minority defendants. Thus, it is important to examine mandatory minimum cases separately from federal guidelines cases. Building on the descriptive findings presented above, the following section more broadly outlines a discussion of the empirical literature on prosecutors' discretion, the circumvention of mandatory penalties, recent sentencing policy reforms, and the social contexts of courts and sentencing.



Data Source: U.S. Sentencing Commission

Figure 1. Substantial Assistance Departures, All Cases



Data Source: U.S. Sentencing Commission

Figure 2. Substantial Assistance Departures, Mandatory Minimum Cases

SENTENCING RESEARCH

Prosecutorial Discretion and the Circumvention of Mandatory Sentences

In the past four decades, research has clearly documented that racial and ethnic disparities exist in prosecutors' discretion to file initial charges (Albonetti, 1987; Beichner and Spohn, 2005; Frohmann, 1991, 1997; Henning and Feder, 2005; Johnson, 2014; Pyrooz, Wolfe, and Spohn, 2011; Spohn, Beichner, and Davis-Frenzel, 2001; Spohn and Holleran, 2000; Spears and Spohn, 1997; Spohn, Gruhl, and Welch, 1987; Wooldredge and Thistlethwaite, 2004), dismiss pending charges (Albonetti, 1992; Farnworth and Teske, 1995; Kingsnorth and MacIntosh, 2007; Spohn et al., 1987; Wooldredge and Thistlethwaite, 2004), and engage in charge reductions (Albonetti, 1992; Holmes, Daudistel, and Farrell, 1987; Johnson, 2014; Kingsnorth and MacIntosh, 2007; Wright and Engen, 2006). Moreover, Kutateladze, Lynn, and Liang (2012) recently reviewed 34 empirical studies on prosecutors' initial charge, presentence detention, and charge dismissal and reduction decisions across state, federal, and juvenile court jurisdictions. The review of the literature provided compelling evidence of extralegal disparity in all stages of the criminal process, as two-thirds of studies on initial charging decisions and an overwhelming majority of all other studies reported significant race and ethnicity effects. The authors noted that in the bulk of analyses they examined, "Defendants' or victims' race directly or indirectly influence case outcomes, even when a host of other legal and extra-legal factors are taken into account" (Kutateladze et al., 2012: 17; see also Free, 2002; Johnson, 2014).

Although research on prosecutors' charging decisions is relatively limited when compared to empirical investigations of judicial decision making (Chiricos and Crawford,

1995; Spohn, 2000; Zatz, 2000), even less attention has been devoted to prosecuting attorneys' charging behaviors associated with mandatory sentencing schemes (Ulmer et al., 2007). This is especially important, as legal and criminology literature asserts that mandatory minimum penalties, coupled with the unbridled prosecutorial power that characterizes their application, encompasses a primary source of unwarranted disparity (Mustard, 2001; Nagel and Schulhofer, 1992; Stith and Cabranes, 1998; USSC, 2004; 2011a; Weinstein, 2003). An early review of empirical evaluations of mandatory sentencing schemes in Massachusetts, Michigan, and New York reported a significant decline in prosecutions and thus convictions, suggesting that, "officials attempted to shelter some defendants from the law's effects" (Blumstein et al., 1983: 188; see also Bynum, 1982; Loftin, Heumann, and McDowall, 1983). The evidence, however, revealed that racial and ethnic disparities persist regardless of prosecutors' unwillingness to file charges carrying a mandatory sentence. A decade later, Nagel and Schulhofer's (1992) qualitative analysis of three federal district courts similarly found that U.S. Attorneys engage in charge manipulation to circumvent punitive sanctions for deserving defendants who appear as "salvageable" or "sympathetic," particularly in cases that warrant a mandatory minimum penalty. This led the authors to conclude that, "prosecutorial behavior may reproduce unwarranted disparity or, worse, discrimination based on race, gender, social class, thereby compromising the goals of the Sentencing Reform Act" (Nagel and Schulhofer, 1992: 560).

Contemporary scholarship on criminal prosecutions has clearly demonstrated that prosecutors in state courts invoke mandatory sentences in a marginal number of eligible

cases,[7] which in turn may aggravate extralegal disparities in the criminal punishment process. For instance, Crawford, Chiricos, and Kleck's (1998) investigation on male defendants in Florida courts found that, net of offense severity and criminal history considerations, prosecutors, in collaboration with judges, were more likely to seek the application of habitual offender provisions for Black defendants. Further research uncovered that the race effect was not confined to male habitual offenders. In a parallel line of research, Crawford (2000) found higher odds of habitual offender prosecutions for eligible Black females, especially for drug offenses. The study, however, confirmed that, for the most part, the race effects for female defendants were restricted to one judicial circuit.

Research focused explicitly on prosecutors' decision making shows racial and ethnic disparities in cases involving mandatory minimum sentencing. Farrell (2003) found that prosecutors in Maryland used mandatory firearm penalties in only 37 percent of convicted cases that carried a mandatory sentence and were more likely to apply a firearm minimum to young, male, and Black defendants. Similarly, using a national sample of defendants, Bjerk (2005) found that the probability of a charge reduction was higher for defendants whose initial charges triggered punishment under a three-strike statute. Although prosecutors were twice as likely to exercise charge reductions in mandatory cases, the probability of a reduction was considerably less for male, Black, and Hispanic defendants. Ulmer, Kurlychek, and Kramer (2007) examined the

[7] This is not necessarily the case in the federal justice system, as mandatory minimum prosecutions are ultimately faced by a slight majority of defendants initially charged with offenses that carry mandatory sentences (USSC, 1991, 2011).

application of mandatory minimum and three-strike penalties in Pennsylvania courts. Consistent with previous research on prosecutors' charging decisions, the results revealed that mandatory minimum and three-strike provisions were applied in 29 percent and 18.4 percent of eligible cases, respectively. Furthermore, male defendants faced a higher likelihood of a mandatory minimum, and Hispanic defendants were almost twice as likely to receive a mandatory minimum and four times more likely to receive a three-strike sentence. Most noteworthy, the results ultimately showed that young Hispanic males were singled out for more punitive punishment under the mandatory minimum scheme. In short, the findings emphasize the significant role that extralegal defendant considerations exert on mandatory minimum sentencing practices.

A developing wave of research has investigated an array of decision points in the charging process in the federal justice system (Johnson, 2014; Rehavi and Starr, 2012, 2014; Starr, 2012; Starr and Rehavi, 2013). The assessment of punishment outcomes beyond judge-controlled decisions has been facilitated by the recent accessibility of federal law enforcement data from the U.S. Marshals' Service (USMS) and a wide range of prosecution data from the Executive Office of the U.S. Attorneys (EOUSA) and Administrative Office of the U.S. Courts (AOUSC). For instance, a notable study by O'Neill Shermer and Johnson (2009) assessed charge reductions from the federal guidelines but found no direct evidence of racial or ethnic disparity. An analysis of charging decisions by Johnson (2014) found that although the probability of a charge reduction was marginally higher for Black and Hispanic defendants, analyses that attempted to capture the conditioning effects of age and gender with race and ethnicity

revealed that both charge reductions and cases where initial charges were never filed were less likely for young male minority defendants.

More relevant to the current study is a focus on federal prosecutors' discretion and unwarranted disparities associated with cases governed by mandatory minimum sentencing statutes. Rehavi and Starr (2012) examined disparities in initial charging and final imprisonment decisions across federal district courts. Taking into account the post-arrest process and legal case characteristics, Assistant U.S. Attorneys were twice as likely to file charges that carry mandatory minimums for Black defendants, which led the authors to conclude that, "Much of that disparity appears to be driven by decisions at the initial charging stage, especially by prosecutors' filing of 'mandatory minimum' charges" (Rehvi and Starr, 2012: 24). In addition, a companion study found that, on average, Black male defendants faced odds of being charged with and thus convicted under a mandatory minimum provision that were approximately one and three-fourths higher than the odds for similarly situated non-Black males (for further gender-specific analyses, see Starr, 2012). These findings led the authors to the conclusion that, "Charges carrying statutory mandatory minimum sentences are prosecutors' most powerful tool to constrain sentences, and disparities in the use of that tool can translate powerfully into sentence disparities" (Starr and Rehavi, 2014: 1323). A study by Fischman and Schanzenbach (2012) also reported a higher likelihood of a statutory minimum for Black defendants, but the study failed to capture whether the race effect was driven by the arrest and charging process. These studies found that federal prosecutors' charging decisions, most salient

being the application of mandatory minimums, were influenced by defendants' gender and race.[8]

A set of studies on final imprisonment decisions also points out that punitive sanctions and extralegal disparities, particularly those related to gender more than race and ethnicity, have a more pronounced effect on mandatory minimum cases relative to cases sentenced under the federal guidelines (Farrell, 2004; Hartley, 2008; Hartley et al., 2007; Kautt and DeLone, 2006; Lacasse and Payne, 1999; Nagel and Schulhofer, 1992). Engen (2009: 328) stressed that research on recent modifications to the determinate sentencing approach "must explore more broadly how judges and prosecutors exercise their discretion under various types of laws." To be sure, a series of studies have demonstrated the salience of parsing out the effects case and defendant predictors on punishment outcomes between the two federal sentencing structures—federal guidelines and mandatory minimum schemes. Lacasse and Payne's (1999) analysis of plea negotiations and sentencing outcomes in two New York district courts found that charge bargaining and disparity was more prevalent in cases marked by a mandatory minimum. Likewise, Kautt and Spohn's (2002) comprehensive study of drug sentencing outcomes—cases sentenced under the federal guidelines, cases sentenced under a mandatory minimum, and cases where a mandatory minimum was circumvented—found that most racial inconsistencies derived from mandatory minimum cases. In a similar investigation of federal drug trafficking defendants, Farrell (2004) found that female

[8] The authors of this new wave of research note that conclusions on extralegal disparity should be drawn with caution, as the USMS data, which provide federal arrest information, do not capture a measure for suspects' ethnicity, and thus collapses White Hispanic and White non-Hispanic arrestees into the "White" category (Johnson, 2014: 92; see also Rehavi and Starr, 2013; Starr, 2012).

defendants who were granted relief from a mandatory minimum penalty by means of the safety valve amendment exhibited higher odds of receiving a downward departure. In particular, she reported that whereas Black and Hispanic females benefited from a judge-controlled sentence discount, the odds of a motion for a sentence reduction from federal prosecutors were considerably less for minority female defendants, concluding that "Discretion does not disappear under the sentencing guidelines, rather it shifts around among legal actors" (Farrell, 2004: 72).

Alongside assessments of federal prosecuting attorneys' initial charging decisions and subsequent charge reductions stands a separate established literature on AUSA's discretion that is focused on the final sentencing phase—motions for substantial assistance downward departures. Hartley, Maddan, and Spohn (2007) estimated separate models to predict the odds of AUSAs' motions for substantial assistance departures for powder cocaine and crack cocaine offenses, delineated by whether cases were subjected to prosecution under the federal guidelines or mandatory minimum drug statutes. The authors unexpectedly found that prosecutor-controlled sentence discounts, for the most part, were advantageous toward Black defendants (see also Kautt and Spohn, 2002). Johnson, Ulmer, and Kramer (2008) found that, among other extralegal defendant considerations, downward departures for providing substantial assistance were less likely for Black and Hispanic defendants. Similarly, Spohn and Fornango (2009) found that AUSAs were more likely to petition the court for substantial assistance relief for defendants who were female, younger, college educated, U.S citizens, had dependent children, and were under the influence of drugs during the commission of their offense. A noteworthy study by Johnson and Betsinger (2009) expanded focus on racial and ethnic

inequity to Asian defendants and found that substantial assistance departures were more likely for Asians, the "model minority," when compared to all other groups, to a certainly greater extent than Black and Hispanic defendants.

Additional work has uncovered that racial and ethnic disparities in substantial assistance departure outcomes are conditioned by gender (Albonetti, 2002; Cano and Spohn, 2012; Farrell, 2004; Kautt and Spohn, 2002; Spohn and Brennan, 2011), drug use (Ortiz and Spohn, 2014), parenting status (Farrell, 2004; Stacey and Spohn, 2006), and contextual variations across federal court jurisdictions (Johnson et al., 2008; Nagel and Schulhofer, 1992; Spohn, 2005; Ulmer, 2005). For instance, Cano and Spohn's (2012) study on drug trafficking defendants facing a mandatory minimum penalty in three federal district courts in the Midwest found that race effects were masked by gender, as the prevalence of a substantial assistance guidelines departure was considerably lower for Black and Hispanic male defendants. Because of the mixed race findings presented, emphasis is placed on the importance of exploring further the intersectionality of well-known legal and extralegal predictors of AUSAs' motions for substantial assistance. The next section advances to a discussion of the empirical literature on the degree to which the race and ethnicity effects in criminal case processing has been shaped by the most recent federal sentencing policy changes.

Federal Sentencing Reforms and Unwarranted Disparities

As previously discussed, nearly eighteen years after determinate punishment reforms were set into place, the stage of federal sentencing was yet again altered by passage of the PROTECT Act and a series of rulings from the U.S. Supreme Court—most salient, *U.S. v. Booker* (hereafter *Booker*) and *Gall/Kimbrough v. U.S.* (hereafter

Gall/Kimbrough)—which rendered and subsequently reaffirmed the U.S. Sentencing Guidelines as "effectively advisory." Thus, scholarship has examined the extent to which judges have embraced their newfound freedom to deviate from the federal guidelines. With relatively few exceptions, inequality in relation to defendants' race and ethnicity, among other extralegal considerations, has not changed dramatically in wake of the Court's *Booker* and *Gall* decisions (Farrell and Ward, 2011; Fischman and Schanzenbach, 2012; Hofer, 2007, 2011; Rehavi and Starr, 2013; Scott, 2010; Starr and Rehavi, 2012; Tiede, 2009a, 2009b; Ulmer and Light, 2010; Ulmer et al., 2011a, 2011b; USSC, 2006). However, comparativley few asessments have tested whether extralegal disparities amid the policy reforms are more prounced in discretionary decisions associated with Assistant U.S. Attorneys (Starr and Rehavi, 2013; Ulmer et al., 2011a) or whether the scope of disparity is conditioned by extralegal characteristics, such as gender (Ulmer et al., 2011a; USSC, 2010b), or contextual variation across district courts (Farrell and Ward, 2011; Fischman and Schanzenbach, 2012; Kim, Cano, Kim, and Spohn, forthcoming; Ulmer et al., 2011b).

In 2006, the U.S. Sentencing Commission issued a report that investigated criminal punishment practices across three periods of key changes in sentencing policy—before and after passage of the PROTECT Act and in the post-*Booker* period. In relation to extralegal predictors of incarceration severity, the analyses uncovered that although young, male, non-U.S. citizen defendants faced more severe sentences in the wake of the PROTECT Act and *Booker*, race effects were confined to the cases adjudicated in the post-*Booker* era, in that Blacks on average received sentences 4.9 percent higher than White defendants under the advisory guidelines scheme. Moreover, evidence of ethnic

disparity as a result of sentencing reforms was not observed for Hispanic defendants. Four years later, a second USSC report (2010b) estimated a set of "refined models" to re-examine whether shifts in unwarranted disparity were associated with the Court's ruling in *Booker*, as well as convictions rendered subsequent to *Gall*.[9] Findings from the analysis on racial disparity somewhat departed from the USSC's (2006) previous report, as Black male defendants received substantially higher sentences than White male defendants subsequent to *Booker* that were about 15 percent longer, which then increased rapidly in the aftermath of *Gall* with sentences that were about 21 percent longer, although the upward shift in incarceration severity for Hispanic males was restricted to the post-*Gall* period.

Conclusions regarding the USSC's (2010b; see also USSC, 2012) report of stark unwarranted disparities in the post-*Booker* and post-*Gall* periods reached were called into question by researchers, particularly for their departure from the long-established methodology used in the punishment literature. In one of a series of subsequent studies that separately modeled incarceration and incarceration severity outcomes, Ulmer, Light and Kramer (2011a) compared a series of judicial and prosecutorial decisions across four periods of sentencing innovations—pre-PROTECT, post-PROTECT, post-*Booker*, and post-*Gall* periods. Although disparity in imprisonment decisions was disadvantageous solely toward Black males in the post-*Gall* era relative to cases leading up to the

[9] The "refined model's" methodological design contrasts with the previous *Booker* report, as the analyses collapsed imprisonment and non-imprisonment cases (with a value of 0 months of incarceration) into one single measure to predict sentence length (see Albonetti, 1997; Bushway and Piehl, 2001), included immigration offenses, estimated interaction models of defendants' gender, race, and ethnicity, controlled for defendants' presentence detention status, and excluded explanatory variables that capture criminal history and sentence enhancements (USSC, 2010: 17-21).

PROTECT Act, Black and Hispanic male defendants were slightly less likely than their White male counterparts to receive judge-controlled downward departures in punishment phases governed by the *Booker* and *Gall/Kimbrough* decisions. Alternatively, they observed a steady increase in disparity related to prosecutors' decisions, as Black and Hispanic male defendants were less likely to receive substantial assistance guidelines departures in the post-*Gall* period. Aside from the racial disparity that was witnessed primarily in the analyses of prosecutor-controlled sentence discounts, the authors concluded that, "Put simply racial and gender sentence-length disparities are less today, under advisory Guidelines, than they were when the Guidelines were arguably their most rigid and constraining" (Ulmer et al., 2011a: 1100).

A second analysis by Ulmer and associates (2011b) looked at whether unwarranted disparities in imprisonment outcomes across federal districts had been altered in the *Booker* and *Gall* sentencing landscape, controlling for inter-district variation. The findings showed that although disparities in sentence length, for the most part, remained stable, the odds of imprisonment were higher for Hispanic defendants than similarly situated Whites convicted in the *Gall* era. Aside from the disparity effect for Hispanic defendants, the authors eluded to the fact that "the liberalization of judicial discretion has resulted in significantly less racial disparity when compared to the pre-PROTECT era" (Ulmer et al., 2011b: 822). Essentially, with few exceptions, the analyses that sought to replicate the USSC (2010b) report contradictorily uncovered a lower incidence of judge-led disparity in the post-*Booker* and post-*Gall* sentencing establishment.

Consistent with the USSC's current methodological stance, a second wave of investigations of racial and ethnic sentencing inequities in the *Booker* and *Gall/Kimbrough* regime have relied heavily on modeling strategies that exclude key case characteristics, such as the presumptive sentence, mandatory minimum status, and downward departure status (e.g., Fischman and Schanzenbach, 2212; Kim, Cano, Kim, and Spohn, forthcoming; Kim, Spohn, and Hedberg, forthcoming; Starr, 2012; Starr and Rehavi, 2013).[10] For instance, Fischman and Schanzenbach (2012: 257) found that racial disparities associated with sentence length and judicial downward departure decisions were relatively stable post-*Booker* but were substantially heightened in the post-*Gall/Kimbrough* period, cautioning, however, that the disparity effects may have been driven by cases explicitly governed by a mandatory minimum. Using a regression discontinuity research design, Starr and Rehavi (2013) looked at the immediate and lasting effects of *Booker* on charging, plea bargaining, judicial departure, and imprisonment decisions in district courts. The authors found that Black defendants faced harsher charging outcomes relative to Whites, although the disadvantage effect was restricted to a limited number of months following the guidelines' advisory status. Despite finding no evidence of change in racial or ethnic disparity in the long term, the

[10] Analyses on the effects of recent changes in federal sentencing policies have confronted criticism concerning methodological choices, in particular, when employing control measures for the presumptive sentence, judicial downward departures, and mandatory minimums in models aimed to predict incarceration severity. This strategy has been branded problematic. More specifically, it has been stressed that these explanatory variables embody disparity as they attempt to explain variation in final sentences but are simultaneously influenced by judicial (and prosecutorial) discretion and the sentencing reforms, and thus introduce the risk of an endogenous relationship (Engen, 2011; Fischman and Schanzenback, 2012; Starr and Rehavi, 2013). Fischman and Schanzenback (2012: 9) noted that models that employ judicial downward departures as controls "are only measuring the impact of *post-departure* discretion on racial disparity," such that "they fail to capture the impact of the primary channel by which *Booker* and *RGK* [*Rita*, *Gall*, and *Kimbrough*] affect sentences."

analyses demonstrated a sharp and continuing escalation in incarceration severity (guidelines offense levels) in all cases processed in the post-*Booker* period.

Several innovative research endeavors have attemtped to capture the relationship between legal actor's discreiton and disparity after the inception of the advisoy guidelines era. Using judge-specific sentencing data from the Distirct of Massachusetts, Scott (2010) examined whether overall incarceration severity varied across judges in cases not bound by a mandatory minimum penalty. Consistent with the highly contested USSC (2010b) report, the study found that the average sentence increased from 15 months prior to *Booker*, to roughly 30 months following *Booker*, and to approximately 40 months following *Gall*. His innovative analysis also reported a "spike" in inter-judge disparity, as the average sentence length prior to *Booker* reflected between 25.9 months and 40 months, whereas in the post-*Gall* reform era, three judges rendered sentences that averaged 25.5 months and two judges rendered sentences that averaged 51.4 months (Scott, 2010: 25). On the contrary, and more recently, Kim, Cano, Kim, and Spohn (forthcoming) found that in addition to varying significantly across federal districts and across guidelines reforms, average sentence lengths were substantially lower in light of the *Booker* and *Gall* Court rulings. Moreover, they found that sentence severity was shaped by districts' social-environmental characteristics in cases adjudicated subsequent to the *Gall* decision, in that an increase in districts' level of socioeconomic disadvantage and percent Black population was associated with a more lenient sentence.

Some argue—as is discussed in-depth in the introductory chapter of this study—that the conclusions garnered by the new wave of sentencing reform impact studies, of which a large majority report stability or a decline in racial and ethnic disparities relative

to the practices in the past, may be attributable to marked variability in methodological design (Engen, 2009, 2011; Paternoster, 2011; Spohn, 2011). What has yet to be examined is whether immediate and gradual changes in unwarranted disparity stemming from prosecutors' decisions are influenced by differences across reforms and across court jurisdictions. The next section shifts focus to the empirical literature on the organizational- and social-contextual contours of criminal court outcomes.

Social Contexts of Sentencing and Substantial Assistance Downward Departures

A speech delivered by former Attorney General Eric Holder (2009) condemned disparities under the federal guidelines and the mandatory minimum scheme following the transition to advisory guidelines, urging researchers to "assess whether current sentencing practices show an increase in unwarranted sentencing disparities based upon regional differences." Social scientists indeed argue that beyond legal factors and within-court variability, criminal punishment outcomes are characterized by courts' unique organizational processes and surrounding social environment (e.g., Dixon, 1995; Eisenstein and Jacob, 1977; Eisenstein et al., 1988; Nardulli et al., 1988; Sampson and Lauritsen, 1997; Ulmer, 1997). Despite the absence of literature on contextual disparities post-*U.S. v. Booker* (2005) and post-*Gall/Kimbrough v. U.S.* (2007) (see however, Farrell and Ward, 2011; Kim, Cano, Kim, and Spohn, forthcoming; Ulmer et al., 2011b), an enormous body of work highlights the influence local social context bears on sentencing outcomes in state courts (e.g., Britt, 2000; Crawford, Chiricos, and Kleck, 1998; Fearn, 2005; Feldmeyer et al., 2015; Johnson, 2005; Myers and Talarico, 1987; Ulmer and Bradley, 2006; Ulmer and Johnson, 2004; Ulmer et al., 2007; Wang and Mears, 2010a, 2010b; Wooldredge, 2007; Weidner, Frase, and Schultz, 2005; Wooldredge and

Thistlethwaite, 2004) and federal district courts to a lesser degree (Farrell and Ward, 2011; Feldmeyer and Ulmer, 2011; Johnson, 2014; Johnson et al., 2008; Kautt, 2002; Kim et al., forthcoming; Ulmer et al., 2010, 2011b; Ward, Farrell, and Rousseau, 2009a, 2009b). Furthermore, scholars have pointed out that explanations of sentencing disparities extend to inconsistencies across courtroom participants, especially between-court actor variation among judges and prosecutors (Anderson and Spohn, 2010; Johnson, 2006; Kim, Spohn, and Hedberg, forthcoming; Scott, 2010; Spohn and Fornango, 2009, Wooldredge, 2010).

The existing literature on extralegal disparity and the surrounding social contexts of state court jurisdictions has focused on several key decision points of criminal case processing—charging and charge reduction, presentence detention, and imprisonment decisions. Britt's (2000) multilevel analysis of sentencing decisions in Pennsylvania courts revealed that an increase in the percent black population increased the likelihood of incarceration for all defendants. D'Alessio and Stolzenberg's (2002) study of 12 urban court jurisdictions reported that presentence detention was conditioned by the level of unemployment, as the probability of confinement before trial was higher among unemployed defendants charged in cities with escalating rates of unemployment (see also Levin, 2008; Pinchevsky and Steiner, 2013). Johnson (2005) examined judicial departures in Pennsylvania rural and urban courts and found that the probability of a sentence discount was higher for defendants in counties with larger courts and caseloads, while increases in a county's Hispanic population size reduced the likelihood of a sentence reduction. Ulmer, Kurlychek, and Kramer (2007) found that although mandatory sentence outcomes in Pennsylvania state courts were noticeably advantageous

toward White defendants, in general, mandatory minimum penalties were less likely for White and Black defendants processed in counties with higher Black populations. Wang and Mears' (2010a) racial and ethnic threat study of felons convicted across 60 large urban counties found that counties' percent Black population and level of Black political threat (i.e., Black-to-White voting ratio) were positively associated with receiving a prison sentence relative to a jail or non-custodial sentence. Inconsistent with the racial threat results, they found that increases in the percent Hispanic and Hispanic political threat (i.e., Hispanic-to-White voting ratio) led to a higher probability of receiving a jail sentence and a lower probability of a prison or non-custodial sentence (see also Wang and Mears, 2010b).

Despite the recent availability of charging and imprisonment information for a large number of districts, coupled with new advances in contemporary theoretical and empirical research (e.g., multilevel modeling strategies), very little is known about the contextual effects of imprisonment decisions in U.S. District Courts (e.g., Hartley, 2008; Kautt, 2002; Spohn, 2005; Ulmer, 2005, 2012). We know relatively little about how the association between defendant and case characteristics and legal actors' decisions is shaped by districts' social environments (Ulmer, 2012). That said, there is some research that addresses this issue. For instance, Feldmeyer and Ulmer's (2011) racial and ethnic threat analysis concluded that Hispanic defendants relative to similarly situated White defendants face longer imprisonment in districts with a smaller Hispanic population. Ward, Farrell, and Rousseau's (2009a) examination of the effects of court workforce composition on disparity reported that the probability of imprisonment for Black defendants was lower in federal districts with a higher representation of Black

prosecutors, and, to a lesser extent, Black judges (see also Ward et al., 2009b). More recently, a comprehensive investigation of charging decisions across federal district courts by Johnson (2014) reported that although increases in districts' caseload pressure reduced the odds of having charges declined by AUSAs, increases in the size of prosecutors' workforce and the level of socioeconomic disadvantage led to higher odds of initial charges never being filed. With respect to charge reductions, he found that increases in districts' caseload pressure and size of prosecutors' workforce increased the probability of having pending charges lowered. Furthermore, the analyses showed that charge reductions were less likely in districts with larger Black populations and higher crime rates.

A considerably smaller but highly relevant collection of empirical work has assessed inter-district variation in AUSAs' motions for substantial assistance downward departures. Nagel and Schulhofer's (1992) notable analysis uncovered that the standards used to evaluate what the government qualified as "substantial assistance"—based on cooperation in the form of information or testimony among other non-legal considerations such as defendants' who appeared as "deserving" of a downward departure—varied significantly across the three federal districts observed in their study. For instance, deviation from the guidelines by means of substantial assistance in two districts more than doubled the national average, whereas the rate of sentence discounts in the third district closely reflected the national average (Nagel and Schulhofer, 1992: 553).

Investigations conducted by government institutions have produced support for Nagel and Schulhofer's (1992) conclusions concerning jurisdictional variation (General

Accounting Office, 1993, 2003; USSC, 2004, 2006, 2011). An early study by the U.S. General Accounting Office (1993) reported that, similar to the imposition of mandatory minimum penalties, AUSAs' circumvention of recommended sentences for defendants who provide substantial assistance fluctuated across federal districts, in that the requirements that triggered a motion for substantial assistance departures were characterized as "stringent" in some districts but "liberal" in other districts. To illustrate, defendants in the Central District of California were compelled to provide the court "assistance" that encompassed an admission of guilt, testimony, or information leading to the apprehension of other offenders, whereas substantial assistance granted in the Southern District of New York required minimal effort (see also, U.S. General Accounting Office, 2003). More recently, the USSC (2011a: 110-111) reported that substantial assistance sentence discounts from mandatory minimum penalties for similar types of cooperation with the government across districts ranged between 30 percent and 50 percent below the prescribed guidelines' recommendation, suggesting that, "there appears to be no nationwide Department of Justice practice concerning the extent of the reduction that should be recommended for any particular type of cooperation."

A closely related literature has investigated the social contexts of substantial assistance downward departures more extensively (Hartley, 2008; Johnson, Ulmer, and Kramer, 2008; Maxfield and Kramer, 1998; Spohn, 2005; Spohn and Fornango, 2009; Weinstein, 1999; Wu and Spohn, 2010; see also Johnson, 2005). Few assessments, however, have fully examined variability across federal districts, instead accounting for contextual differences simply as a control measure (e.g., Albonetti, 1997; Steffensmeier and Demuth, 2000). Among the limited systematic investigations of inter-district

variation in downward departures, Spohn's (2005) study of three federal districts situated in the Midwest—Nebraska, Minnesota, and Southern Iowa—found that the probability of a substantial assistance departure was higher among defendants convicted in the district of Southern Iowa relative to the other two districts. This led Spohn (2005: 23) to articulate that, "Members of the courtroom workgroups in Minnesota and Nebraska have established different—that is, more generous—standards for rewarding defendants who provide this type of assistance." Further analyses confirmed that, independent of legal and extralegal factors, defendants in Nebraska and Minnesota were granted sentence discounts roughly 20 months shorter when compared to sentence discounts granted in the District of Southern Iowa. In a parallel line of research, when cases were specifically parsed out by district, Wu and Spohn (2010) found that that substantial assistance relief was less likely for defendants convicted in the district of Minnesota than defendants convicted in the districts of Nebraska and Southern Iowa.

A mixed-methods approach undertaken by Ulmer (2005) looked at downward departures across four federal districts diverse in court size and geographic location (Northeast, Midwest, Southern, and Western). When compared to the other two districts in the South and West, substantial assistance departures were more prevalent in the two federal districts situated in the Northeast and Midwest regions. Moreover, interviews with attorneys from the two districts where substantial assistance departures were widespread, the Northeast district in particular, revealed a relaxed court environment where guidelines departures for provident substantial assistance were awarded for information of "questionable value" (Ulmer, 2005: 263). Substantial assistance relief in the Southern and Western districts, however, was quite uncommon. Although prosecutors in the Western

district subjected defendants to risky situations leading to information on drug distribution networks, prosecutors in the Southern district evaded filing motions for substantial assistance altogether.

By and large, assessments of the social contexts of substantial assistance downward departures have generally examined decisions across a small number of federal districts (e.g., Cano and Spohn, 2012; Nagel and Schulhofer, 1992; Ortiz and Spohn, 2014; Wu and Spohn, 2010), and have not tested the direct or indirect influence of contextual-level predictors on prosecutor-controlled departures beyond that of district-to-district comparisons (e.g., Hartley et al., 2007). In a recent development in the research, Johnson, Ulmer, and Kramer's (2008) multilevel analysis of guidelines departures across all U.S. federal districts found that whereas an increase in the district's caseload pressure and racial and ethnic minority composition heightened the probability of a substantial assistance departure, an increase in the district's court size (captured by the number of judges) and crime rate heightened the magnitude of the sentence discount. Moreover, cross-level interaction models revealed that an increase in districts' percent Hispanic population reduced the probability of substantial assistance relief for Hispanic defendants relative to White defendants, leading to the conclusion that, "The legal contours of federal sentencing, therefore, are likely to be shaped by district-specific social environments" (Johnson et al., 2008: 767; see also Ulmer et al., 2011b). Lastly, a breakthrough study by Spohn and Fornango (2009) examined inter-prosecutor variation in Assistant U.S. Attorneys' decisions to seek substantial assistance downward departures across three federal district courts and found that motions for substantial assistance varied significantly across prosecutors. Although most of the variation in sentence discounts was

explained by legal factors, the findings showed that prosecutors did not conform to "identical views of the circumstances that justify a substantial assistance departure" (Spohn and Fornango, 2009: 835). These works imply that independent of case and defendant considerations, criminal punishment outcomes are influenced by court jurisdictions' organizational and structural characteristics.

Collectively, empirical examinations of Assistant U.S. Attorneys' administration of substantial assistance motions across defendants, legal structures, sentencing reforms, and court jurisdictions offer compelling evidence of nonuniformity in the federal criminal punishment process. Chapter 3 elaborates on the theoretical explanations of prosecutors' decision making, as well as the research propositions that frame this study.

CHAPTER 3

THEORETICAL FRAMEWORK AND RESEARCH HYPOTHESES

Although legal case factors such as offense severity and criminal history characterize the bulk of the variation captured in punishment outcomes (Blumstein et al., 1983; Gottfredson and Gottfredson, 1987; Mitchell, 2005; Pratt, 1998; Spohn, 2000; Zatz, 2000), contemporary theoretical perspectives argue that harsher treatment of minority defendants stems from legal actors' negative attributions or stereotypes of criminal responsibility and dangerousness (Albonetti, 1986, 1991; Albonetti and Hepburn, 1996; Bridges and Steen, 1998; Steffensmeier, Ulmer, and Kramer, 1998; Spohn and Holleran, 2000). Beyond defendant-based characteristics as the key causal mechanism for extralegal disparities in criminal punishments, a separate line of theoretical propositions asserts that outcomes vary across legal jurisdictions, and that decision makers' assessments of culpability and public safety are tied to considerations of case processing efficiency (Dixon, 1995; Engen and Steen, 2000; Ulmer and Johnson, 2004; Ulmer, 1997), racial and ethnic group threat (Bridges and Crutchfield, 1988; Britt, 2000; Chiricos, Welch, and Gertz, 2004; Fearn, 2005; Feldmeyer and Ulmer, 2011; Wang and Mears, 2010a, 2010b), and criminal threat (Bontranger, Bales, and Chiricos, 2005; Quillian and Pager, 2001). Taken together, these perspectives inform us on the impact that race and ethnicity exert on sentencing decisions within and between court domains—at the individual level and at the organizational and community level.

Substantially less theoretical and empirical attention, however, has been devoted to investigating potential shifts in the disparate treatment of defendants in wake of sentencing policy reforms—principally, disparity derived from prosecutors' decisions.

The sentencing reform literature has explicitly focused on the trajectory of extralegal effects on a reform-to-reform or year-to-year basis, potentially overlooking a smaller window of extralegal disparities in punishment outcomes. Moreover, in most research, theoretical explanations of the relationship between race and ethnicity and federal sentencing outcomes have not been demarcated by type of punishment scheme (i.e., federal guidelines and mandatory minimum statutes). Recently, Peterson (2012:308) reiterated her early appeal to researchers to "examine racial differences in sentencing in ways that take into account the varying meanings attached to race across settings and overtime" (see also Myers, 1989; Peterson and Hagan, 1984).

Chapter 3 develops the theoretical framework and research propositions that will be tested in this study. The remainder of the chapter is divided into three sections. The first section is designed to explain anticipated changes in AUSAs' substantial assistance departures motions in the short term and long term in the aftermath of *Booker v. U.S.* (2005) and *Gall/Kimbrough v. U.S.* (2007). Emphasis is also drawn to the qualitative differences between guidelines cases and mandatory minimum cases. In the same context, the next section discusses theories based on the intersection of defendants' race and ethnicity with recent sentencing reforms to explain change in AUSAs' motions for substantial assistance departures. The final framework focuses on the effects of social context on criminal punishments, especially the influence of federal districts' minority population, crime rate, and caseload pressure on AUSAs' substantial assistance motions.

ASSISTANT U.S. ATTORNEYS' DECISION MAKING ACROSS REFORMS

Criminal punishment in the federal criminal justice system, in theory, reflects a uniform scheme of policies and statutes. The U.S. Sentencing Guidelines and mandatory minimum statutes, then, embody formalized legal rationality to the extent that decisions are based exclusively on legal case considerations, not concerns for the root causes of criminal behavior and the collateral consequences of imprisonment (Engen and Steen, 2000: 1361; Stith and Cabranes, 1998). In modern society, however, formal rationality is subverted by substantive rationality (Ulmer and Kramer, 1996), in that the determinate sentencing approach is "systematically related to the sociostructural, cultural, and organizational forces that are the bases for substantial rationalization" (Savelsberg, 1992: 1364). The federal criminal process by its very nature—that is, the availability of a wide range of guidelines penalties for similarly situated defendants, sentence adjustments, downward departures, and innovations in sentencing policies—stands at odds with uniformity and consistency, and instead embodies a system that conforms to complexity, resource constraints, and local and cultural norms.

As discussed in previous chapters, empirical evaluations of the existence of extralegal disparities subsequent to the establishment of presumptive guidelines in Minnesota and Ohio came to somewhat different conclusions. Although the extralegal disparity observed under Minnesota's rigid guidelines scheme fluctuated over time, the reduction in disparity under Ohio's less-structured guidelines scheme assumed a long-enduring, stable effect. An explanation for this glaring contrast implies that legal actors might respond more favorably—with less disparate treatment of defendants and certain types of cases—to a less-restrictive punishment scheme (Wooldredge, 2009; see,

however, Bushway and Piehl, 2007). For instance, Wooldredge, Griffin, and Rauschenberg's (2005: 862) study on the legal and extralegal effects of charging and imprisonment outcomes before and immediately after Ohio's transition from presumptive to advisory guidelines stressed that "decision making processes are somewhat resilient to formal change, at least when a certain level of discretion in decisionmaking is retained." Wooldredge and colleagues' (2005) interpretation of their findings may resonate well with federal judges as demonstrated in the literature that essentially shows enhanced uniformity in imprisonment outcomes after the guidelines' advisory status, but this is certainly not the case for Assistant U.S. Attorneys.

As the U.S. Supreme Court's decision in *U.S. v. Booker* (2005) "liberated" judges from the federal guidelines, a succession of legal directives, notably the rulings in *Gall v. U.S.* (2007) and *Kimbrough v. U.S.* (2007), repeatedly affirmed and further broadened judges' discretion to deviate from the guidelines. What is more, although AUSAs' discretionary power in cases carrying mandatory minimum charges remained untouched, the case law allowed judges to deviate from standing charges during the sentencing phase and significantly constrained prosecutors' discretion to initiate appellate review of sentences falling outside of the guidelines range. At the same time, the U.S. Department of Justice's highly-centralized regime (Eisenstein, 2007; Richman, 2008) emphasized a "pretend nothing happened" (Richman, 2008: 1394) orientation, thus directing federal prosecuting attorneys to exercise and preserve adherence to the federal guidelines scheme. In fact, then-U.S. Attorney General Alberto Gonzales (2005: 324) stressed that the new advisory guidelines system "threatens the progress we [U.S. Department of Justice] have made in ensuring tough and fair sentences for federal offenders."

The wave of legal contingencies that ultimately led to the downfall of the federal guidelines structure and federal prosecutors' diminished authority in those respective cases, coupled with the Department of Justice's defiant stance against the guidelines' advisory status, may have led AUSAs to respond by executing greater control over cases under their complete control—statutory mandatory minimum cases in which in most circumstances charges may only be circumvented by motions for a substantial assistance downward departure. Then, federal prosecutors' loss of discretion and perceptions of heightened judicial freedom and leniency for defendants might have been exacerbated in the post-*Booker* era, potentially leading to a disruption in the granting of downward departures for providing substantial assistance. In a related argument, AUSAs may have reacted even more aggressively following *Gall* and *Kimbrough* relative to the *Booker* decision, as these legal mandates placed broader limitations on their charging and appellate authority in guidelines cases—thus being more reluctant to file motions for substantial assistance departures.

Taken together, in each of the contexts discussed above, based on the theoretical expectations and empirical evidence, it is expected that federal prosecuting attorneys will attempt to maintain a strong grasp on their discretionary power, which will become more enhanced as greater restrictions are placed on their authority. The following research hypotheses are derived to test these theoretical expectations:

> *Hypothesis 1a*: AUSAs will be less likely to file motions for substantial assistance downward departures, immediately and in the long term in cases sentenced after *U.S. v. Booker* (2005) and *Gall/Kimbrough v. U.S.* (2007).

Hypothesis 1b: Changes in AUSAs' use of substantial assistance departures will be conditioned by the time period. The reduction in AUSAs' likelihood of filing motions for substantial assistance downward departures will be greater in cases sentenced after *Gall/Kimbrough v. U.S.* (2007) than cases sentenced after *U.S. v. Booker* (2005), immediately and in the long term.

Hypothesis 1c: Changes in AUSAs' use of substantial assistance departures will be conditioned by the type of case. The reduction in AUSAs' likelihood of filing motions for substantial assistance downward departures will be greater in mandatory minimum cases than federal guidelines cases, immediately and in the long term after *U.S. v. Booker* (2005) and *Gall/Kimbrough v. U.S.* (2007).

RACIAL AND ETHNIC DISPARITIES IN ASSISTANT U.S. ATTORNEYS' DECISION MAKING

Causal explanations of unwarranted disparities in criminal case processing within court jurisdictions have emerged from several social psychological and organizational perspectives. Theoretical positions on extralegal inconsistencies in charging practices focus on prosecuting attorneys who exercise unfettered discretion in most situations and prioritize managing uncertainty (Albonetti, 1986; Eisenstein and Jacob, 1977). This is an especially important concern in the federal justice system. Because Assistant U.S. Attorneys, like the majority of state prosecuting attorneys, do not enjoy lifetime tenure, assessments of their performance and accountability are, for the most part, based on records of case processing efficiency, criminal convictions, and organizational expectations, which may exert a more significant role when prosecutors have political aspirations (Kessler and Piehl, 1997; O'Neill Shermer and Johnson, 2010; Ulmer, 2012). Consistent with the "hydraulic displacement" effect, some scholars argue that whereas extralegal variation in jurisdictions with rigid presumptive guidelines is most pronounced during the entry stages of criminal case processing, extralegal variation in jurisdictions

with less-restrictive, advisory guidelines schemes will be most likely present at the imprisonment phase (e.g., Bushway and Piehl, 2007; Wooldredge, 2009).

Uncertainty avoidance/causal attribution theory posits that courtroom actors rarely possess the information and resources to make accurate, rational predictions of defendants' culpability, criminality, and future criminal involvement. As a result, these decision makers, including those who are focused on securing convictions, face great uncertainty (Albonetti, 1987, 1991; see also Albonetti and Hepburn, 1996; Bridges and Steen, 1998; Farrell and Holmes, 1991; Kramer and Ulmer, 2002). Decision makers then seek rationality by developing "patterned responses" (March and Simon, 1958); these responses are founded and framed on a limited search for "'satisficing' rather than optimizing solutions" (Albonetti, 1991: 249). In light of the dearth of information on defendants' criminality and relative harm to the community gathered under time constraints, courtroom actors develop a "perceptual shorthand" (Hawkins, 1981), which is bounded by stereotypes that tap into defendants' personal characteristics like race and ethnicity (Bridges and Steen, 1998; Steffensmeier, Ulmer, and Streifel, 1993). As a response to organizational constraints, courtroom participants "resort to stereotypes of deviance and dangerousness that rest on considerations of race, ethnicity, gender, age, and unemployment" (Spohn and Holleran, 2000: 301).

Premised on Albonetti's (1991) causal attribution framework, Steffensmeier, Ulmer, and Kramer (1998) suggest that the discretion of legal actors is embedded in three focal concerns of punishment—defendants' blameworthiness, a desire to protect community safety, and concerns about the practical constraints and social costs of punishment. Blameworthiness reflects the defendant's culpability in relation to the

offense severity and criminal history, whereas concerns for public safety determine whether incapacitation reduces threat to victims, witnesses, and members of the community. Concerns for practical constraints and the social costs of legal actors' decisions reflect the justice system's resources, such as court caseload pressure and jail overcrowding, and the potential effects of imprisonment on defendants' personal well being and familial ties. Extensive research supports Steffensmeier et al.'s (1998) conclusion that prosecutors, judges, and other court officials initially draw on legally relevant case factors but their focal concerns are eventually complemented by extralegal considerations directly and indirectly related to race and ethnicity, which in turn contribute to unwarranted punishment disparities (e.g., Chiricos and Bales, 1991; Demuth, 2003; Doerner and Demuth, 2009; Huebner and Bynum, 2008; Kaiser and Spohn, 2014; Spohn and Holleran, 2000, 2001).

The legal and criminological literature on criminal prosecution confirms the salience of the three focal concerns in the charging process and the decision to circumvent the federal guidelines and statutory minimums. For instance, there is support for the arguments that to preserve court resources, promote efficiency, or simply secure a conviction, AUSAs collaborate with judges to invoke substantial assistance downward departures as leverage to induce guilty pleas (Bibas, 2004; Cano and Spohn, 2012; Schulhofer and Nagel, 1989). This is important as defendants facing mandatory minimums, long criticized for being unduly harsh (Mauer, 2006; Schulhofer, 1992; Schwarzer, 1992), in particular for drug offenses, may exhibit a "nothing to lose" position, having little incentive to waive their right to trial. Prosecuting attorneys' access to motions for assistance and charge reductions in general take the form of a "bargaining

chip in the plea-bargaining process" (Stith and Cabranes, 1998: 130). In this context, racial and ethnic disparities are linked to the fact that substantial assistance motions are granted as a result of plea negotiations, a process in which minority defendants are more reluctant and overall less likely to engage (Lee and Derdowski, 1998: 84; see also Kramer and Steffensmeier, 1993).

At the same time, downward departures for providing assistance may be situational, that is, used to evade federal guidelines and mandatory sentences for "deserving" defendants who elicit sympathy from federal prosecutors (Nagel and Schulhofer, 1992; see also Albonetti, 2002; Cano and Spohn, 2012; Schulhofer and Nagel, 1997; Spohn and Fornango, 2009), being more prevalent in "drug cases in which guidelines sentences are anchored by mandatory minimum sentence levels" (Nagel and Schulhofer, 1992: 535; Hartley et al., 2007; Kautt and Spohn, 2002). Although prosecutors ultimately circumvent mandatory sentences perceived as excessively harsh or unfair in a large portion of cases, penalty reductions are applied *selectively* and are considerably disadvantageous toward Black and Hispanic defendants (Albonetti, 2002; Cano and Spohn, 2012; Stacey and Spohn, 2006; see also Ulmer et al., 2007).

The extent to which federal prosecutors' decision making is racially neutral may be defendants' racial and ethnic minority group membership. According to several legal scholars, public discourse and social perceptions define African Americans and Hispanics in a negative light which permeates the criminal justice system (e.g., Kennedy, 1997; Tonry, 2011). Considerations for taming case processing uncertainty lead prosecuting attorneys to apply stereotypes that illustrate African Americans as more threatening and dangerous than other groups and thus convey a public perception that "Blackness and

criminality are inextricably related" (Welch, 2007: 280, see also Mauer, 1999; Russell-Brown, 2009). For instance, judges and prosecutors' distinctions between dangerous offenders and non-threatening offenders single out Black defendants for harsher penalties relative to their Hispanic and non-Hispanic White counterparts with similar criminal backgrounds (Spohn, 2008; Spohn and Sample, 2008; Tonry, 2011; see, however, Steen, Engen, and Gainey, 2005).

Aside from the theoretical work that is focused on African American criminal stereotypes, research theorizes that Hispanics are perceived as irresponsible, more culpable, and prone to violence (Hagan, Levi, and Dinovitzer, 2008; Martinez, 2002; Martinez and Lee, 2000; Massey, 2007; Wolfe, Pyrooz, and Spohn, 2011), which becomes elevated for those of immigrant status (Light, Massoglia, and King, 2014; Ousey and Kubrin, 2009; Wang, 2012). Similar arguments suggest that Hispanics elicit far greater perceptions of fear and dangerousness as they are associated with the war on drugs and identified as "a drain on their communities, and a threat to a way of life many believe to be under siege" (Mata and Herrerias, 2006: 151; Portillos, 2006). Important to this line of reasoning is the notion that negative ethnic perceptions may be propelled by the escalating presence of Hispanics in the U.S. (see Demuth, 2003; Feldmeyer and Ulmer, 2011). Compared with other minority groups, the Hispanic population has undergone enormous growth from 1970 through the 1990s (Pew Center, 2005), a development that is projected to triple by 2050 (Passel and Cohn, 2008). In the late 1980s, Wilson (1987: 35) wrote, "The rapid growth of the urban Hispanic population, accompanied by the opposite trend for the urban black population, could contribute significantly to different outcomes for these two groups in the next several decades." This

dramatic transformation may have enhanced unfavorable judgments of Hispanics in contrast to other minority groups facing criminal prosecution. Indeed, the weight of evidence suggests that charging and imprisonment decisions are notably punitive for Hispanic defendants (e.g., Demuth, 2003; Demuth and Steffensmeier, 2004; Spohn and Holleran, 2000; Steffensmeier and Demuth, 2000, 2001; Ulmer et al., 2007), emphasizing that, "The behavior of Hispanic defendants may be perceived as more dissimilar and threatening than the behavior of White and Black defendants and hence most deserving of punishment" (Demuth, 2003: 901).

Building from the first set of theoretical predictions, the approach taken in this dissertation assumes that federal prosecutors will be more reluctant to engage in substantial assistance motions in mandatory minimum cases after the *Booker* and *Kimbrough/Gall* decisions. It is anticipated, however, that sentence reductions for substantial assistance will produce racial and ethnic disparities, and greater race effects will be masked unless federal guidelines and statutory minimum cases are examined separately. These predictions are assessed with the following theoretical expectations:

> *Hypothesis 2a*: Changes in AUSAs' use of substantial assistance departures will be conditioned by the race and ethnicity of the defendant. The reduction in AUSAs' likelihood of filing motions for substantial assistance downward departures will be greater for Black and Hispanic defendants than for White defendants, immediately and in the long term after *U.S. v. Booker* (2005) and *Gall/Kimbrough v. U.S.* (2007).

Hypothesis 2b: Changes in AUSAs' use of substantial assistance departures will be conditioned by the race and ethnicity of the defendant and time period. The reduction in AUSAs' likelihood of filing motions for substantial assistance downward departures experienced by minority defendants relative to White defendants will be greater in cases sentenced after *Gall/Kimbrough v. U.S.* (2007) than cases sentenced after *U.S. v. Booker* (2005), immediately and in the long term.

Hypothesis 2c: Changes in AUSAs' use of substantial assistance departures will be conditioned by the race and ethnicity of the defendant and the type of case. The reduction in AUSAs' likelihood of filing motions for substantial assistance downward departures experienced by minority defendants relative to White defendants will be greater in mandatory minimum cases than in mandatory minimum cases, immediately and in the long term after *U.S. v. Booker* (2005) and *Gall/Kimbrough v. U.S.* (2007).

CONTEXTUAL VARIATION IN ASSISTANT U.S. ATTORNEYS' DECISION MAKING

Beyond theoretical perspectives related to extralegal disparities within court jurisdictions, there is reason to anticipate inter-district variation in federal prosecutors' discretion amid the punishment policy reforms. Central to this argument is the notion that the focal concerns emphasized by decision makers are situational from an organizational stance, thus prioritized and formed by substantive rationality at the localized level (Savelsberg, 1992; Steffensmeier et al., 1998; Ulmer and Johnson, 2004). As Ulmer and Johnson (2004: 142) noted, "Reliance on the three concerns is said to be universal, but the meaning, emphasis and interpretation of them is local."

Proponents of the "courts as communities" perspective articulate that sentencing decisions and outcomes correspond to a manifestation of values and perceptions emphasized by key players in the courtroom workgroup and court community (Eisenstein

and Jacob, 1977; Eisenstein, Flemming, and Nardulli 1988). In contrast to resembling an adversarial process, court organizations' overarching goal of case processing efficiency (Dixon, 1995; Engen and Steen, 2000) is achieved by engendering relationships that reflect a "subculture of cooperation" between judges, defense attorneys and prosecutors (Bowen, 2009: 15). Accordingly, charges and sentences meted out in criminal courts translate into "going rates" (Rosett and Cressey, 1976; Feeley, 1979; Sudnow, 1965) that conform to "normal" crimes, victims, and defendants (Sudnow, 1965: 260; see also Hill, Harris, and Miller, 1985; Swigert and Farrell, 1977). The case processing approach is echoed by Eisenstein and Jacob's (1977: 297) influential assertion that:

> Courtroom organizations seek to control uncertainty; they all claim to be pursuing the goals of justice and efficient disposition of cases…Each is influenced by techniques as its disposal and each depends on sponsoring organizations. Each responds to a task environment that includes the police, prisons, appellate courts, local legislative bodies, and the media.

Federal district courts then are interpreted as "social worlds" or "segmented subworlds within the large community" (Ulmer, 1997: 26) where rationality in decision making is influenced by court organizational forces such as caseload pressure, court size, and trial rate (Britt, 2000; Fearn, 2005; Johnson, 2006; Johnson et al., 2008; Kautt, 2002; Ulmer, 1997; Wooldredge and Thistlethwaite, 2004).

Independent of the focal concerns underscored in the legal decision making process, conflict and minority threat theories contend that the etiology of discriminatory punishment outcomes is not situated at the individual level but instead reflects a collective process shaped by "the definition of the respective positions of racial groups" (Blumer, 1958: 5; Bobo and Hutchings, 1996). Racial and ethnic disparities in the

adjudication process emanate from a class-based structure where a threatened dominant group exerts power over a subordinate group (Chambliss and Seidman, 1971; Quinney, 1970; Spitzer, 1975; Turk, 1966). Blalock's (1967) elaboration of minority threat theory—in the form of political and economic threat—argues that an increase in "competition" and "power" threat among the minority group (i.e., racial and ethnic minorities) prompts enhanced measures of social control from the dominant group (see also Liska, 1992; Stults and Baumer, 2007). More specifically, as members of the disadvantaged group achieve higher status, captured by entrance to the primary labor market, political ascendency, and elevated spending potential, the elite group will revert to the criminal justice system to employ punitive punishment mechanisms to reestablish the previous social order—in this study's context, a greater reluctance from Assistant U.S. Attorneys to file substantial assistance motions for defendants from "threatening" minority groups. With these issues at mind, Kramer and Ulmer (2009: 89) suggest that formal social control functions under a "racialized social system" in which minorities face enhanced punishment under a regime in which "Racially motivated behavior, whether or not the actors are conscious of it, is regarded as 'rational'" (Bonilla-Silva, 1997: 475). The extant research on the minority threat perspective has uncovered that imprisonment decisions are associated with court jurisdictions' proportion of minorities (e.g., Bridges and Crutchfield, 1988; Myers and Talarico, 1987; Quillian and Pager, 2001; Wang and Mears, 2010a, 2010b), socioeconomic disadvantage (e.g., Bridges and Crutchfield, 1988; Britt, 2000; Jacobs and Kleban, 2003), crime rates (Crawford et al., 1998), and political contexts (e.g., Jacobs and Carmichael, 2002; Kim, Cano, Kim, and Spohn, forthcoming).

The primary theoretical focus of this study is on race and ethnicity effects in the aftermath of the sentencing policy reforms at the individual and time level. Thus, the following theoretical propositions are derived to control for inter-district variation in general, and the influence of well-established, contextual-level predictors of charging and imprisonment outcomes:

> *Hypothesis 3a*: The likelihood that AUSAs will file motions for substantial assistance downward departures will vary significantly across time periods (months) and across federal district courts.
>
> *Hypothesis 3b*: The likelihood that AUSAs will file motions for substantial assistance downward departures will be lower in districts with a higher proportion of Blacks and Hispanics, elevated crime rates, reduced caseload pressure, larger courts, higher levels socioeconomic disadvantage, and a higher magnitude of political conservatism.

As previously mentioned the key objective of this study is to contribute to the courts and sentencing literature by investigating the relationship between punishment policy reforms and unwarranted disparities. This objective is accomplished by examining Assistant U.S. Attorneys' discretion in motions for downward departures for substantial assistance at the defendant level, looking at the short-term and long-term effects in the post-reform era, and across punishment settings (i.e., federal guidelines and statutory mandatory minimums). Chapter 4 proceeds to a discussion on the data, measures, and analytic plan that will test the aforementioned theoretical propositions.

CHAPTER 4

DATA AND METHODS

This chapter lays out the data and methods carried out in this study. The first part of the chapter discusses the numerous sources of the multilevel data employed in the study, as well as a discussion on the deletion of certain cases and issues with missing information. The next section provides a detailed discussion of the outcome measure and individual-level, time-level, and district-level measures used in the multilevel study. The following section specifies the analytic strategy used to test the research hypotheses. The final section of the chapter includes an outline of the diagnostic tests and specific statistical analyses that will be performed.

DATA

The research hypotheses in this study are tested using individual-level punishment data that are then merged with time-sensitive and district-level contextual measures. The punishment data to be analyzed come from the U.S. Sentencing Commission's (USSC) Monitoring of Federal Criminal Sentences Offender Datafile. The data include 465,476 convicted criminal cases in 89 U.S. District Courts during fiscal years 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, and 2010, which is delineated by 117 months.[11] The

[11] Although the original sentencing data set consisted of 709,646 cases, concerns encompassing theoretical relevance, conceptual clarity, and missing information warranted the exclusion of cases from the study. First, given this study's explicit focus on AUSAs' circumvention of imprisonment terms from the federal guidelines and mandatory minimums, cases from guidelines' cells where the presumptive sentence stipulates a non-custodial sanction or zero months of incarceration (i.e., Zone A) were removed (see Johnson et al., 2008; Spohn, Kim, Belenko, and Brennan, 2014). Second, cases sentenced during the first quarter of FY2001, from October 1, 2000 through December 31, 2000, were excluded from the analyses to account for a temporal order issue associated with the measure for districts' crime rate (N = 11,768), which is discussed in the section on time-level predictors. Third, because of missing information and marked

data set consists of all White, Black, and Hispanic defendants convicted of non-immigration offenses in federal district courts between January 1, 2001 and September 30, 2010. The USSC data are highly suitable for this study as they provide in-depth information on key defendant- and case-prescribed factors, for example, the legal outcome of each case and defendants' primary offense, criminal history, recommended sentence under the federal guidelines, gender, age, U.S. citizenship status, and race and ethnicity (see Feldmeyer and Ulmer, 2011; Johnson et al., 2008; Kautt, 2002; Steffensmeier and Demuth, 2000). An additional strength is that the USSC data cover punishment practices over extensive periods of time and all federal districts. This allows a comprehensive investigation of the immediate and enduring effects of unwarranted disparities in Assistant U.S. Attorneys' decision making in the aftermath of sentencing reforms, while accounting for the punishment setting.

The study also examines the effects of time, organizational characteristics, and structural characteristics on AUSAs' substantial assistance departures decisions. Thus, data gathered from supplementary sources are used to compile control measures beyond

---

differences in case processing and legal authority relative to the other 89 federal districts, cases from the District of Columbia, Guam, Marianna Islands, Puerto Rico, and the U.S. Virgin Islands, which account for slightly less than 2 percent of convictions, were omitted from the study (N = 13,522). Fourth, the complex, legal nature of immigration cases precludes an accurate assessment of AUSAs' use of substantial assistance departures and unwarranted disparity in these types of cases. Despite representing one quarter of all convictions, immigration cases comprise less than two percent of motions for substantial assistance relief, as fast track departures may be more common in these types of cases. Furthermore, Hispanic defendants account for 88 percent of immigration cases. As a result, cases that involve immigration offenses are excluded from the analyses (N = 179,036). Finally, even though contemporary research on sentencing disparities has expanded focus to Asian (Johnson and Betsinger, 2009; Kutateladze et al., 2014) and Native American defendants (Everett and Wojtkiewicz, 2002; Franklin, 2013), cases where defendants' race and ethnicity is identified as other than White, Black, or non-White Hispanic account for less than 4 percent of federal convictions and are thus not analyzed in the study (N = 25,955).

the defendant level, at the second and third levels of analysis—that is, across time epochs and federal district courts. Predictors at the time level (level 2), which is captured in months, are computed by extracting data from the USSC data set and the Uniform Crime Reports (UCR). In addition to using data from the USSC and the National Judicial Center, contextual measures at the district level of analysis (level 3)—county-based measures aggregated to federal districts—are drawn from the U.S. Census Bureau and the County Characteristics, 2000-2007 data set from the Interuniversity Consortium for Political and Social Research (ICPSR).

Issues concerning selection bias emerge as not all defendants facing criminal charges were convicted and thus faced the probability of being granted a substantial assistance downward departure (see Berk, 1983). Because the USSC data files exclude cases that do not result in a conviction, this study only examined criminal cases where defendants who faced prosecution were convicted and subsequently sentenced. For this reason, this study is unable to control for sample selection bias. There is, however, a minimal threat of biased estimates in the analyses. In general, convictions were obtained in over 90 percent of criminal cases processed in federal district courts (Administrative Office of the U.S Courts, 2007, 2008, 2009). What is more, it has been recommended that researchers proceed with caution when controlling for sample selection bias, in that the inclusion of a correction term may produce unstable standard errors and may introduce collinearity between predictors and the correction term, particularly in models with dichotomous case processing outcome measures (Bushway, Johnson, and Slocum 2007; Stolzenberg and Relles, 1997).

Missing values for key individual-level predictors in the current analyses present a probable threat to the generalizability of findings. Thus, missing values are addressed using listwise deletion for several reasons. First, the extant multilevel analyses that employed federal sentencing data have addressed missing values by implementing an alternative coding scheme or listwise deletion (e.g., Johnson et al., 2008; Kautt, 2002; Spohn and Fornango, 2009). Second, in relation to the dependent variable, only 11,595 cases or 2.5 percent of the convicted population had missing information on defendants' substantial assistance downward departure status. In fact, the highest incidence of absent values among the independent variables was observed in the predictor that captured defendants' dependents status, missing only 13,846 cases or 3 percent of the population. Second, data imputation is not a suitable solution because values may not be missing at random (MAR) but rather an artifact of time-level or district-level characteristics, although missing values appear to be well distributed across time periods and districts. As Allison (2001: 7) had argued, "Logistic regression with listwise deletion is problematic only when the probability of any missing data depends on *both* the dependent and independent variables.

EMPIRICAL MEASURES

Dependent Variable

In line with Blumstein et al. (1983:273-274) and Wheeler, Weisburd, and Bode's (1982) call to differentiate between sentence type and sentence magnitude outcomes, comprehensive reviews of the sentencing literature have uncovered that in some jurisdictions and punishment contexts, unwarranted sentencing disparities are more

pronounced in imprisonment outcomes when compared to imprisonment severity outcomes (Chiricos and Crawford; 1995; Spohn, 2000; Ulmer et al., 2011b; Zatz, 2000; see also Baumer, 2012). This conclusion is also echoed in contemporary research on the probability and magnitude of substantial assistance departures, in that male minorities face harsher treatment in AUSAs' decision to grant a downward departure relative to the degree of the sentence discount (Cano and Spohn, 2012; Maxfield and Kramer, 1998). Thus, this study examines a single dependent variable—a binary outcome measure that captures whether the defendant received a substantial assistance downward departure (1 = yes, 0 = no).

Defendant-Level and Case-Level Variables

At the individual level, using data compiled by the USSC, a series of defendant- and case-prescribed characteristics considered long-established, robust predictors of federal sentencing outcomes are incorporated into the analyses. A measure for gender determines whether the defendant is female (1 = yes, 0 = no). A predictor for race and ethnicity makes a distinction between a defendant being White (1 = yes, 0 = no), Black (1 = yes, 0 = no), or non-White Hispanic (1 = yes, 0 = no), with White serving as the reference category. Citizenship status is captured using a dummy measure for U.S. citizenship (1 = yes, 0 = no). A continuous measure for age accounts for the defendant's age at the time of the offense. A dummy variable for dependent status reflects whether the defendant is financially supporting dependents (1 = yes, 0 = no). A control for education status indicates whether the defendant has an education (1 = yes, 0 = no). To ensure parsimony, measures for this variable distinguish between defendants without a

high school diploma or equivalent and those having a high school diploma or equivalent or any type of college attendance or college completion (see Johnson et al., 2008).

With respect to case-prescribed factors at the individual level, the presumptive sentence is a continuous measure that depicts the sentence recommended under the U.S. Sentencing Guidelines (and mandatory minimum statute). The presumptive sentence is compiled by calculating defendants' offense severity (1 to 43 points) and criminal history score (1 to 6 points), taking into consideration sentencing provisions or adjustments that may trump the federal guidelines such as "acceptance of responsibility" or a statutory mandatory minimum (see Engen and Gainey, 2000). Presumptive sentences with sanctions beyond 470 months were capped at 470 months to capture a "more accurate" measure of imprisonment in relation to life expectancy (U.S. Sentencing Commission, 2010). Diagnostics tests revealed that the presumptive sentence measure was highly and positively skewed. Therefore, a natural log transformation was employed to approximate a normal distribution (skewness = -1.727; Kennedy, 2003). Beyond comprising a major component of the recommended sentence, the defendant's criminal history score, calculated by a six-point scale ranging from 1 to 6 in severity, is used to capture any effects the score may exert beyond the presumptive sentence (see Johnson et al., 2008; Ulmer et al., 2010).[12] The criminal history score was adjusted to account for statutory sentencing enhancements such as the application of "career offender" status.

In addition to the USSC's recommended sentence and criminal history, other legal characteristics have emerged as strong predictors of federal punishment outcomes. A

[12] Measures for the presumptive sentence and criminal history score were moderately correlated with one another (r = .344), significantly below the recommended threshold of .70 (Tabachnik and Fidell, 2012).

measure for the primary type of offense is reflected in a series of dummy measures that include a drug-related offense (1 = yes, 0 = no), violent offense (1 = yes, 0 = no), firearm offense (1 = yes, 0 = no), fraud or white-collar offense (1 = yes, 0 = no), and other offense (1 = yes, 0 = no), with drug offense representing the reference category.[13] A dichotomous measure indicates whether the defendant entered a plea or exercised the right to trial (1 = plea, 0 = trial). A dummy measure for counts reflects whether the offender is facing only one charge (1 = yes, 0 = no). The defendant's presentence detention status prior to conviction is captured by a dummy indicator (1 = detained, 0 = released).

Time-Level and District-Level Measures

As discussed throughout the study, the punishment literature has by and large suggested that court jurisdictions' organizational and social contours influence legal decision making. For this reason, contextual predictors are incorporated at the second and third levels of the multilevel analyses. In addition to the time-sensitive predictors that attempt to capture discontinuities in elevation and slope (i.e., immediate and gradual shifts) in the trajectory of substantial assistance departures following the *U.S. v. Booker* and *Gall/Kimbrough v. U.S.* decisions (discussed in detail in the analytic strategy section), two time-varying measures are included at the second level (months) of the three-level model. A control for changes in the case processing rate is generated using data from the USSC (e.g., Dixon, 1995; Johnson, 2005). A measure for case rate is computed as the average number of cases processed in a district court for a given quarter

[13] Cases in the "other" category include property, regulatory, or traffic offenses that triggered federal charges and a federal conviction.

(3 months), divided by the number of active judges, and then divided by 10 for ease of interpretation (Johnson, 2005). A measure for crime rate determines whether changes in the prevalence of crime might influence federal prosecutors' level of concern for public safety and thus their decision making (e.g., Britt, 2000; Crawford et al., 1998). Using county-level data extracted from the UCR and merged to federal districts, crime rate is an annual rate captured by the total number of index crimes per 1,000 citizens.

A series of time-invariant, established predictors of federal charging and imprisonment decisions are included as control measures at the district level or third level of analysis. A predictor for court size is accounted for by the number of authorized judgeships in each federal district (Johnson et al., 2008). Control measures for minority threat capture the size of the Black and Hispanic population (Fearn, 2005; Feldmeyer and Ulmer, 2011; Wang and Mears, 2010a, 2010b). County-based data from the 2000 decennial census are aggregated to the district level to compile measures for percent Black and percent Hispanic.[14] Data from the 2000 decennial census are also utilized to compute a predictor for economic disadvantage (Bridges and Crutchfield, 1988; Rodriguez, 2007). A measure for disadvantage is calculated using a standardized factor score derived from four well-established, highly-correlated indicators of disadvantage: percent female-headed families with children, male unemployment rate, poverty rate, and percent of people without a high school diploma or equivalent (Eigenvalue = 2.867, Factor loadings: minimum = .722 and maximum = .929, $\alpha = .85$). An indicator for federal districts' magnitude of political conservatism (e.g., Jacobs and Carmichael, 2002; Kim et

[14] An indicator for whether the district was situated alongside the Mexican border was included to account for regional differences. The measure for border district was subsequently removed due extremely high collinearity with the measure for percent Hispanic (greater than .8).

al., forthcoming) is compiled from county-level data which represents the percentage of votes for George W. Bush in the 2004 presidential election (ICPSR, 2007).[15] For a meaningful interpretation of results, all of the time-level and district-level variables were standardized with a mean of 0 and a standard deviation of 1. Bivariate associations calculated for defendants' race/ethnicity and all time-level (level 2) and district-level (level 3) contextual measures, separated by the type of case (all cases, guidelines cases, and mandatory minimum cases), are presented in Table 1A, Table 1B, and Table 1C.[16] The analytic strategy proposed in this study is discussed in the following section.

[15] Diagnostics tests of variance inflation factors (VIF) and condition indices for all time-level and district-level predictors demonstrated appropriate levels of collinearity (Cohen, Cohen, West, and Aiken, 2003:423-424).

[16] In regard to harmful collinearity, the highest bivariate association emerged between the district-level measures of case rate and percent Hispanic (all cases, $r = .68$, $p < .01$; guidelines cases, $r = .68$, $p < .01$; mandatory minimum cases, $r = .69$, $p < .69$), slightly below the recommended threshold.

Table 1A. Correlation Matrix, Key Defendant-Level, Time-Level, and District-Level Variables, All Cases

		X1	X2	X3	X4	X5	X6	X7	X8	X9
X1	Black Defendant	___								
X2	Hispanic Defendant	-.44**	___							
X3	Case Rate	-.22**	.37**	___						
X4	Crime Rate	.03**	.02**	-.11**	___					
X5	Court Size	-.06**	.24**	.07**	.09**	___				
X6	Percent Black	.25**	-.16**	-.18**	.15**	-.02**	___			
X7	Percent Hispanic	-.27**	.44**	.68**	.07**	.52**	-.25**	___		
X8	Disadvantage	-.05**	.14**	.44**	.12**	-.08**	.38**	.38**	___	
X9	Conservatism	-.05**	.02**	.29**	-.11**	-.38**	-.16**	-.01**	.21**	___

Note: Bivariate associations (Pearson's r); $p < .01$

Table 1B. Correlation Matrix, Key Defendant-Level, Time-Level, and District-Level Variables, Guidelines Cases

		X1	X2	X3	X4	X5	X6	X7	X8	X9
X1	Black Defendant	___								
X2	Hispanic Defendant	-.37**	___							
X3	Case Rate	-.21**	.44**	___						
X4	Crime Rate	.02**	.02**	-.11**	___					
X5	Court Size	-.04**	.22**	.06**	.08**	___				
X6	Percent Black	.24**	-.15**	-.18**	.15**	-.04**	___			
X7	Percent Hispanic	-.24**	.48**	.68**	.07**	.51**	-.26**	___		
X8	Disadvantage	-.05**	.19**	.44**	.11**	-.12**	.38**	.36**	___	
X9	Conservatism	-.05**	.04**	.29**	-.11**	-.38**	-.15**	-.01	.23**	___

Note: Bivariate associations (Pearson's r); $p < .01$

Table 1C. Correlation Matrix, Key Defendant-Level, Time-Level, and District-Level Variables, Mandatory Minimum Cases

		X1	X2	X3	X4	X5	X6	X7	X8	X9
X1	Black Defendant	___								
X2	Hispanic Defendant	-.58**	___							
X3	Case Rate	-.23**	.27**	___						
X4	Crime Rate	.04**	.02**	-.12**	___					
X5	Court Size	-.09**	.28**	.07**	.11**	___				
X6	Percent Black	.28**	-.19**	-.18**	.16**	.01**	___			
X7	Percent Hispanic	-.30**	.41**	.69**	.07**	.53**	-.23**	___		
X8	Disadvantage	-.04**	.07**	.44**	.14**	-.01**	.38**	.42**	___	
X9	Conservatism	-.06**	-.02**	.28**	-.11**	-.40**	-.18**	-.02**	.18**	___

Note: Bivariate associations (Pearson's r); $p < .01$

ANALYTIC STRATEGY

This study examines sudden and enduring effects in the trajectory of federal prosecutors' decision making in wake of recent legal developments in punishment policies. Accordingly, multilevel discontinuity regression models are estimated to explore *immediate shifts* (elevation) and long-term effects (slope) in AUSAs' motions for a substantial assistance downward departure following the U.S. Supreme Court's decisions in *U.S. v. Booker* (2005) and *Gall/Kimbrough v. U.S.* (2007) (Singer and Willett, 2003; see also Melde and Esbensen, 2013; for discussion on discontinuity regression modeling, see Berk, 2010). Moreover, Singer and Willett's (2003: 206-208) discontinuity estimation approach allows investigators to account for "breaks" or discontinuities in elevation and slope in discrete epochs and at common points in time. Thus, this method is used to investigate the abrupt and subsequent impact of both *Booker* and *Gall/Kimbrough* on the substantial assistance departure outcomes. As illustrated in Figure 3, the analyses employ a three-level multilevel structure, with cases nested within time and federal district courts (see DiPrete and Grusky, 1990; Xie, Lauristen, and Heimer, 2012).[17]

[17] Hierarchical generalized linear models (HGLM), the modeling strategy employed in this study, are ideally suited when compared to a traditional single level logistic regression modeling strategy (Raudenbush and Bryk, 2002). Using a hierarchical modeling structure accounts for the underestimation of standard errors of regression coefficients stemming from a lack of dependence in the data—in the proposed analyses specifically, the clustering of substantial assistance departure outcomes with the corresponding time (months) and district. This is to be expected as the analyses employ repeated cross-sectional data that extend across extensive periods of time and many districts, increasing the likelihood of similarities between individual cases processed at close epochs of time and within the same district. In addition, a multilevel approach corrects for the misestimation of error terms, producing more robust standard errors by "incorporating into the statistical model a unique random effect for each organizational unit" (Raudenbush and Bryk, 2002:100). Furthermore, a hierarchal linear strategy models heterogeneity in regression coefficients. As Raudenbush and Bryk (2002:100) noted, researchers are enabled to "estimate a separate set of regression coefficients for each organizational unit, and then to model variation among the organizations in their sets of coefficients." A unique random effect therefore is included in the model for each time point and district.

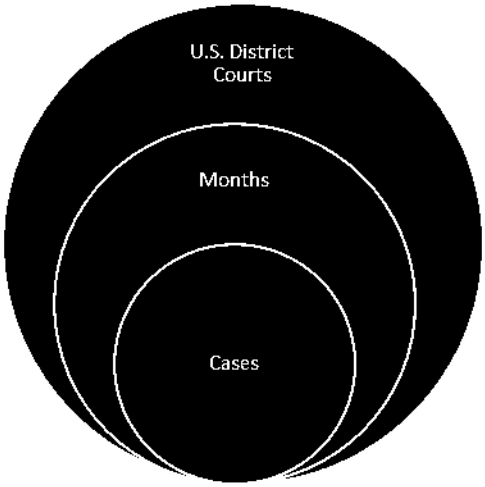


Figure 3. Multilevel Hierarchical Nature of Sentencing Data

Aside from leading to no change in the trajectory, discontinuities in AUSAs' substantial assistance departure decisions in the wake of the High Court's decisions in *Booker* (2005) and *Gall/Kimbrough* (2007) may be associated with the following outcomes (see Singer and Willett, 2003: 193-194): An *immediate shift* in elevation and slope would imply that the likelihood of a substantial assistance departure abruptly changed in wake of the *Booker* decision and its slope in the pre-*Booker* and post-*Booker* epochs varies. An *immediate shift* in elevation but not in slope would suggest an abrupt change in the likelihood of a substantial assistance departure and no difference in its slope in the pre-*Booker* and post-*Booker* epochs. Lastly, an *immediate shift* in slope but not in elevation suggests the likelihood of a substantial assistance departure was constant upon the *Booker* decision and a distinction in its slope in the pre-*Booker* and post-*Booker* epochs. In this context, the analyses in this study separately capture the elevation of the

Booker and *Gall/Kimbrough* decisions and slope of each of the following four legal punishment policy reform eras:

Pre-PROTECT Act of 2003 (January 2001 to March, 2003)
PROTECT Act of 2003 (April 2003 to December 2004)
U.S. v. Booker (January 2005 to November 2007)
Kimbrough/Gall v. U.S. (December 2007 to September 2010)[18]

Parameters for discontinuities in each of the sentencing reform eras are specified at the time level of analysis.

To address the research hypotheses associated with simple change in the likelihood of motions for substantial assistance (Hypotheses 1a., 1b., and 1c.), the baseline model takes the following form:

$$Y_{itj} = \beta_{0tj} + \beta_1 X_{itj}$$

where at the individual level or level 1, Y_{itj} is the average log odds of a substantial assistance downward departure associated with case *i*, at time *t*, in district *j*. β_{0tj} in this equation is the intercept, and X_{itj} denotes the defendant and case variables at time *t*, in district *j*. The model at the time level or level 2, captured in months, is denoted as:

$$\beta_{0tj} = \pi_{0j} + \pi_{1j}Booker1_{tj} + \pi_{2j}Gall/Kimbrough1_{tj} + \pi_{3j}Booker2_{tj} + \pi_{4j}Gall/Kimbrough2_{tj} + \pi_{5j}(Z_{tj}) + r_{tj}$$

where β_{0tj} accounts for the log odds of a AUSA filing a motion for a substantial assistance departure, *Booker1* and *Gall/Kimbrough1* capture discontinuities in elevation in the first month of each Court decision and *Booker2* and *Gall/Kimbrough2* capture discontinuities in slope of AUSAs' likelihood of filing motions for substantial assistance at time *t*, in

[18] Because of their theoretical and methodological relevance, and consistent with the recent empirical literature on the impact of *U.S. v. Booker* (2005) and *Gall/Kimbrough v. U.S.* (2007) on federal sentencing outcomes, the pre-PROTECT and post-PROTECT Act periods serve only as control measures.

district *j*. Z_{tj} represents the time-varying predictors at time *t*, in district *j*. r_{tj} in this equation is the random effect for time and district, assumed to be normally distributed with means of zero and variances of $\sigma^2\mu$ and σ^2_v. The district-level or level 3 model is denoted as:

$$\pi_{0j} = \gamma_{00} + \gamma_{01j}(W_j) + u_{0j}$$

where W_j represents the time-invariant predictors associated with district *j*. u_{0j} in this equation is the random effect for time and district, assumed to be normally distributed with means of zero and variances of $\sigma^2\mu$ and σ^2_v.

Research hypotheses associated with the trajectory of racial/ethnic disparities in the likelihood of motions for substantial assistance (Hypotheses 2a., 2b., and 2c.) are investigated by the estimating the following three-level model:

$$Y_{itj} = \beta_{0tj} + \beta_1 Black_{itj} + \beta_2 Hispanic_{itj} + \beta_3 X_{itj}$$

where at level 1 or at the case level of analysis, Y_{itj} represents the average log odds of a substantial assistance downward departure associated with case *i*, at time *t*, in district *j*. β_{0tj} in this equation is the intercept. Explanatory variables of theoretical interest account for defendants' race/ethnicity (*Black*, *Hispanic*), and X_{itj} represents parameters for a vector of defendant and case variables at time *t*, in district *j*. The model at the time level or level 2 is denoted as:

$$\beta_{0tj} = \pi_{0j} + \pi_{1j}Booker1_{tj} + \pi_{2j}Gall/Kimbrough1_{tj} + \pi_{3j}Booker2_{tj} + \pi_{4j}Gall/Kimbrough2_{tj} + \pi_{5j}(Booker1_{tj} \text{ x } Black_{itj}) + \pi_{6j}(Gall/Kimbrough1_{tj} \text{ x } Black_{itj}) + \pi_{7j}(Booker2_{tj} \text{ x } Black_{itj}) + \pi_{8j}(Gall/Kimbrough2_{tj} \text{ x } Black_{itj}) + \pi_{9j}(Booker1_{tj} \text{ x } Hispanic_{itj}) + \pi_{10j}(Gall/Kimbrough1_{tj} \text{ x } Hispanic_{itj}) + \pi_{11j}(Booker2_{tj} \text{ x } Hispanic_{itj}) + \pi_{12j}(Gall/Kimbrough2_{tj} \text{ x } Hispanic_{itj}) + \pi_{13j}(Z_{tj}) + r_{tj}$$

where β_{0tj} accounts for the average likelihood of a substantial assistance departure. Beyond identifying discontinuities in elevation in the first month and slope of the High Court's decisions in *Booker* and *Gall/Kimbrough*, this equation includes parameters that capture the intersectionality of defendants' race/ethnicity with discontinuities in elevation (*Booker1* x *Black*, *Booker1* x *Hispanic*, *Gall/Kimbrough1* x *Black*, *Gall/Kimbrough1* x *Hispanic*) and slope (*Booker2* x *Black*, *Booker2* x *Hispanic*, *Gall/Kimbrough2* x *Black*, *Gall/Kimbrough2* x *Hispanic*) in the trajectory of AUSAs' motions for substantial assistance departures at time *t*, in district *j*. Z_{tj} represents time-varying predictors at time *t*, in district *j*. r_{tj} in this equation is the random effect for time and district, assumed to be normally distributed with means of zero and variances of $\sigma^2\mu$ and σ^2_v. The district-level or level 3 model takes the form:

$$\pi_{0j} = \gamma_{00} + \gamma_{01j}(W_j) + u_{0j}$$

where W_j denotes a vector of time-invariant predictors in district *j*. u_{0j} in this equation is the random effect for time and district, assumed to be normally distributed with means of zero and variances of $\sigma^2\mu$ and σ^2_v. All predictors are centered at their grand means to approximate a better interpretation of the intercept, and the intercept is allowed to vary across districts (Raudenbush and Byrk, 2002). The HLM 7.0 software (Raudenbush, Bryk, Cheong, and Congdon, 2011) is used for all analyses, and all models are estimated with robust standard errors. The next section discusses the specific analyses performed in

this dissertation.

PLAN OF ANALYSES

This study proceeds with the following series of analytic techniques. First, descriptive statistics are presented for empirical measures at all three levels of analysis. Four sets of multilevel discontinuity regressions with random effects for defendants' race/ethnicity are estimated. The first set of models estimates the likelihood of a substantial assistance departure by only including defendant and case predictors at the individual-level. To address the first series of research hypotheses (*Hypotheses 1a.*, *1b.*, and *1c.*), the second set of models looks at abrupt and long-term effects in the likelihood of substantial assistance departures in the post-*Booker* and post-*Gall/Kimbrough* eras. These models include predictors at the individual level of analysis and time-varying predictors at the second level of analysis that capture the elevation and slope of the *Booker* and *Gall* decisions. Measures for elevation and slope of *Booker* and *Gall/Kimbrough* are allowed to vary across federal districts in these and all subsequent models. In the third set, which addresses the second series of research hypotheses (*Hypotheses 2a.*, *2b.*, and *2c.*), cross-level interactions models are estimated to determine whether the immediate and long-term effects of *Booker* and *Gall/Kimbrough* on AUSAs' substantial assistance departure decisions, if observed, are conditioned by defendants' race/ethnicity. The final set of models, examining the final series of research hypotheses (*Hypotheses 3a.* and *3b.*), introduces time-varying and time-invariant organizational and social contextual measures at the second and third levels of analysis. Unconditional models are estimated to predict the probability of a substantial assistance downward

departure across months and across federal districts. This final set of models does not capture change, as only the effects of social and organizational context on AUSAs' motions for substantial assistance departures are examined. Lastly, a series of supplementary models that account for variation in substantial assistance departures across U.S. Courts of Appeal are estimated. All analyses are performed separately in models that include all cases, guidelines cases, and mandatory minimum cases. The next chapter turns to a discussion of the results.

CHAPTER 5

RESULTS

This dissertation's primary research objective is to evaluate whether the High Court's decisions in *U.S. v. Booker* (2005) and *Gall/Kimbrough v. U.S.* (2007) altered Assistant U.S. Attorneys' motions for substantial assistance downward departures, with a particular focus on determining whether the decisions result in changes in unwarranted disparities, controlling for the punishment setting and organizational and social contexts. First, descriptive statistics are compared for all cases, guidelines cases, and mandatory minimum cases. Next, the predicted probabilities of receiving a substantial assistance departure are presented. Then, the effects of case-level variables on AUSAs' motions for substantial assistance are assessed. Drawing from the theoretical predictions, this study investigates change in substantial assistance relief for defendants after *Booker* and *Kimbrough*. Similarly, this study examines the trajectory of racial and ethnic disparities in substantial assistance departures decisions post-*Booker* and post-*Gall/Kimbrough*. Finally, analyses that control for inter-district variation and the influence of time-level and district-level variables on federal prosecutors' substantial assistance decisions.

DESCRIPTIVE STATISTICS

The distribution of all case-level, time-level, and district-level variables—demarcated by the guidelines and mandatory minimum punishment schemes—is presented in Table 2. The descriptive statistics show that slightly less than one-fifth of defendants are granted a downward departure from an Assistant U.S. Attorney for providing substantial assistance to the government. The results also reveal that the use of

Table 2. Descriptive Statistics

	All Cases					Guidelines Cases					Mandatory Minimum Cases				
Variables	**%**	**Mean**	**SD**	**Min.**	**Max.**	**%**	**Mean**	**SD**	**Min.**	**Max.**	**%**	**Mean**	**SD**	**Min.**	**Max.**
Dependent Variable															
Substantial Assistance Departure	19.30	____	.39	0	1	13.50	____	.34	0	1	28.50	____	.45	0	1
Case-Level Variables															
Female	15.00	____	.36	0	1	18.50	____	.39	0	1	9.40	____	.29	0	1
Race and Ethnicity															
White (reference)	38.80	____	.49	0	1	46.20	____	.50	0	1	26.80	____	.44	0	1
Black	31.80	____	.47	0	1	29.30	____	.46	0	1	35.80	____	.48	0	1
Hispanic	29.40	____	.46	0	1	24.50	____	.43	0	1	37.40	____	.48	0	1
Age	_____	35.23	11.25	16	97	____	36.25	11.96	16	97	____	33.63	9.76	17	85
Non-U.S. Citizen	20.00	____	.40	0	1	16.30	____	.37	0	1	26.00	____	.44	0	1
Dependents	62.10	____	.49	0	1	59.40	____	.49	0	1	66.30	____	.47	0	1
No High School Education	39.70	____	.49	0	1	34.70	____	.48	0	1	47.80	____	.50	0	1
Presumptive Sentence	_____	71.67	81.91	0	470	____	35.52	44.14	0	470	____	131.01	94.11	0	470
Criminal History	_____	2.37	1.76	1	6	____	2.28	1.71	1	6	____	2.52	1.81	1	6
Offense															
Drug (reference)	49.40	____	.50	0	1	28.30	____	.45	0	1	83.50	____	.37	0	1
Violent	4.00	____	.20	0	1	5.60	____	.23	0	1	1.30	____	.11	0	1
Firearm	14.90	____	.36	0	1	17.60	____	.38	0	1	10.50	____	.31	0	1
Fraud and White Collar	19.40	____	.40	0	1	30.50	____	.46	0	1	1.60	____	.13	0	1
Other Offense	12.40	____	.33	0	1	18.00	____	.38	0	1	3.10	____	.24	0	1
Plea	95.00	____	.22	0	1	96.00	____	.20	0	1	93.50	____	.25	0	1
Facing One Count	77.10	____	.39	0	1	81.30	____	.39	0	1	70.30	____	.48	0	1
Presentence Detention	65.10	____	.48	0	1	54.80	____	.50	0	1	81.70	____	.39	0	1
N			465,476					287,918					177,558		

Table 2., Continued

	All Cases					Guidelines Cases					Mandatory Minimum Cases				
Variables	**%**	**Mean**	**SD**	**Min.**	**Max.**	**%**	**Mean**	**SD**	**Min.**	**Max.**	**%**	**Mean**	**SD**	**Min.**	**Max.**
Time-Level Variables (N = 117)															
Case Rate (centered)	____	-0.08	3.21	0.27	17.7	____	-0.09	3.28	0.27	17.7	____	-0.06	3.09	0.27	17.7
Crime Rate (centered)	____	0.15	13.63	0.76	83.18	____	0.30	13.37	0.76	83.18	____	-0.11	14.04	0.76	83.18
District-Level Variables (N = 89)															
Court Size	____	10.60	6.64	1.00	28.00	____	10.66	6.64	1.00	28.00	____	10.51	6.65	1.00	28.00
Percent Black	____	9.30	10.10	0.15	44.83	____	9.21	10.14	0.15	44.83	____	9.45	10.03	0.15	44.83
Percent Hispanic	____	13.04	14.61	0.53	49.46	____	13.34	14.66	0.53	49.46	____	12.56	14.53	0.53	49.46
Disadvantage	____	-0.02	1.01	-1.97	2.33	____	-0.01	1.01	-1.97	2.33	____	-0.03	1.01	-1.97	2.33
Conservatism	____	57.06	8.67	34.55	77.45	____	56.92	8.81	34.55	77.45	____	57.28	8.43	34.55	77.45

substantial assistance departures varies considerably across the type of cases, as 13.5 percent of defendants in guidelines cases and 28.5 percent of defendants in mandatory minimum cases receive a sentence discount. In terms of defendant characteristics, fifteen percent of defendants are female, although the distribution is higher in guidelines cases (18.5 percent) when compared to mandatory minimum cases (9.4 percent). Most defendants convicted in federal district courts are White (38.8 percent), followed by Black (31.8 percent) and Hispanic (29.4 percent) defendants. When cases are partitioned by the sentencing scheme, the representation of White defendants (46 percent) in guidelines cases substantially increases, and Hispanic defendants emerge as the leading racial/ethnic group facing a mandatory minimum sentence (37.4 percent). The average age of defendants at the time of the offense is 35 years, which, for the most part, is consistent between defendants facing punishment under the guidelines or mandatory minimum statutes. Twenty percent of defendants are non-U.S. citizens, but the percentage of noncitizens is somewhat lower in guidelines cases (16.3 percent) and is elevated in mandatory minimum cases (26 percent). Approximately two-thirds of defendants in all cases and guidelines cases have dependents, with the number slightly higher for defendants facing a mandatory sentence (66.3 percent). Two-fifths of defendants do not have at least a high school education or equivalent, whereas roughly one-third of defendants in the guidelines group and approximately half of defendants in the mandatory sentence group do not have a high school education.

In relation to case characteristics, the presumptive sentence is 71.67 logged months for all defendants, 35.52 logged months for defendants in guidelines cases, and 131.01 logged months for defendants in mandatory minimum cases. As expected, there

are notable differences in the presumptive sentence between types of cases, as offenses that trigger a mandatory minimum carry substantially higher penalties than offenses that trigger punishment under the guidelines. It is important to note that because of natural log transformation and sentences capped at 470 months, the measure of presumptive sentence is relatively conservative. Alternatively, the criminal history score is similar among all types of cases, with a mean of 2.37 in all cases, 2.28 in guideline cases, and 2.52 in mandatory minimum cases. Investigation of cases by the type of offense reveals immense variation between drug offenses and fraud and white-collar offenses. That is, cases involving a drug offense comprise roughly half of all cases and nearly one-third of guidelines cases but comprise more than four-fifths of mandatory minimum cases. On the other hand, cases involving a fraud or white-collar offense comprise four-fifths of all cases, roughly one-third of guidelines cases, and less than 2 percent of mandatory minimum cases. An overwhelming majority of defendants in all cases and both punishment schemes entered a guilty plea, thus waiving the right to a trial—ninety-five percent of all defendants, 96 percent of defendants in guidelines cases, and 93.5 percent of defendants in mandatory minimum cases. More than 70 percent of defendants facing charges under both the guidelines and a statutory minimum were facing one count. The results reveal that compared to all defendants (65.1 percent) and guidelines defendants (54.8 percent), a large majority of mandatory minimum defendants (81.7 percent) are held in presentence detention prior to conviction. Descriptive statistics for the contextual variables are introduced in the bottom half of Table 2.[19] Turning to the time-varying

[19] Only descriptive statistics from the model that includes all cases are discussed in the section on time-level and district-level covariates, as the means were virtually similar in all three groups—all cases,

predictors at level 2, the measure for case rate has an overall average of 3.93 cases filed in each district, which varies between .27 cases and 17.7 cases. The mean crime rate is 25.29 index crimes per 1,000 citizens, which ranges between a low rate of .76 and a high rate of 83.18. With respect to district-level predictors at level 3, the indicator for court size shows an average of 11 judges in each district, varying from 1 active judge to 28 active judges. Measures for racial and ethnic threat also uncover notable variation across districts. Whereas the measure for percent Black population has a mean of 9.3 percent that ranges from .15 percent to 44.8 percent, the distribution of percent Hispanic is even higher, averaging 13 percent and ranging from .53 percent to 49.6 percent. Although it is not easily interpreted because it is comprised of four constructs (percent female-headed families with children, male unemployment rate, property rate, and percent of people without a high school diploma), the magnitude of districts' concentrated disadvantage fluctuates from -1.97 to 2.33. With a mean of 57.1 percent, the level of political conservatism varies considerably between districts, with the percentage of votes for George W. Bush in the 2004 presidential election ranging from 34.6 percent to 77.5 percent. The next section advances to a discussion of the hierarchical generalized linear models estimated with theoretically relevant and robust individual-level predictors of AUSAs' motions for substantial assistance departures.

guidelines cases, and mandatory minimum cases. Complete statistics for all three groups of cases are presented in Table 2.

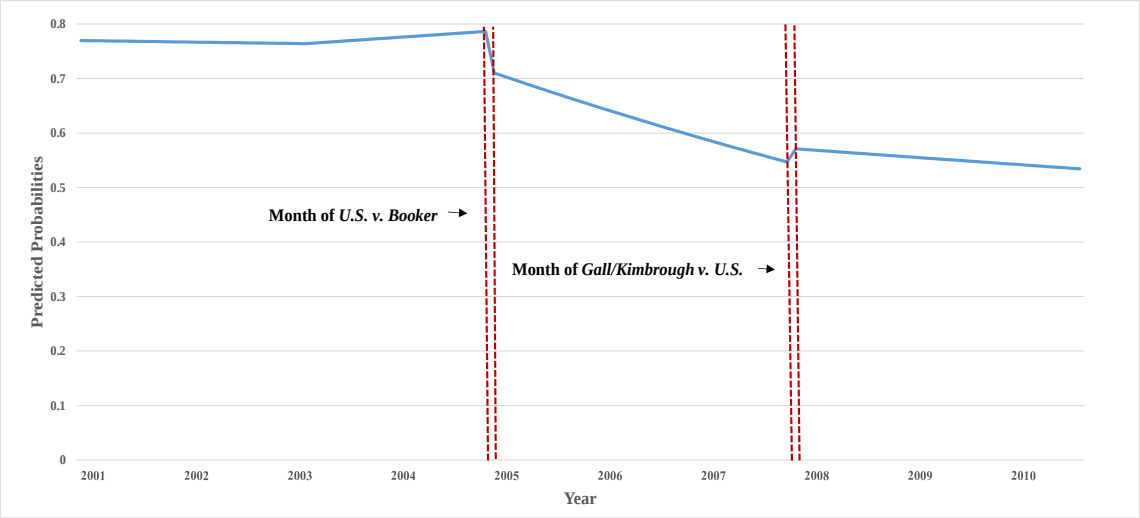


Figure 4. Predicted Probabilities of Receiving a Substantial Assistance Depature, All Cases

PREDICTED PROBABILITIES

The predicted probabilities of being granted a substantial assistance departure from an AUSA across months, which capture discontinuities in the elevation and slope in the wake of *U.S. v. Booker* (2005) and *Gall/Kimbrough v. U.S.* (2007), are presented in Figure 4. The figure implies that the overall likelihood of substantial assistance varies considerably over time, and is particularly influenced by the High Court's rulings in *U.S. v. Booker* (2005) and *Gall/Kimbrough v. U.S.* (2007). That is, the probability of a downward departure substantially declines in the first month after the *Booker* decision. A gradual decline in the probability of substantial assistance is observed in the months in the post-*Booker* period. On the contrary, the overall likelihood AUSAs' use of substantial assistance downward departures slightly increases the first month following the *Gall/Kimbrough* decisions, but then demonstrates a modest decline in the long term.

Overall, the figure suggests that the abrupt and long-term shifts in AUSAs' substantial assistance decisions are far greater in the *Booker* period.

CASE-LEVEL EFFECTS

Table 3 provides results related to the three-level hierarchical generalized linear models (HGLMs) estimated with individual-level variables. Given the salience of defendant and case characteristics in predicting substantial assistance departure outcomes (e.g., Cano and Spohn, 2012; Hartley et al., 2007; Johnson et al., 2008; Spohn and Fornango, 2009), an exploratory investigation of case–level effects is warranted.[20] The results are consistent with the empirical literature on federal sentencing outcomes, as all defendant characteristics and the majority of case characteristics are associated with the odds of a substantial assistance departure. Whereas female defendants are 51 percent more likely to receive a substantial assistance departure, the odds are less likely for Black and Hispanic defendants relative to White defendants (.79 times as likely and .75 times as likely, respectively).[21] The probability of substantial assistance relief is higher for defendants with dependents but is significantly lower for defendants who are older, are non-U.S. citizens, and have no high school education. Inspection of the case characteristics reveals that although a higher presumptive sentence slightly increases the

[20] Because results from the models estimated with case-level variables only were relatively similar across both guidelines and mandatory minimum schemes, the discussion of effects is limited to the model estimated with all cases. Complete results for all three groups of cases are presented in Table 3.

[21] In these exploratory three-level models, the slopes of Black (all cases, $s^2 = .20$, SD = .45, $\chi^2 = 9627.50$; guidelines cases, $s^2 = .27$, SD = .52, $\chi^2 = 6882.30$; mandatory minimum cases, $s^2 = .26$, SD = .51, $\chi^2 = 6606.86$) and Hispanic (all cases, $s^2 = .23$, SD = .48, $\chi^2 = 10505.45$; guidelines cases, $s^2 = .35$, SD = .59, $\chi^2 = 7116.81$; mandatory minimum cases, $s^2 = .26$, SD = .51, $\chi^2 = 7361.54$) varied significantly across months at level 2. Thus, the slopes were allowed to vary across months in the current and all subsequent models. In addition, this provides an empirical foundation for the estimation of cross-level interactions to test whether the association between *Booker* (2005) and *Gall/Kimbrough* (2007) and AUSAs' substantial assistance decisions is conditioned by defendants' race/ethnicity.

Table 3. Hierarchal Generalized Linear Models of Substantial Assistance Departures, Case-Level Variables

	All Cases			Guidelines Cases			Mandatory Minimum Cases		
	b	SE	Exp(b)	*b*	SE	Exp(b)	*b*	SE	Exp(b)
Fixed Effect									
Intercept	-2.48 ***	.07	____	-2.32 ***	.08	____	-2.18 ***	.12	____
Female	.41 ***	.03	1.51	.31 ***	.03	1.36	.59 ***	.04	1.80
Black	-.24 ***	.03	.79	-.16 ***	.03	.85	-.37 ***	.04	.69
Hispanic	-.29 ***	.03	.75	-.31 ***	.05	.74	-.36 ***	.04	.70
Age	-.00 ***	.00	1.00	-.00 ***	.00	1.00	-.00 ***	.00	1.00
Non-U.S. Citizen	-.22 ***	.05	.80	-.16 *	.07	.85	-.25 ***	.06	.78
Dependents	.12 ***	.01	1.12	.13 ***	.02	1.14	.07 ***	.01	1.08
No High School Education	-.16 ***	.02	.85	-.18 ***	.03	.84	-1.15 ***	.02	.86
Presumptive Sentence	.67 ***	.03	1.94	.58 ***	.02	1.79	.72 ***	.05	2.06
Criminal History	-.09 ***	.01	.91	-.13 ***	.01	.88	-.05 ***	.01	.95
Violent Offense	-1.16 ***	.06	.31	-.97 ***	.08	.38	____	____	____
Firearm Offense	-.89 ***	.06	.41	-.79 ***	.08	.46	-.82 ***	.05	.44
Fraud and White Collar Offense	-.17 *	.09	.84	-.07	.09	.93	____	____	____
Other Offense	-.97 ***	.08	.38	-.61 ***	.09	.55	-1.64 ***	.11	.19
Plea	3.73 ***	.10	41.83	3.49 ***	.13	32.87	3.98 ***	1.12	53.53
Facing One Count	.14 *	.07	1.15	.12	.07	1.13	.13	.07	1.14
Presentence Detention	-.72 ***	.03	.49	-.75 ***	.03	.47	-.66 ***	.04	.52
Random Effect									
Time-Level Intercept	.08***			.10***			.10***		
χ^2	11873.50			7350.00			8208.39		
District-Level Intercept	.39***			.26***			.60***		
χ^2	10745.44			4562.81			8221.30		
N	465,476			287,918			177,558		

*$p < .05$; **$p < .01$; ***$p < .001$.

odds of substantial assistance, a higher criminal history score reduces the odds of substantial assistance. Defendants convicted of drug offenses are more likely to receive a downward departure than defendants convicted of any other offense, as drug defendants may be in a better position to provide relevant information to the government or may face more stringent penalties, which may elicit sympathy from federal prosecutors (see Nagel and Schulhofer, 1992). Plea status emerges as the strongest predictor, such that entering a guilty plea significantly increases the probability of substantial assistance relief. The probability of substantial assistance is lower for defendants in custody before trial or entering a guilty plea. The following section proceeds to the analyses of Assistant U.S. Attorneys' decision making subsequent to changes in federal sentencing policies.

CHANGE IN ASSISTANT U.S. ATTORNEYS' DECISION MAKING

Turning to the results of primary interest, Table 4 presents the findings from multilevel discontinuity regression models that examine the effect of *U.S. v. Booker* (2005) and *Gall/Kimbrough v. U.S.* (2007) on Assistant U.S. Attorneys' motions for substantial assistance downward departures. Although the sentencing reforms are strongly associated with AUSUs' decision making, part of the effects are in a direction contradictory to the study's theoretical predictions. According to *Hypothesis 1a*, an immediate and gradual reduction is anticipated in AUSA' use of substantial assistance departures after *Booker* and *Gall/Kimbrough*. The findings reveal an onset and enduring reduction in the trajectory of substantial assistance relief following the High Court's decision in *Booker*. The model estimated with all cases shows a discontinuity in the

Table 4. Multilevel Discontinuity Regression Models of Sentencing Reforms on Substantial Assistance Departures

	All Cases			Guidelines Cases			Mandatory Minimum Cases		
	b	SE	Exp(b)	*b*	SE	Exp(b)	*b*	SE	Exp(b)
Intercept	-2.48 ***	.08	____	-2.34 ***	.08	____	2.17 ***	.09	____
U.S. v. Booker (elevation)	-.11 **	.04	.89	-.14 ***	.04	.87	-.03	.05	.97
U.S. v. Booker (slope)	-.02 **	.00	.99	-.02 ***	.00	.98	-.00	.00	1.00
Gall/Kimbrough v. U.S. (elevation)	.05	.03	1.06	.14 **	.04	1.15	.01	.04	1.01
Gall/Kimbrough v. U.S. (slope)	.01 *	.00	1.01	.02 ***	.00	1.02	-.00	.00	1.00
Random Effect									
Time-Level Intercept	.04***			.06***			.06***		
χ^2	10440.30			6675.15			7440.82		
District-Level Intercept	.41***			.27***			.62***		
χ^2	12803.72			5056.24			9008.78		
N	465,476			287,918			177,558		

*$p < .05$; **$p < .01$; ***$p < .001$.

Note: The models were estimated with case-level variables, which are presented in Table 3. Coefficients for the case-level variables remained relatively unchanged when time-level and district-level variables were introduced into the models and are thus not presented.

elevation, suggesting that substantial assistance departures are 11 percent less likely in the first month subsequent to the post-*Booker* period (*b* = -.11; SE = .04; OR = .89). A significant negative change is also observed in the slope, suggesting that the odds of substantial assistance are reduced by 1 percent each month after the first month following the *Booker* decision (*b* = -.02; SE = .00; OR = .99). Although the elevation and slope of AUSAs' substantial assistance decisions in mandatory minimum cases are similar to patterns in the pre-*Booker* period, in the guidelines cases, there is an immediate reduction in substantial assistance relief of 13 percent during the first month post-*Booker* (*b* = -.14; SE = .04; OR = .87) and an enduring effect each month afterwards, averaging a 2 percent monthly reduction (*b* = -.02; SE = .00; OR = .98). The reduction in prosecutor-enacted downward departures is limited to criminal convictions in the *U.S. v. Booker* (2005) period (February 2005 to December 2007), garnering partial support for *Hypothesis 1a*.

The results fail to demonstrate a greater immediate and long-term reduction in motions for substantial assistance in criminal convictions after the *Gall*/*Kimbrough* period (January 2007 to September 2010) when compared to criminal convictions in the *Booker* period. Contrary to expectations, the evidence does not provide support for *Hypothesis 1b*, predicting that the odds of substantial assistance would increase notably in the post-*Gall/Kimbrough* era. Although there is no discontinuity effect in the elevation following the ruling in *Gall/Kimbrough*, the slope in the model that includes all cases exerts statistical significance, as the odds of a substantial assistance departure are elevated by 1 percent each month following the first month post-*Gall/Kimbrough* (*b* =

.01; SE = .00; OR = 1.01). The effects of the *Gall/Kimbrough* decisions are more pronounced in guidelines cases, showing positive discontinuities in the elevation and slope, such that the odds of substantial assistance are 15 percent higher immediately after *Gall/Kimbrough* (*b* = .14; SE = .04; OR = 1.15) and 2 percent higher each subsequent month (*b* = .02; SE = .00; OR = 1.02).

The analysis now focuses on *Hypothesis 1c,* which predicts a greater reduction in substantial assistance departures in mandatory minimum cases immediately and gradually post-*Booker* and post-*Gall/Kimbrough*. There is no support for *Hypothesis 1c*. As discussed above, the results provide compelling evidence that the trajectory of substantial assistance relief for defendants varies depending on the punishment scheme—guidelines cases and mandatory minimum cases. In fact, changes in federal prosecutors' decision making subsequent to the *Booker* and *Gall/Kimbrough* decisions are limited to tests that include all cases and guidelines cases. *Z*-tests are calculated to determine whether the observed effects of *Booker* and *Gall/Kimbrough* on the likelihood of substantial assistance vary between all cases and guidelines cases (Clogg, Petkova, and Haritou, 1995; Paternoster, Brame, Mazerolle, and Piquero, 1998). Although coefficients that capture the elevation in *Booker* do not vary between models estimated with all cases and guidelines cases (Z =.53, $p < .05$), effects that capture the slope of *Booker* (Z = 2.36, $p < .05$) and the slope of *Gall/Kimbrough* (Z = -2.36, $p < .05$) significantly vary across both types of all cases and guidelines cases. In short, evidence shows that federal prosecutors are less likely to file motions for substantial assistance departures immediately and in the long term in the post-*Booker* period. Conversely, the greatest impact of the sentencing policy reforms observed is in the post-*Gall/Kimbrough* period, as federal prosecutors are

Table 5. Multilevel Discontinuity Regression Models of Defendants' Race/Ethnicity and Sentencing Reforms on Substantial Assistance Departures

	All Cases			Guidelines Cases			Mandatory Minimum Cases		
	b	SE	Exp(b)	*b*	SE	Exp(b)	*b*	SE	Exp(b)
Intercept	-2.24 ***	.09	____	-2.34 ***	.08	____	-2.17 ***	.13	____
Black	-.25 ***	.03	.78	-.17 ***	.03	.84	-.39 ***	.03	.68
Hispanic	-.30 ***	.03	.74	-.32 ***	.05	.73	-.37 ***	.03	.69
U.S. v. Booker (elevation)	-.11 **	.04	.90	-.12 *	.06	.89	-.04	.05	.96
U.S. v. Booker (slope)	-.01 **	.00	.99	-.02 ***	.00	.98	-.00	.00	1.00
Gall/Kimbrough v. U.S. (elevation)	.06	.04	1.06	.12 *	.05	1.13	.01	.05	1.01
Gall/Kimbrough v. U.S. (slope)	.01 *	.00	1.01	.02 ***	.00	1.02	-.00	.00	1.00
Interaction									
Black X *U.S. v. Booker* (elevation)	.01	.07	1.01	.05	.10	1.05	-.13	.11	.88
Black X *U.S. v. Booker* (slope)	-.00	.00	1.00	.00	.01	1.00	-.01	.01	.99
Black X *Gall/Kimbrough v. U.S.* (elevation)	-.03	.06	.97	-.11	.10	.90	.07	.08	1.07
Black X *Gall/Kimbrough v. U.S.* (slope)	-.00	.00	1.00	-.01	.00	.99	.01	.00	1.01
Hispanic X *U.S. v. Booker* (elevation)	.00	.08	1.00	.11	.13	1.12	-.22 *	.10	.80
Hispanic X *U.S. v. Booker* (slope)	-.00	.00	1.00	.00	.01	1.00	-.01 *	.01	.99
Hispanic X *Gall/Kimbrough v. U.S.* (elevati	-.02	.07	.98	-.10	.09	.90	.07	.09	1.08
Hispanic X *Gall/Kimbrough v. U.S.* (slope)	-.00	.00	1.00	-.00	.01	1.00	.00	.00	1.00
Random Effect									
Time-Level Intercept	.04***			.06***			.06***		
χ^2	10472.28			6694.42			7442.76		
District-Level Intercept	.41***			.27***			.63***		
χ^2	12795.66			5041.19			9026.42		
N	465,476			287,918			177,558		

*$p < .05$; **$p < .01$; ***$p < .001$.

Note: The models were estimated with case-level variables, which are presented in Table 3. Coefficients for the case-level variables remained relatively unchanged when time-level and district-level variables were introduced into the models and are thus not presented.

more likely to file motions for substantial assistance in the long term. This unexpected finding suggests that AUSAs may have reverted to their prior decision making patterns as it became evident that federal judges' decisions, for the most part, were not altered by the *Booker* and *Gall/Kimbrough* decisions. Moreover, further analyses confirm that the punishment setting plays a major role in AUSAs' decision making, as the effects of *Booker* and *Gall/Kimbrough* are confined to models that include all cases and guidelines cases. The following section advances to a series of cross-level interaction models that test the effects of defendants' race/ethnicity on AUSAs' substantial assistance decisions following the reform of federal sentencing policies.

RACIAL AND ETHNIC DISPARITY EFFECTS

The second avenue of particular interest is the extent to which the association between *U.S. v. Booker* (2005) and *Gall/Kimbrough v. U.S.* (2007) and Assistant U.S Attorneys' decisions in relation to substantial assistance departures are conditioned by defendants' race/ethnicity. Findings from the multilevel discontinuity regression models estimated without district-level predictors are presented in Table 5.[22] The effects of the elevation and slope of *Booker* and *Gall/Kimbrough* are very similar to the analyses that only examined change in AUSAs' decision making. More importantly, results from the cross-level interactions are to a certain degree consistent with *Hypothesis 2a*, which

[22] Inspection of the distribution of defendants' race and ethncity across districts uncovered substantial variation, with convictions of Hispanic defendants virutally non-existant in a few districts. To ensure an accurate comparison beween racial and ethnic groups of defendants, supplementary models were estimated without 8 federal districts identified as having less than 6 percent of their caseloads comprised of Hispanic defendants: Middle District of Georigia, Southern District of Georgia, Middle District of Louisiana, Northern District of Mississippi, Western District of Pennsylvania, Western District of Tennessee, Northern District of West Virginia, and Southern District of West Virginia. Cross-level interaction effects in the supplementary analyses, however, remained relatively identical to those in the original interacton models. For this reason, only findings from the original models are reported.

anticipates that reductions in motions for substantial assistance will be greater, immediately and in the long term, for minority defendants convicted post-*Booker* and post-*Gall/Kimbrough*. A review of the interaction effects between the elevation and slope of *Booker* and defendants' race/ethnicity indeed shows a reduction in substantial assistance for Hispanic defendants convicted in the post-*Booker* period. There is a lack of evidence to support *Hypothesis 2b*, as discontinuities in the immediate and enduring effects of motions for substantial assistance departures are only observed in cases convicted in the post-*Booker* period (February 2005 to December 2007). The conditioning effects of defendants' race/ethnicity, however, are restricted to Hispanic defendants in cases facing a mandatory sentence, drawing considerable support for *Hypothesis 2c*. When compared to White defendants in mandatory minimum cases, the odds of substantial assistance for Hispanic defendants facing a mandatory sentence are 20 percent less likely in the first month subsequent to the *Booker* decision (b = -.22; SE = .10; OR = .80) and 1 percent less likely each month after (b = -.01; SE = .01; OR = .99).

The assessment of unwarranted disparities in AUSUs' motions for substantial assistance uncovered significant effects in the *Booker* punishment time period beyond cases associated with all defendants and the federal guidelines. When the punishment setting is taken into consideration, the results indicate that racial/ethnic disparity is especially pronounced for Hispanics in mandatory minimum cases. As expected, the interaction tests specifically link the reduction in substantial assistance departure decisions immediately and in the long term after the *Booker* decision to Hispanic defendants. The next section proceeds to an investigation of variation between federal

districts and organizational- and social-contextual effects of substantial assistance departures.

SOCIAL CONTEXTUAL EFFECTS

Results from the three-level unconditional hierarchical generalized linear models (HGLMs) estimated without predictors are reported in Table 6. The results generate substantial support for *Hypothesis 3a*, demonstrating that AUSAs' use of substantial assistance departure varies across time periods (months) and districts. The likelihood, however, differs depending on the type of case—all cases, guidelines cases, and mandatory minimum cases. The variance components for the outcome measure are statistically significant between months at level 2 (all cases, $s^2 = .09$, $\chi^2 = 16636.85$; guidelines cases, $s^2 = .12$, $\chi^2 = 14063.95$; mandatory minimum cases, $s^2 = .13$, $\chi^2 = 14403.53$) and between districts at level 3 (all cases, $s^2 = .30$, $\chi^2 = 9895.83$; guidelines cases, $s^2 = .24$, $\chi^2 = 4991.79$; mandatory minimum cases, $s^2 = .51$, $\chi^2 = 7862.83$).

Table 6. Unconditional Hierarchical Generalized Linear Models of Substantial Assistance Departures

	All Cases			Guidelines Cases			Mandatory Minimum Cases		
Fixed Effects	***b***	**SE**		***b***	**SE**		***b***	**SE**	
Grand Mean Intercept	-1.48 ***	.06		-1.95 ***	.05		-.91 ***	.08	
Random Effects	s^2	**SD**	**χ2**	s^2	**SD**	**χ2**	s^2	**SD**	**χ2**
Months	.09	.30	16636.85***	.12	.35	14063.95***	.13	.35	14403.53***
Districts	.30	.55	9895.83***	.24	.49	4991.79***	.51	.71	7862.83***
N		465,476			287,918			177,558	

*p < .05; **p < .01; ***p < .001.

Table 7. Multilevel Discontinuity Regression Models of Substantial Assistance Departures, Time-Level and District-Level Variables

	All Cases			Guidelines Cases			Mandatory Minimum Cases		
	b	SE	Exp(b)	*b*	SE	Exp(b)	*b*	SE	Exp(b)
Intercept	-2.24 ***	.08	____	-2.34 ***	.08	_____	-2.17	.13	_____
Time-Level Variables									
Case Rate	.02 *	.01	1.02	.00	.01	1.00	.03 *	.01	1.03
Crime Rate	-.01 ***	.00	.99	-.00 *	.00	.99	-.01 ***	.00	.99
District-Level Variables									
Court Size	.01	.01	1.01	.01	.01	1.01	-.00	.02	1.00
Percent Black	-.00	.01	1.00	.00	.01	1.00	.00	.01	1.00
Percent Hispanic	-.02 *	.01	.98	-.01	.01	.99	-.01	.01	.99
Disadvantage	-.00	.11	1.00	-.01	.10	.99	-.04	.13	.96
Conservatism	-.00	.01	1.00	.00	.01	1.00	-.01	.01	.99
Random Effect									
Time-Level Intercept	.04***			.06***			.06***		
χ^2	10469.38			6691.83			7441.12		
District-Level Intercept	.40***			.26***			.61***		
χ^2	11696.67			4713.11			8414.98		
N	465,476			287,918			177,558		

*$p < .05$; **$p < .01$; ***$p < .001$.

Note: The models were estimated with case-level variables, which are presented in Table 3. Coefficients for the case-level variables remained relatively unchanged when time-level and district-level variables were introduced into the models and are thus not presented.

Table 8. Multilevel Discontinuity Regression Models of Substantial Assistance Departures, Time-Level and District-Level Variables, Control for U.S. Courts of Appeals

	All Cases			Guidelines Cases			Mandatory Minimum Cases		
	b	SE	Exp(b)	*b*	SE	Exp(b)	*b*	SE	Exp(b)
Intercept	-2.24 ***	.08	____	-2.35 ***	.07	____	-2.17 ***	.12	____
Time-Level Variables									
U.S. v. Booker (elevation)	-.11 **	.04	.90	-.11	.06	.89	-.04	.05	.96
U.S. v. Booker (slope)	-.01 **	.00	.99	-.02 ***	.00	.98	-.00	.00	.99
Gall/Kimbrough v. U.S. (elevation)	.05	.04	1.05	.12 *	.05	1.12	.00	.05	1.00
Gall/Kimbrough v. U.S. (slope)	.01 *	.00	1.01	.02 ***	.00	1.02	-.00	.00	.99
Case Rate	.02 *	.01	1.02	.00	.01	1.00	.03 *	.01	1.03
Crime Rate	-.01 ***	.00	.99	-.00 *	.00	1.00	-.01 ***	.00	.99
District-Level Variables									
Court Size	-.01	.01	.99	-.01	.01	.99	.01	.01	.99
Percent Black	.01	.01	1.01	.01	.01	1.01	.02	.01	1.02
Percent Hispanic	-.00	.01	1.00	.00	.01	1.00	.00	.01	1.00
Disadvantage	-.05	.10	.95	-.06	.08	.94	-.08	.12	.92
Conservatism	.01	.01	1.01	.01	.01	1.01	.01	.01	1.01
First Circuit	.20	.34	1.22	.30	.26	1.35	.24	.50	1.27
Second Circuit	.11	.29	1.12	.16	.25	1.17	.34	.30	1.40
Third Circuit	.49	.26	1.64	.53 *	.23	1.69	.36	.30	1.43
Fourth Circuit	-.34	.29	.71	-.18	.24	.83	-.51	.35	.60
Fifth Circuit	-.38	.26	.69	-.36	.23	.70	-.41	.32	.66
Sixth Circuit	.49 **	.15	1.63	.54 ***	.16	1.71	.53 *	.21	1.70
Seventh Circuit	-.24	.24	.79	-.27	.18	.76	-.22	.34	.80
Eighth Circuit	-.25	.23	.78	-.26	.17	.77	-.29	.29	.75
Tenth Circuit	-.46	.24	.63	-.46 *	.19	.63	-.26	.35	.77
Eleventh Circuit	-.07	.24	.93	-.01	.20	.99	-.07	.34	.93
Random Effect									
Time-Level Intercept	.04***			.06***			.06***		
χ^2	10472.43			6697.43			7447.47		
District-Level Intercept	.33***			.20***			.50***		
χ^2	9677.44			3803.10			7167.10		
N	465,476			287,918			177,558		

*p < .05; **p < .01; ***p < .001.

Note: The models were estimated with case-level variables, which are presented in Table 3. Coefficients for the case-level variables remained relatively unchanged when time-level and district-level variables were introduced into the models and are thus not presented.

Predicated probabilities and estimates of the variability of receiving a substantial assistance departure were calculated (for equations, see Long, 1997: 50-51; see also Johnson et al., 2008: 759). In the model that includes all cases, the overall predicted probability of being granted a substantial assistance departure is 19 percent, which varies between 14 percent and 24 percent across two-thirds of months. Moreover, across two-thirds of districts, the probability fluctuates between 12 percent and 28 percent. Thus, the average odds of substantial assistance are nearly three-fourths greater in at least one month and more than double in at least one district. Compared to the models with all cases and mandatory minimum cases, considerably less variability is observed in the model specified strictly with guidelines cases. The average likelihood of a substantial assistance departure is 12 percent, which varies across two-thirds of months by 9 percent to 17 percent and across two-thirds of districts by 8 percent to 19 percent. A greater average likelihood of substantial assistance and substantially higher variation is detected in cases associated with a mandatory minimum sentence. The estimated probability of a motion for substantial assistance in mandatory minimum cases is 29 percent, such that the standard deviation fluctuates between 22 percent and 36 percent between months and 17 percent to 45 percent between districts. In fact, the odds of a sentence discount for cooperating with the government is approximately two-thirds greater in some months and roughly two and two-thirds higher in some districts. As expected, the variance components analyses, especially in the models restricted to mandatory minimum cases, provide evidence of variation across time periods and districts in federal prosecutors' decisions related to substantial assistance downward departures.

As presented in Table 7, findings from the discontinuity regression models of the time-level and district-level effects on AUSAs' substantial assistance departure decisions provide some support for *Hypothesis 3b*. Districts' case rate is marginally associated with a substantial assistance downward depature. With the exception of the indicator for percent Hispanic at the district level, the likelihood of substantial asistance is related to time-varying predictors at level 2 rather than time-invariant predictors at level 3. For instance, the probability of substantial assistance relief is more likely in districts with a higher case rate (all cases, *b* = .02; SE = .01; OR = 1.02; mandatory minimum cases, *b* = .03; SE = .01; OR = 1.03). Moreover, districts with a lower crime rate are the most likely to grant defendants substantial assistance departures (all cases *b* = -.01; SE = .00; OR = .99; guidelines cases, *b* = -.00; SE = .01; OR = .99; mandatory minimum cases, *b* = -.01; SE = .00; OR = .99). Whereas the other district-level predictors are not significant, support for ethnic threat emerges, as an increase in districts' proportion of Hispanics reduces the likelihood of a downward departure for providing substantial assistance (*b* = -.02; SE = .01; OR = .98).

Because the High Court's decisions in *Booker* (2005) and *Gall/Kimbrough* (2007) settled constitutional inquiries between U.S. Courts of Appeals concerning the interpretation of the federal guidelines "advisory" status and the "reasonableness" doctrine in AUSAs' appellate authority in sentences outside of the guidelines, variation across the 11 appellate circuits in which the 89 federal districts are situated may be present. An investigation of change and racial/ethnic effects in AUSAs' substantial assistance departure decisions was conducted, controlling for the circuit in which the court is located. In Table 8, with the U.S. Court of Appeals for the Ninth Circuit as the

reference category, the analysis reveals that marginal variation exists in substantial assistance decisions between federal circuits, and the change and interaction effects in the elevation and slope of *Booker* and *Gall/Kimbrough* are parallel to those reported in the models in Table 7. The results, however, show that when circuit courts are taken into account, the elevation effect of *Booker* in guidelines cases and the district-level predictor for percent Hispanic no longer exert statistical significance in the models estimated with a control The following chapter begins with a discussion of the research hypotheses and overall findings.

CHAPTER 6

DISCUSSION

In the last three decades, arguably the most significant concerns spawned by determinate sentencing reforms in the federal criminal justice system comprise the unconstrained discretion rendered to Assistant U.S. Attorneys (AUSAs) at all stages of the criminal process and the potential introduction of unwarranted punishment disparities. In fact, legislative reforms enacted during the 1980s paved the way for new domains of prosecutor-controlled practices beyond charging and plea bargaining decisions, such as the implementation of mandatory minimum penalties and substantial assistance downward departures. The proliferation of determinate sentencing reforms, coupled with the rise of unregulated prosecutorial discretion, may contribute to extralegal inequities, as decision makers seek avenues to circumvent severe penalties for certain defendants (Blumstein et al., 1983; Ulmer et al., 2007). An increasing number of legal and empirical investigations have indeed established that the federal guidelines (Albonetti, 1997; Everett and Wojtkiewicz, 2002; Stith and Cabranes, 1998; Tonry, 1996), and mandatory minimums to a greater extent (Mustard, 2001; Nagel and Schulhofer, 1992; USSC, 2004; 2011a), characterize the foundation of unwarranted disparity in the federal criminal process. More importantly, extralegal disparity is especially pronounced in cases in which AUSAs invoke the substantial assistance downward departure to evade statutory mandatory minimums (Fischman and Schanzenbach, 2012; USSC, 2004, 2011a). In regard to the escalating power of the federal prosecutor, O'Neill Shermer and Johnson (2009: 2) recently argued that:

> The initial decision to prosecute, determination of preliminary charges, charge reductions, and plea negotiations all precede final sentencing determinations and hold the potential to exert powerful influences on criminal punishments…these early case processing decisions are not controlled by the sentencing judge, but instead fall under the auspices of one of the most powerful and least-researched members of the federal courtroom workgroup-the U.S. Attorney.

Punishment in the federal justice system has become muddled as a result of a series of legal contingencies, particularly the U.S. Supreme Court's decisions in *U.S. v. Booker* (2005) and *Gall/Kimbrough v. U.S.* (2007) that have transitioned and broadened the U.S. Sentencing Guidelines' status from compulsory to advisory. These game-changing legal contingencies restored the discretion that federal judges lost over the course of almost two decades (1987 to 2005). With the exception of mandatory minimum cases, the rulings from the High Court essentially restricted Assistant U.S. Attorneys' discretion to legally challenge judicial decisions that deviate from the federal guidelines. Accordingly, contemporary research on the sentencing policy innovations has aimed to evaluate whether judges have in fact been liberated from the constraints imposed by the law and, as a result, have meted out sentences that depart from the guidelines; research has also focused on the extent to which extralegal sentencing disparities persist or have been altered in the post-reform era (e.g., Farrell and Ward, 2011; Kim, Cano, Kim, and Spohn, forthcoming; Scott, 2010; Starr and Rehavi, 2013; Ulmer et al., 2011a, 2011b; USSC, 2006, 2010b, 2012). The research conducted to date reveals that whereas disparities emerging from judges' decisions were relatively static, showing no increase in extralegal disparities post-*Booker* and post-*Gall/Kimbrough*, prosecuting attorneys' substantial assistance departures comprise the lion's share of racial and ethnic disparities in criminal convictions subsequent to the *Booker* and *Gall/Kimbrough* decisions,

considerably disadvantaging Black and Hispanic male defendants (Ulmer et al., 2011a, 2011b; Ulmer and Light, 2010).

Although a new wave of studies has placed emphasis on the effects of *Booker* and *Gall/Kimbrough* in the criminal processes, the focus is primarily on judges' decision making, virtually ignoring scientific inquiries into punishment outcomes related to federal prosecutors (Engen, 2009). Moreover, relatively little is known about the long-term effects of change and racial/ethnic disparities associated with sentencing decisions in the post-reform era, especially in the federal justice system (Starr and Rehavi, 2013: see also Koons-Witt, 2002; Stolzenberg and D'Alessio, 1994 Wooldredge, 2009). In addition, assessments of the effects of *Booker* and *Gall/Kimbrough* have aggregated all cases into one analysis, ignoring the qualitative differences between cases guided by the federal guidelines and statutory mandatory minimums, particularly variation in the motives for circumvention that characterizes each type of case (Anderson et al., 1999; Engen. 2009; Nagel and Schulhofer, 1992; Schulhofer and Nagel, 1997). This concern is echoed by Engen's (2009:330) call that:

> Research should also test whether prosecutors have more control when cases are subject to mandatory minimums, under presumptive versus voluntary guidelines, or under a variety of other conditions. Each of these predictions rests on the assumption that discretionary charging decisions (reductions or enhancements) affect sentences indirectly because they change the presumptive/recommended disposition choices and sentence ranges that limit what judges can do.

Also, empirical research on the federal policy reforms that controls for variability across districts and tests whether federal sentencing outcomes are shaped by organizational and social characteristics at the contextual level is relatively limited (e.g., Farrell and Ward, 2011; Kim, Cano, Kim, and Spohn, forthcoming).

SUMMARY OF FINDINGS

The purpose of this dissertation was to examine the trajectory and conceptualization of race and ethnicity in punishment outcomes in relation to sentencing structure, moving beyond traditional pre-guideline and post-guideline assessments. Specifically, this study analyzed the short-term and long-term effects of *U.S. v. Booker* (2005) and *Gall/Kimbrough v. U.S.* (2007) and defendants' race/ethnicity on AUSAs' use of substantial assistance departures, accounting for the punishment setting—sentences marked by the guidelines scheme and mandatory minimums—and contextual differences between federal district courts. Accordingly, the theoretical predictions, guided by focal concerns, courts as communities, and conflict perspectives, are primarily examined using sentencing data from the U.S. Sentencing Commission for 465,476 defendants convicted from FY 2001 to FY 2010, across 117 months and between 89 federal districts. The theoretical propositions tested in this dissertation are presented in Table 9.

The first part of the dissertation investigated stability and change in Assistant U.S. Attorneys substantial assistance departure decisions following the High Court's rulings in *Booker* and *Gall/Kimbrough* and examined whether alterations in AUSAs' decision making were impacted by the time period and punishment setting. The results lend partial support to the argument that federal prosecutors responded aggressively to the legal developments in sentencing policy. Analyses on the enduring effect of the punishment policy reforms revealed that the probability of substantial assistance relief was lower for defendants immediately and in the long term in the period subsequent to the *Booker* decision. Contrary to expectations, the probability of receiving a substantial assistance departure was enhanced for defendants in the long term in the period following the

Table 9. Summary of Findings, Effects of *U.S. v. Booker* (2005) and *Gall/Kimbrough v. U.S.* (2007) and Social Contexts on Substantial Assistance Downward Departures

Hypotheses		Full Support	Partial Support	No Support
Hypothesis 1a	AUSAs will be less likely to file motions for substantial assistance downward departures, immediately and in the long term in cases sentenced after *U.S. v. Booker* (2005) and *Gall/Kimbrough v. U.S.* (2007).		✓	
Hypothesis 1b	The reduction in AUSAs' likelihood of filing motions for substantial assistance downward departures will be greater in cases sentenced after *Gall/Kimbrough v. U.S.* (2007) than cases sentenced after *U.S. v. Booker (2005)* , immediately and in the long term.			✓
Hypothesis 1c	The reduction in AUSAs' likelihood of filing motions for substantial assistance downward departures will be greater in mandatory minimum cases than federal guidelines cases, immediately and in the long term after *U.S. v. Booker* (2005) and *Gall/Kimbrough v. U.S.* (2007).			✓
Hypothesis 2a	The reduction in AUSAs' likelihood of filing motions for substantial assistance downward departures will be greater for Black and Hispanic defendants than for White defendants, immediately and in the long term after *U.S. v. Booker* (2005) *and Gall/Kimbrough v. U.S.* (2007).		✓	
Hypothesis 2b	The reduction in AUSAs' likelihood of filing motions for substantial assistance downward departures experienced by minority defendants relative to White defendants will be greater in cases sentenced after *Gall/Kimbrough v. U.S.* (2007) than cases sentenced after *U.S. v. Booker* (2005), immediately and in the long term.			✓
Hypothesis 2c	The reduction in AUSAs' likelihood of filing motions for substantial assistance downward departures experienced by minority defendants relative to White defendants will be greater in mandatory minimum cases than in mandatory minimum cases, immediately and in the long term after *U.S. v. Booker* (2005) and *Gall/Kimbrough v. U.S.* (2007).		✓	
Hypothesis 3a	The likelihood that AUSAs will file motions for substantial assistance downward departures will vary significantly across time periods (months) and between federal district courts.	✓		
Hypothesis 3b	The likelihood that AUSAs will file motions for substantial assistance downward departures will be lower in districts with a higher proportion of Blacks and Hispanics, elevated crime rates, reduced caseload pressure, larger courts, higher levels concentrated disadvantage, and a higher magnitude of political conservatism.		✓	

Gall/Kimbrough decisions, although no immediate effect was associated within this time frame. An explanation for this trajectory in prosecutors' decisions is that in addition to the organizational pressure to preserve adherence to the guidelines and sustain uniformity (Eisenstein, 2008; Gonzales, 2005), AUSAs may have anticipated a rise in judicial decisions that depart from the presumptive sentencing scheme following the post-*Booker* transition to an advisory punishment structure. This assumption proved to be misleading, as judges, by and large, continued to sentence within the federal guidelines (e.g., USSC, 2006), thereby leading prosecutors to return to their previous charging pattern. Finally, the immediate and long-term overall change observed in both the *Booker* and *Gall/Kimbrough* punishment eras was confined to models that included all cases and guidelines cases, not mandatory minimum cases which are specifically controlled by prosecutors. This suggests that prosecuting attorneys did not alter their charging practices in relation to substantial assistance decisions in cases that triggered a mandatory minimum, as the High Court's rulings only constrained AUSA's discretion in cases associated with the federal guidelines, although the use of substantial assistance departures is more pronounced in mandatory minimum cases when compared to guidelines cases (USSC, 2011a).

The second part of the dissertation turns to a test of stability and change in the effects of race and ethnicity on AUSAs' substantial assistance departure decisions amid the recent legal developments. That is, the study examined whether the effects of the *Booker* and *Gall/Kimbrough* decisions on the use of substantial assistance departures were conditioned by defendants' race and ethnicity. The results of the analyses provided some support for the theoretical prediction that the reduction in substantial assistance

departures would be greater for minority defendants that for White defendants, as the probability of receiving a substantial assistance departure was lower for Hispanic defendants immediately and over time in the post-*Booker* era. The results, however, show that defendants' race/ethnicity did not condition the association between the odds of a substantial assistance departure and the *Gall/Kimbrough* decision. What is more, the expectation that the race effect would be more pronounced in mandatory cases garners considerable support, as the change in the odds of AUSAs' substantial assistance departures for Hispanic defendants after *Booker* was only found in cases in which defendants were facing a mandatory minimum penalty. This implies that federal prosecutors tightened their grip on and full control of mandatory minimum cases in anticipation of judges' newfound discretionary power, although the effect was selective, disadvantaging Hispanic defendants, and did not transcend the *Booker* period. This suggests that Hispanics in the federal justice system may elicit greater concerns about or perceptions of culpability and threat to community safety when compared to other racial/ethnic groups. Also, an increase in the disparate treatment of certain defendants in the post-reform era may be associated with punishment schemes that are more restrictive (see Wooldredge, 2009). In this context, the severe restrictions placed on appellate review of judges' decisions that depart from the guidelines in the wake of *Booker* and *Gall/Kimbrough* may have led federal prosecutors to engage in more discriminatory behavior.

Alongside the analyses that focused on stability and change and the trajectory of racial/ethnic disparities in prosecutorial discretion, the final part of the dissertation systematically investigated the degree to which social context influenced AUSAs'

substantial assistance departure decisions. The results provide substantial support for the theoretical predictions related to variability between time periods (months) and federal districts, including the effect of contextual-level covariates at the time level of analysis. Specifically, the overall probability of substantial assistance relief varied significantly between months and districts. Moreover, AUSAs' consideration for efficiency in case processing (e.g., Dixon, 1995; Engen and Steen, 2000) was positively and strongly associated with substantial assistance decisions, as the probability of being granted substantial assistance was significantly higher for defendants in districts with larger caseloads. In contrast, defendants convicted in districts characterized by a higher crime rate faced reduced odds of receiving a substantial assistance departure. Prosecuting attorneys may have exercised a "get tough" orientation and greater concerns for community safety in districts branded with higher crime (e.g., Britt, 2000; Crawford et al., 1998; see however, Sudnow, 1965), and thus were more reluctant to engage in plea negotiations, such as granting a downward departure for providing "substantial assistance" to the government, which in turn would have translated into a more lenient sentence. The ethnic threat indicator that captured the percentage of Hispanics in the population was the only district-level covariate that achieved statistical significance. That is, the probability of a substantial assistance departure was reduced in districts with a higher percentage of Hispanics. The negative association between percent Hispanic and the probability of a motion for substantial assistance, however, was no longer significant when the study controlled for inter-circuit court variation. Collectively, these findings demonstrated that punishment in the federal justice system is based on the organizational

and social environment in which legal actors are embedded (e.g., Johnson et al., 2008; Spohn and Fornango, 2008; Ulmer and Feldmeyer, 2011).

POLICY IMPLICATIONS

Punishment policy reforms aimed at constraining legal actors' discretion, coupled with the availability of methods for circumvention such as the substantial assistance downward departure, emerge as a principal source of disparity. The findings from this dissertation, which are consistent with prior research on the individual-level and contextual-level effects that shape punishment outcomes, raise serious concerns of whether substantial assistance departures are implemented as intended and in a racially-neutral way. In theory, the 5K1.1 or substantial assistance downward departure is based on the significance, usefulness, truthfulness, completeness, reliability, nature, and risk associated with the defendant's cooperation with the government (USSC, 2011b: 464). It is highly unlikely, however, that defendants convicted immediately and over time following the High Court's decision in *U.S. v. Booker* (2005) would be less likely to provide "assistance" to the prosecution or that defendants convicted in the months subsequent to the first month of the *Gall v. U.S.* (2007) and *Kimbrough v. U.S.* (2007) decisions would possess information or testimony deemed more suitable for the federal prosecutor. In a similar vein, it seems implausible that Hispanic defendants facing a mandatory minimum penalty in the *Booker* era would possess information less valuable to the prosecution, although research has shown that minority defendants are overall less likely to engage in plea negotiations that lead to a substantial assistance departure (e.g., Bibas, 2004). This glaring disparity observed over time in the use of a legal remedy that

is intended to assist both the government and defendants warrants the attention of and scrutiny from policy makers. In addition to being accountable to the Department of Justice, federal prosecutors' decisions should be subject to oversight from an external administrative body.

Furthermore, federal determinate sentencing reforms enacted during the last thirty years have emphasized uniformity in sentencing practices, but the majority of political and public discourse on extralegal punishment disparities stems from concerns with the unregulated discretionary power afforded to judges. For instance, passage of the Fair Sentencing Act of 2010 (Pub. L. 111-220, 124 Stat. 2372) abolished the long-standing mandatory minimum penalty for possession of crack cocaine and reduced the 100-to-1 quantity disparity between powder and crack cocaine penalties to an 18-to-1 quantity distinction. Although these well-intentioned policy innovations attempt to advance fairness in sentencing and address mass incarceration, for the most part, they ignore the untamed discretion embedded in prosecutors' decision making. One of the major findings of this study implies that racial/ethnic disparity in the *Booker* period was associated with Hispanic defendants facing mandatory minimum sentences—cases under the absolute discretion of the federal prosecutor. Therefore, policies developed to promote consistency and proportionality in sentencing must take into consideration all discretionary stages of the criminal process, in particular charging and plea bargaining decisions directly related to the prosecuting attorney. Findings from this dissertation may inform the discussion on the extent to which recent rulings from the High Court, which have had a dramatic effect on the sentencing process, contributed to unwarranted disparities linked to federal prosecutors' decisions.

DIRECTIONS FOR FUTURE RESEARCH

The findings from this study have implications for research as well as practice. The wave of studies that highlight the interactive effects of race/ethnicity with other legal and extralegal considerations (see Zatz, 1987) has unequivocally demonstrated that young minority male defendants are singled out for harsher treatment in the criminal process (e.g., Cano and Spohn, 2012; Doerner and Demuth, 2009; Spohn and Holleran, 2000; Steffensmeier et al., 1998; see, however, Johnson, 2014). Similarly, the extant literature on the impact of *Booker* and *Gall/Kimbrough* on punishment outcomes found that imprisonment decisions, and AUSAs' motions for substantial assistance departures to a greater extent, are especially punitive toward Black and Hispanic male defendants (e.g., Ulmer et al., 2011a, 2011b). An investigation of the interactive effects of race/ethnicity and gender on federal prosecutors' decision making in relation to *Booker* and *Gall/Kimbrough*, however, was not possible, as the number of female defendants adjudicated each month and in each federal district courts was too small for the modeling structure employed in this study.

Second, the effects of social context on AUSAs' substantial assistance decisions that were observed in this study warrant additional theoretical and empirical attention. This dissertation focused primarily on the conditioning effects of defendants' race/ethnicity on the association between the *Booker* and *Gall/Kimbrough* rulings and substantial assistance departures, in the short term and long term. The results of the contextual-level analyses unexpectedly showed that control measures for case rate and crime rate, the only two time-varying covariates incorporated at the time level, were strongly associated with substantial assistance decisions across all three types of cases

(all cases, guidelines cases, and mandatory minimum cases). Drawing from an organizational efficiency perspective (Dixon, 1995; Ulmer, 1997), this finding may be further addressed by estimating interaction models that test whether districts' case rate and crime rate account for changes in the probability of substantial assistance in the post-*Booker* and post-*Gall/Kimbrough* eras. Because significant variation was revealed in substantial assistance motions granted across U.S. Courts of Appeals, and the implementation of the guidelines scheme and review of the standard of "reasonableness" for sentences that fall outside of the guidelines are tied to circuit court jurisdictions (see Starr and Rehavi, 2013), a systematic examination of characteristics related to federal circuits may enhance the study of the effects of federal sentencing reforms.

A third avenue for future research involves examining whether the relationship between federal prosecutors' decision making and the race and ethnicity of the defendant is conditioned by the offense category. For instance, the exploratory analysis of case-level covariates in this study revealed that substantial assistance downward departures were more likely in drug cases when compared to any other type of case. This finding lends credence to the notion that drug defendants may have more information to offer the government in exchange for a more lenient sentence and/or that drug defendants, especially those facing more punitive mandatory penalties, may be deemed more sympathetic. Thus, the effects of *Booker* and *Gall/Kimbrough* on AUSAs' decision making may be more pronounced in cases involving drug offenses and therefore these offenses should be examined separately. Despite the Department of Justice's organizational prioritization of prosecuting drug trafficking, weapon, and child pornography offenses (Eisenstein, 2008), racial disparity may be heightened in cases

related to drug offenses, as prosecutors exert greater discretion when processing less serious cases (Kalven and Zeisel, 1966; Smith and Damphousse, 1998; Spohn and Cederblom, 1991). To be sure, racial and ethnic inconsistencies are especially pronounced in punishment outcomes for drug offenses (Albonetti, 1997; Chiricos and Bales, 1991; Crawford et al., 1998; Mitchell, 2005; Myers, 1989; Simons, 2002; Spohn and Delone, 2000; Spohn and Fornango, 2009; Steffensmeier and Demuth, 2000). An extensive meta-analysis of sentencing outcomes in state and federal court jurisdictions suggests that "Researchers must continue the trend of conducting disaggregated data analyses, as the influence of race varies by type of offense and type of sentencing outcome" (Mitchell, 2005: 463; see also Spohn, 2000).

Finally, although significant, the outcome measure examined in this study—the probability of AUSAs' motions for substantial assistance departures—focused on the impact of the *Booker* and *Gall/Kimbrough* decisions at a single decision point in the criminal process. Consistent with the "hydraulic displacement" thesis, the High Court's decisions, which liberated judges but at the same time constrained AUSAs' discretion, may have shifted extralegal disparities downstream, to federal prosecutors' domain beyond downward departure decisions. Almost certainly a result of the dearth of data capturing charging and plea bargaining practices, research on the current sentencing policy reforms is largely concentrated on imprisonment decisions (see, however, Fischman and Schanzenbach, 2012; Starr and Rehavi, 2013). This reality echoes Blumstein et al.'s (1983: 222) early contention that, "the narrowness of focus fails to acknowledge the complexity of criminal case processing and opportunities for the exercise of discretion that it affords." An emerging body of work exploring cumulative

disadvantage has demonstrated that racial disparities exist, especially for Black defendants, and the extent of such disparities varies significantly across various stages of the criminal justice process (Johnson, 2014; Kutateladze et al., 2014; Stolzenberg, D'Alessio, and Eitle, 2013; Sutton, 2013; Wooldredge, Frank, Goulette, and Travis, 2015). As Spohn (2015: 6) recently opined, "The latest wave of race and sentencing research continues to unfold and as researchers devise new ways of estimating cumulative disadvantage, more definitive answers to questions regarding racial disparity and racial discrimination in punishment should be forthcoming" (see also Johnson, 2015).

CONCLUSION

Considered together, this dissertation sheds light on the trajectory of Assistant U.S. Attorneys' discretionary power in relation to unwarranted disparities amid dramatic changes to punishment policy reforms. Thus, accounting for the significance of the punishment setting (guidelines and statutory mandatory minimums) and time-level and district-level social context, the findings reveal that substantial assistance downward departures decisions were significantly altered in the wake of the U.S. Supreme Court's rulings in *U.S. v. Booker* (2005) and *Gall/Kimbrough v. U.S.* (2007). AUSAs exercise unfettered discretion and their conceptualization of race and ethnicity varies across time, place, and setting.

REFERENCES

Administrative Office of the United States Courts. 2008. *Annual Report of the Director: Judicial Business of the United States Courts, 2007*. Washington, DC: U.S. Government Printing Office.

Administrative Office of the United States Courts. 2008. *Annual Report of the Director: Judicial Business of the United States Courts, 2008*. Washington, DC: U.S. Government Printing Office.

Administrative Office of the United States Courts. 2009. *Annual Report of the Director: Judicial Business of the United States Courts, 2008*. Washington, DC: U.S. Government Printing Office.

Albonetti, Celesta A. 1986. Criminality, prosecutorial screening, and uncertainty: Toward a theory of discretionary decision making in felony case processings. *Criminology* 24:623-644.

Albonetti, Celesta A. 1987. Prosecutorial discretion: The effects of uncertainty. *Law and Society Review* 21:291-314.

Albonetti, Celesta A. 1991. An integration of theories to explain judicial discretion. *Social Problems* 38:247–266.

Albonetti, Celesta A. 1992. Charge reduction: An analysis of prosecutorial discretion in burglary and robbery cases. *Journal of Quantitative Criminology* 8:317-333.

Albonetti, Celesta A. 1997. Sentencing under the federal sentencing guidelines: Effects of defendant characteristics, guilty pleas, and departures on sentence outcomes for drug offenses, 1991–1992. *Law and Society Review* 31:789–822.

Albonetti, Celesta A. 2002. The joint conditioning effect of defendant's gender and ethnicity on length of imprisonment under the federal sentencing guidelines for drug trafficking/ manufacturing offenders. *Journal of Gender, Race, and Justice* 6:39–60.

Albonetti, Celesta A., and John Hepburn. 1996. Prosecutorial discretion to defer criminalization: The effects of defendant's ascribed and achieved status characteristics. *Journal of Quantitative Criminology* 12:63-81.

Allison, Paul D. 2001. *Missing Data, Volume 136*. Thousand Oaks, CA: Sage.

Alschuler, Albert W. 1978. Sentencing reform and prosecutorial power: A critique of recent proposals for fixed and presumptive sentencing. *University of Pennsylvania Law Review* 126:550-577

Alschuler, Albert W. 1991. The failure of sentencing guidelines: A plea for less aggregation. *University of Chicago Law Review* 58:901-951.

Anderson, Amy L., and Cassia Spohn. 2010. Lawlessness in the federal sentencing process: A test for uniformity and consistency in sentence outcomes. *Justice Quarterly* 27:362-393.

Anderson, James M., Jeffrey R. Kling, and Kate Stith. 1999. Measuring interjudge sentencing disparity: Before and after the federal sentencing guidelines. *Journal of Law and Economics* 42:271-299.

Bailey, 2004. Feeney's folly: Why appellate courts should review departures from the federal sentencing guidelines with deference. *Iowa Law Review* 90:269-312.

Baumer, Eric P. 2013. Reassessing and redirecting research on race and sentencing. *Justice Quarterly* 30:231-261.

Beckett, Katherine. 1997. *Making Crime Pay: Law and Order in Contemporary American Politics*. New York: Oxford University Press.

Beckett, Katherine, and Theodore Sasson. 2004. *The Politics of Injustice: Crime and Punishment in America,* 2nd ed. Thousand Oaks, CA: Sage.

Beichner, Dawn, and Cassia Spohn. 2005. Prosecutorial charging decisions in sexual assault cases: Examining the impact of a specialized prosecution unit. *Criminal Justice Policy Review* 16:461-498.

Berk, Richard A. 1983. An introduction to sample selection bias in sociological data. *American Sociological Review* 48:386–398.

Berk, Richard A. 2010. Recent perspectives on the regression discontinuity discontinuity design. In *Handbook of Quantitative Criminology*, eds. Alex R. Piquero and David Weisburd. New York: Springer.

Berman, Douglas A. 2012. *Seeking to Fix Only What's Obviously Broke in the Post-Booker Federal Sentencing System*. U.S. Sentencing Commission Hearing. February 16, 2012.

Bibas, Stephanos. 2004. Plea-bargaining outside of the showdown of trial. *Harvard Law Review* 117:2464-2485.

Bjerk, David. 2005. Making the crime fit the penalty: The role of prosecutorial discretion under mandatory minimum sentencing. *Journal of Law and Economics* 48:549-625.

Blackwell, Brenda Sims, David Holleran, and Mary A. Finn. 2008. The impact of the Pennsylvania sentencing guidelines on sex differences in sentencing. *Journal of Contemporary Criminal Justice* 24:399-418.

Blalock, Hubert M. 1967. *Toward a Theory of Minority-Group Relations*. New York: Wiley.

Blumer, Herbert. 1958. Race prejudice as a sense of group position. *Pacific Sociological Review* 1:3–7.

Blumstein, Alfred, and Allen J. Beck. 1999. Population growth in US prisons, 1980-1996. *Crime and Justice* 26:17-62.

Blumstein, Alfred, Jacqueline Cohen, Susan E. Martin, and Michael H. Tonry. 1983. *Research on Sentencing: The Search for Reform*. Washington, DC: National Academy Press.

Bobo, Lawrence, and Vincent Hutchings. 1996. Perceptions of racial group competition: Extending Blumer's theory of group position to a multiracial social context. *American Sociological Review* 61:951-972.

Bonilla-Silva, Eduardo. 1997. Rethinking racism: Toward a structural interpretation. *American Sociological Review* 62:465-480.

Bontrager, Stephanie, William D. Bales, and Ted Chiricos. 2005. Race, ethnicity, threat and the labeling of convicted felons. *Criminology* 43:589–622.

Bowen, Deirdre M. 2009. Calling your bluff: How prosecutors and defense attorneys adapt plea bargaining strategies to increased formalization. *Justice Quarterly* 26:2-29.

Breuer, Lanny A. 2010. The Attorney General's Sentencing and Corrections Working Group: A progress report. *Federal Sentencing Reporter* 23:110-114.

Breuer, Lanny A. 2011. Assistant Attorney General Lanny A. Breuer speaks at the American Lawyer/National Law Journal Summit. *Federal Sentencing Reporter* 24:178-180.

Breyer, Stephen. 1999. Justice Breyer: Federal Sentencing Guidelines revisited. *Criminal Justice* 14:28-35.

Bridges, George S., and Sara Steen. 1998. Racial disparities in official assessments of juvenile offenders: Attributional stereotypes as mediating mechanisms. *American Sociological Review* 63:554-570.

Bridges, George S., and Robert D. Crutchfield. 1988. Law, social standing and racial disparities in imprisonment. *Social Forces* 66:699–724.

Britt, Chester. 2000. Social context and racial disparities in punishment decisions. *Justice Quarterly* 17:707-732.

Bushway, Shawn D., and Anne Morrison Piehl. 2001. Judging judicial discretion: Legal factors and racial discrimination in sentencing. *Law and Society Review* 35:733-764.

Bushway, Shawn D., and Anne M. Piehl. 2007. Social science research and the legal threat to presumptive sentencing guidelines. *Criminology and Public Policy* 6:461–482.

Bushway, Shawn D., Brian D. Johnson, and Lee Ann Slocum. 2007. Is the magic still there? The relevance of the Heckman two-step correction for selection bias in criminology. *Journal of Quantitative Criminology* 23:151–78.

Bynum, Timothy S. 1982. Prosecutorial discretion and the implementation of a legislative mandate. In *Implementing Criminal Justice Policies, Volume 26*, ed. Merry Morash. Beverly Hills, CA: Sage.

Cano, Mario V., and Cassia Spohn. 2012. Circumventing the penalty for offenders facing mandatory minimums: Revisiting the dynamics of "sympathetic" and "salvageable" offenders. *Criminal Justice and Behavior* 39:308-332.

Cassell, Paul G. 2004. Too Severe?: A Defense of the federal sentencing guidelines (and a critique of federal mandatory minimums). *Stanford Law Review* 56:1017-1048.

Cassidy, Michael B. 2009. Examining crack cocaine sentencing in a post-Kimbrough world. *Akron Law Review* 42:105-134.

Casper, Jonathan D. 1984. Determinate sentencing and prison overcrowding in Illinois. *University of Illinois Law Review* 231:231-252.

Caulkins, Jonathan P., C. Peter Rydell, William L. Schwabe, and James Chisea. 1997. *Mandatory Minimum Sentences: Throwing Away the Key or Taxpayers' Money?* Santa Monica, CA: RAND.

Chambliss, William J., and Robert B. Seidman. 1971. *Law, Order, and Power*. Reading, MA: Addison-Wesley.

Chiricos, Theodore G., and William D. Bales. 1991. Unemployment and punishment: An empirical assessment. *Criminology* 29:701-724.

Chiricos, Theodore G., and Charles Crawford. 1995. Race and imprisonment: A contextual assessment of the evidence. *Ethnicity, Race, and Crime: Perspectives across Time and Place* 13:281-309.

Chiricos, Ted, Kelly Welch, and Marc Gertz. 2004. Racial typification of crime and support for punitive measures. *Criminology* 42:358–390.

Clear, Todd R. 2007. *Imprisoning Communities: How Mass Incarceration Makes Disadvantaged Neighborhoods Worse*. New York: Oxford University Press.

Clear, Todd R., John D. Hewitt, and Robert M. Regoli. 1978. Discretion and the determinate sentence: its distribution, control, and effect on time served. *Crime and Delinquency* 24:428-445.

Clogg, Clifford C., Eva Petkova, and Adamantios Haritou. 1995. Statistical methods for comparing regression coefficients between models. *American Journal of Sociology* 100:1261-1293.

Cohen, Jacob, Patricia Cohen, Stephen G. West, and Leona S. Aiken. 2003. *Applied Multiple Regression: Correlation Analysis for the Behavioral Sciences*. Mahwah, NJ: Lawrence Erlbaum Associates.

Crawford, Charles, Ted Chiricos, and Gary Kleck. 1998. Race, racial threat, and sentencing of habitual offenders. *Criminology* 36:481-511.

Crawford, Charles. 2000. Gender, race, and habitual offender sentencing in Florida. *Criminology* 38:263-280.

D'Alessio, Stewart, and Lisa Stolzenberg. 2002. A multilevel analysis of the relationship between labor surplus and pretrial incarceration. *Social Problems* 49:178-193.

Demuth, Stephen. 2003. Racial and ethnic differences in pretrial release decisions and outcomes: A comparison of Hispanic, black, and white felony arrestees. *Criminology* 41:873–908.

Demuth, Stephen, and Darrell Steffensmeier. 2004. The impact of gender and race/ethnicity in the pretrial release process. *Social Problems* 51:222–242.

Dixon, Jo. 1995. The organizational context of criminal sentencing. *American Journal of Sociology* 100:1157–1198.

DiPrete, Thomas A., and David B. Grusky. 1990. The multilevel analysis of trends with repeated cross-sectional data. *Sociological Methods* 20:337-368.

Doerner, Jill K., and Stephen Demuth. 2010. The independent and joint effects of race/ethnicity, gender, and age on sentencing outcomes in U.S. federal courts. *Justice Quarterly* 27:1-27.

Eisenstein, James. 2007. The U.S. Attorney firings of 2006: Main justice's centralization efforts in historical context. *Seattle University Law Review* 31:219-264.

Eisenstein, James, Roy B. Flemming, and Peter F. Nardulli. 1988. *The Contours of Justice: Communities and Their Courts*. Boston, MA: Little, Brown.

Eisenstein, James, and Herbert Jacob. 1977. *Felony Justice: An Organizational Analysis of Felony Courts.* Boston, MA: Little, Brown.

Engen, Rodney L. 2009. Assessing determinate and presumptive sentencing-Making research relevant. *Criminology and Public Policy* 8:323-336.

Engen, Rodney L. 2011. Racial disparity in the wake of Booker/Fanfan making sense of "messy" results and other challenges for sentencing research. *Criminology and Public Policy* 10:1139-1149.

Engen, Rodney L., and Randy R. Gainey. 2000. Modeling the effects of legally relevant and extralegal factors under sentencing guidelines: The rules have changed. *Criminology* 38:1207-1230.

Engen, Rodney L., and Sara Steen. 2000. The power to punish: Discretion and sentencing reform in the war on drugs. *American Journal of Sociology* 105:1357-1395.

Everett, Ronald S., and Roger A. Wojtkiewicz. 2002. Difference, disparity, and race/ethnic bias in federal sentencing. *Journal of Quantitative Criminology* 18:189-211.

Families Against Mandatory Minimums. 2008. Families Against Mandatory Minimums Omnibus Survey. Washington, DC: Author.

Farnworth, Margaret, and Raymond HC Teske, Jr. 1995. Gender differences in felony court processing: Three hypotheses of disparity. *Women and Criminal Justice* 6:23-44.

Farrell, Jill. 2003. Mandatory minimum firearm penalties: A source of sentencing disparity. *Justice Research and Policy* 5:95-115.

Farrell, Amy. 2004. Measuring judicial and prosecutorial discretion: Sex and race disparities in departures from the federal sentencing guidelines. *Justice Research and Policy* 6:45-78.

Farrell, Amy, and Geoff Ward. 2011. Examining district variation in sentencing in the post-Booker period. *Federal Sentencing Reporter* 23:318-325.

Fearn, Noelle E. 2005. A multilevel analysis of community effects on criminal sentencing. *Justice Quarterly* 22:452–487.

Feeley, Malcolm M. 1979. *The Process is the Punishment: Handling Cases in a Lower Criminal Court.* New York: Russell Sage Foundation.

Feldmeyer, Ben, and Jeffery T. Ulmer. 2011. Racial/ethnic threat and federal sentencing. *Journal of Research in Crime and Delinquency* 48:238-270.

Feldmeyer, Ben, Patricia Y. Warren, Sonja E. Siennick, and Malisa Neptune. 2015. Racial, ethnic, and immigrant threat: Is there a new criminal threat on state sentencing? *Journal of Research in Crime and Delinquency* 52:62-92.

Fischman, Joshua B. and Max M. Schanzenbach. 2012. Racial disparities under the federal sentencing guidelines: The role of judicial discretion and mandatory minimums. *Journal of Empirical Legal Studies* 9:1-49.

Forst, Brian. 1999. Prosecution. In *Crime: Public Policies for Crime Control*, eds. James Q. Wilson and Joan Petersilia. Oakland, CA: ICS Press.

Forst, Brian, and Shawn Bushway. 2010. Discretion, rule of law, and rationality. In *Conference on The Past and Future of Empirical Sentencing Research, Albany, NY*. http://www.albany.edu/scj/documents/Forst-Bushway_Discretion_000. pdf.

Frankel, Marvin. 1972. Lawlessness in sentencing. *University of Cincinnati Law Review* 41:1-54.

Frankel, Marvin E. 1973. *Criminal Sentences: Law without Order*. New York: Hill and Wang.

Franklin, Travis W. 2013. Sentencing Native Americans in U.S. federal courts: An examination of disparity. *Justice Quarterly* 30:310-339.

Frase, Richard S. 1993. The uncertain future of sentencing guidelines. *Law and Inequality* 12:1-42.

Frase, Richard S. 2000. Is guided discretion sufficient? Overview of the State Sentencing Guidelines. *Saint Louis University Law Journal* 44:425-449.

Frase, Richard. 2007. The Apprendi-Blakely cases: Sentencing reform counter-revolution? *Criminology and Public Policy* 6:403–32.

Free, Marvin D. 2002. Race and presentencing decisions in the United States: A summary and critique of the research. *Criminal Justice Review* 27:203-232.

Freeborn, Beth A. and Monica E. Hartmann. 2010. Judicial discretion and sentencing behavior: Did the Feeney Amendment rein in district judges? *Journal of Empirical Legal Studies* 7:355-378.

Frohmann, Lisa. 1991. Discrediting victims' allegations of sexual assault: Prosecutorial accounts of case rejections. *Social Problems* 38:213–226.

Frohmann, Lisa. 1997. Convictability and discordant locales: Reproducing race, class, and gender ideologies in prosecutorial decision-making. *Law and Society Review* 31:531-555.

Froyd, Jane L. 1999. Safety valve failure: Low-level drug offenders and the federal sentencing guidelines. *Northwestern University Law Review* 94:1471-1507.

Garland, David. 2001. *The Culture of Control: Crime and Social Order in Contemporary Society*. New York: Oxford University Press.

Gonzales, Alberto. 2005. Federal sentencing guidelines speech by Attorney General Alberto Gonzales. *Federal Sentencing Reporter* 17:324-326.

Gorton, Joe, and John L. Boies. 1999. Sentencing guidelines and racial disparity across time: Pennsylvania prison sentences in 1977, 1983, 1992, and 1993. *Social Science Quarterly* 80:37-54.

Gottfredson, Michael R., and Don M. Gottfredson. 1988. *Decision Making in Criminal Justice: Toward the Rational Exercise of Discretion*. New York: Plenum Press.

Griffin, Timothy, and John Wooldredge. 2006. Sex-based disparities in felony dispositions before versus after sentencing reform in Ohio. *Criminology* 44:893-923.

Guerino, Paul, Paige M. Harrison, and William J. Sabol. 2011. Prisoners in 2010. Washington, DC: Bureau of Justice Statistics, U.S. Department of Justice.

Hagan, John, and Ilene Nagel Bernstein. 1979. The sentence bargaining of upperworld and underworld crime in ten federal district courts. *Law and Society Review* 13:467-478.

Hagan, John, Ron Levi, and Ronit Dinovitzer. 2008. The symbolic violence of the crime-immigration nexus: Migrant mythologies in the Americas. *Criminology and Public Policy* 7:95-112.

Hatch, Orrin G. 1993. The role of Congress in sentencing: The United States Sentencing Commission, mandatory minimum sentences, and the search for a certain and effective sentencing system. *Wake Forrest Law Review* 28:185-198.

Hartley, Richard. 2008. Sentencing reforms and the war on drugs: An analysis of sentence outcomes for narcotics offenders adjudicated in U.S. district courts on the southwest border. *Journal of Contemporary Criminal Justice* 24:437-461.

Hartley, Richard, Sean Maddan, and Cassia Spohn. 2007. Prosecutorial discretion: An examination of substantial assistance departures in federal crack-cocaine and powder-cocaine cases. *Justice Quarterly* 24:382–407.

Hartley, Richard D., and J. Mitchell Miller. 2010. Crack-ing the myth: Reconsidering sentencing severity for cocaine offenders by drug type. *Criminal Justice Review* 35:67-89.

Hawkins, Darnell F. 1981. Causal attribution and punishment for crime. *Deviant Behavior* 2:207–230.

Heaney, Gerald W. 1991. Revisiting disparity: Debating Guidelines sentencing. *American Criminal Law Review* 29:771-794.

Henning, Kris, and Lynette Feder. 2005. Criminal prosecution of domestic violence offenses: An investigation of factors predictive of court outcomes. *Criminal Justice and Behavior* 32:612-642.

Hill, Gary D., Anthony R. Harris, and JoAnn L. Miller. 1985. The etiology of bias: Social heuristics and rational decision making in deviance processing. *Journal of Research in Crime and Delinquency* 22:135-162.

Hofer, Paul J. 2000. Federal sentencing for violent and drug trafficking crimes involving firearms: Recent changes and prospects for improvement. *American Criminal Law Review* 37:41-74.

Hofer, Paul J. 2006. Immediate and long-term effects of *United States v. Booker*: More discretion, more disparity, or better reasoned sentences. *Arizona State Law Journal* 38:425-468.

Hofer, Paul J. 2007. *United States v. Booker* as a natural experiment: Using empirical research to inform the federal sentencing policy debate. *Criminology and Public Policy* 6:433-460.

Hofer, Paul J. 2011. Has Booker restored balance? A look at data on plea bargaining and sentencing. *Federal Sentencing Reporter* 23:326-332.

Hofer, Paul J., Kevin R. Blackwell, and R. Barry Ruback. 1999. The effect of the federal sentencing guidelines on inter-judge sentencing disparity. *Journal of Criminal Law and Criminology* 90:239-322.

Holder, Eric. 2009. Attorney General Holder's Remarks for the Charles Hamilton Houston Institute for Race and Justice and Congressional Black Caucus Symposium "Rethinking Federal Sentencing Policy 25th Anniversary of the Sentencing Reform Act. Washington, DC.

Holmes, Malcolm D., Howard C. Daudistel, and Ronald A. Farrell. 1987. Determinants of charge reductions and final dispositions in cases of burglary and robbery. *Journal of Research in Crime and Delinquency* 24:233-254.

Huebner, Beth M., and Timothy S. Bynum. 2008. The role of race and ethnicity in parole decisions. *Criminology* 46:907-938.

Inciardi, James. A., Anne E. Pottieger, and Hilary L. Surrat. 1996. African Americans and the crack-crime connection. In *The American Pipe Dream: Crack Cocaine and the Inner City*, eds. Dale D. Chitwood, James E. Rivers, and James A. Inciardi. Fort Worth, TX: Harcourt Brace.

Inter-University Consortium for Political and Social Research (ICPSR). 2007. *County Characteristics, 2000-2007*. Ann Arbor, MI: Inter-University Consortium for Political and Social Research

Jacobs, David, and Richard Kleban. 2003. Political institutions, minorities, and punishment: A pooled cross-national analysis of imprisonment rates. *Social Forces* 80:725–755.

Johnson, Brian D. 2005. Contextual disparities in guidelines departures: Courtroom social contexts, guidelines compliance, and extralegal disparities in criminal sentencing. *Criminology* 43:761-796.

Johnson, Brian D. 2006. The multilevel context of criminal sentencing: Integrating judge- and county- level influences. *Criminology* 44:259-298.

Johnson, Brian D. 2014. *The Missing Link: Examining Prosecutorial Decision-Making Across Federal District Courts*. U.S. Department of Justice. National Institute of Justice. Document No: 245351.

Johnson, Brian D. 2015. Examining the "life course" of criminal cases. *Criminology and Public Policy* 14:183-186.

Johnson, Brian D., Jeffery T. Ulmer, and John Kramer. 2008. The social context of guideline circumvention: The case of federal district courts. *Criminology* 46:711-783.

Johnson, Brian D., and Sara Betsinger. 2009. Punishing the "model minority": Asian-American criminal sentencing outcomes in federal district courts. *Criminology* 47:1045–1090.

Johnson, Molly Treadway, and Scott A. Gilbert. 1997. *The U.S. Sentencing Guidelines, Results of the Federal Judicial Center's 1996 Survey*. Washington, DC: Federal Judicial Center.

Johnston, Lloyd. D., Patrick. M. O'Malley, Jerald G. Bachman, and John E. Schulenberg. 2012. *Monitoring the Future National Results on Adolescent Drug Use: Overview of Key* Findings. Ann Arbor, MI: Institute for Social Research, The University of Michigan.

Kalvin, Harry, and Hans Zeisel. 1966. *The American Jury*. Boston: Little, Brown.

Kaiser, Kimberly A., and Cassia Spohn. 2014. Fundamentally flawed? *Criminology and Public Policy* 13:241-270.

Karle, Theresa Walker, and Thomas Sager. 1991. Are the federal sentencing guidelines meeting congressional goals: An empirical and case law analysis. *Emory Law Journal* 40:393-444.

Kautt, Paula M. 2002. Location, location, location: Interdistrict and intercircuit variation in sentencing outcomes for federal drug-trafficking offenses. *Justice Quarterly* 19:633–671.

Kautt, Paula M., and Miriam A. DeLone. 2006. Sentencing outcomes under competing but coexisting sentencing interventions: Untying the Gordian knot. *Criminal Justice Review* 31:105-131.

Kautt, Paula M., and Cassia Spohn. 2002. Crack-ing down on black drug offenders? Testing for interactions among offenders' race, drug type, and sentencing strategy in federal drug sentences. *Justice Quarterly* 19:1–35.

Kempf-Leonard, Kimberly, and Lisa L. Sample. 2001. Have federal sentencing guidelines reduced severity? An examination of one circuit. *Journal of Quantitative Criminology* 17:111-144.

Kennedy, Peter. 2003. *A Guide to Econometrics*, 5th ed. Cambridge, MA: MIT Press.

Kennedy, Randall. 1994. The state, criminal law, and racial discrimination: A comment. *Harvard Law Review* 107:1255-1278.

Kennedy, Randall. 1997. *Race, Crime, and the Law*. New York: Random House.

Kessler, Daniel P., and Anne Morrison Piehl. 1997. *The role of discretion in the criminal justice system*. No. w6261. National Bureau of Economic Research.

Kim, Byungbae, Mario V. Cano, Kiduek Kim, and Cassia Spohn. 2014. The Impact of United States v. Booker and Gall/Kimbrough v. United States on sentence severity: Assessing Social Context and Judicial Discretion. *Crime and Delinquency*. 0011128714551783.

Kim, Byungbae, Cassia Spohn, and Eric Hedberg. 2015. Federal sentencing as a complex collaborative process: judges, prosecutors, judge–prosecutor dyads, and disparity in sentencing. *Criminology*.

King, Ryan S., and Marc Mauer. 2006. *Sentencing with Discretion: Crack Cocaine Sentencing after Booker*. Washington, DC: The Sentencing Project.

Kingsnorth, Rodney, and Randall C. MacIntosh. 2007. Intimate partner violence: The role of suspect gender in prosecutorial decision-making. *Justice Quarterly* 24:460-495.

Koons-Witt, Barbara A. 2002. The effect of gender on the decision to incarcerate before and after the introduction of sentencing guidelines. *Criminology* 40:297-328.

Kramer, John, and Darrell Steffensmeir. 1993. Race and imprisonment decisions. *The Sociological Quarterly* 34:357-376.

Kramer, John H., and Jeffery T. Ulmer. 2002. Downward departures for serious violent offenders: Local court 'corrections' to Pennsylvania's sentencing guidelines. *Criminology* 40:897–932.

Kramer, John H., and Jeffery T. Ulmer. 2009. *Sentencing Guidelines: Lessons from Pennsylvania*. Boulder, CO: Lynne Rienner Publishers.

Kutateladze, Besiki L., Nancy R. Andiloro, Brian D. Johnson, and Cassia Spohn. 2014. Cumulative disadvantage: Examining racial and ethnic disparity in prosecution and sentencing. *Criminology* 52:514-551.

Kutateladze, Besiki, Vanessa Lynn, and Edward Liang. 2012. *Does Race and Ethnicity Matter in Prosecution?* New York: VERA Institute of Justice.

Lacasse, Chantale, and A. Abigail Payne. 1999. Federal Sentencing Guidelines and mandatory minimum sentences: Do defendants bargain in the shadow of the judge. *Journal of Law and Economics* 42:245-270.

Lee, Cynthia, and Brian Derdowski, JR. 1998. The future of substantial assistance: Recommendations for reform. *Federal Sentencing Reporter* 11:78-82.

Levin, David. 2008. *Pretrial Release of Latino Defendants*. U.S. Department of Justice: Washington, DC.

Light, Michael T. 2014. The New Face of Legal Inequality: Noncitizens and the Long-term Trends in sentencing disparities across U.S. District Courts, 1992–2009. *Law and Society Review* 48:447-478.

Light, Michael T., Michael Massoglia, and Ryan D. King. 2014. Citizenship and Punishment: The salience of national membership in U.S. criminal courts. *American Sociological Review* 79:825-847.

Liska, Allen E. 1992. *Social Threat and Social Control*. Albany, NY: SUNY Press.

Lock, Eric D., Jeffrey M. Timberlake, and Kenneth A. Rasinski. 2002. Battle fatigue: Is public support waning for "war"-centered drug control strategies? *Crime and Delinquency* 48:380-398.

Lockwood, Dorothy, Anne E. Pottieger, and James A. Inciardi. 1995. Crack use, crime by crack users, and Ethnicity. In *Ethnicity, Race, and Crime: Perspectives across Time and Place*, ed. Darnell Felix Hawkins. Albany, NY: State University of New York Press.

Loftin, Colin, Milton Heumann, and David McDowall. 1983. Mandatory sentencing and firearms violence: Evaluating an alternative to gun control. *Law and Society Review* 17:287–318.

Long, J. Scott. 1997. *Regression Models for Categorical and Limited Dependent Variables*. Thousand Oaks, CA: Sage.

Lowenthal, Gary T. 1993. Mandatory sentencing laws: Undermining the effectiveness of determinate sentencing reform. *California Law Review* 81:61-123.

Luna, Erik. 2010. Testimony Delivered to U.S. Sentencing Commission, "Mandatory Minimum Sentencing Provisions under Federal Law." May 27, 2010. Washington, DC.

Luna, Erik, and Paul G. Cassell. 2010. Mandatory minimalism. *Cardozo Law Review* 32:1-83.

March, James G., and Herbert Alexander Simon. 1958. *Organizations*. New York: Wiley.

Martinez Jr, Ramiro, and Matthew T. Lee. 2000. Comparing the context of immigrant homicides in Miami: Haitians, Jamaicans and Mariels. *International Migration Review* 34:794-812.

Martinez, Ramiro Jr. 2002. *Latino Homicide: Immigration, Violence and Community Safety*. New York: Routledge.

Martinson, Robert. 1974. What works? Questions and answers about prison reform. *Public Interest* 35:22-54.

Massey, Douglas S. 2007. *Categorically Unequal: The American Stratification System*. New York: Russell Sage Foundation

Mata, Alberto G., and Catalina Herrerías. 2006. Immigrant bashing and nativist political movements. In *Images of Color, Images of Crime*, 3rd ed., eds. Corame Richey Mann, Marjorie. S. Zatz, and Nancy Rodriguez. Los Angeles: Roxbury Publishing Company.

Mauer, Marc. 2006. *Race to Incarcerate*. New York: New Press.

Mauer, Marc, and Tracy Huling. 1995. *Young Black Americans and the Criminal Justice System: Five Years Later*. Washington, DC: The Sentencing Project.

Maxfield, Linda, and John H. Kramer. 1998. *Substantial Assistance: An Empirical Yardstick Gauging Equity in Current Federal Policy and Practice.* Washington, DC: United States Sentencing Commission.

Maxfield, Linda Drazga. 2003. *Final Report: Survey of Article III Judges on the Federal Sentencing Guidelines*. Washington, DC: U.S. Sentencing Guidelines.

Maxfield, Linda Drazga, Willie Martin, and Christine Kitchens. 1997. *Just Punishment: Public Perceptions and the Federal Sentencing Guidelines*. Washington, DC: U.S. Sentencing Commission.

McDonald, Douglas C., and Kenneth E. Carlson. 1994. Why did race/ethnic sentencing differences in federal district courts grow larger under the Guidelines? *Federal Sentencing Reporter* 6:223-226.

Melde, Chris, and Finn-Aage Esbensen. 2014. The relative impact of gang status transitions: Identifying the mechanisms of change in delinquency. *Journal of Research in Crime and Delinquency* 51:349-376.

Merritt, Nancy, Terry Fain, and Susan Turner. 2006. Oregon's get tough sentencing reform: A lesson in justice system adaptation. *Criminology and Public Policy* 5:5-36.

Mieczkowski, Thomas M. 1996. The prevalence of drug use in the United States. *Crime and Justice* 20:349-414.

Miethe, Terrance. 1987. Charging and plea bargaining practices under determinate sentencing: An investigation of the hydraulic displacement of discretion. *Criminology* 78:155-176.

Miethe, Terence, and Charles Moore. 1985. Socioeconomic disparities under determinate sentencing systems: A comparison of preguideline and postguideline practices in Minnesota. *Criminology* 23:337-363.

Miller, Jerome G. 1996. *Search and Destroy: African-American Males in the Criminal Justice System*. New York: Cambridge University Press.

Mitchell, Ojmarrh. 2005. A meta-analysis of race and sentencing research: Explaining the inconsistencies. *Journal of Quantitative Criminology* 21:439-466.

Musto, David F. 1987. *The American Disease: Origins of Narcotic Control*. New York: Oxford University Press.

Mustard, David. 2001. Racial, ethnic and gender disparities in sentencing: Evidence from the U.S. federal courts. *Journal of Law and Economics* 44:285–314.

Myers, Martha A., and Susette M. Talarico. 1987. *The Social Contexts of Criminal Sentencing*. New York: Springer-Verlag.

Myers, Martha A. 1989. Symbolic policy and the sentencing of drug offenders. *Law and Society Review* 23:295-316.

Nagel, Ilene H., and Stephen J. Schulhofer. 1992. A tale of three cities: An empirical study of charging and bargaining practices under the federal sentencing guidelines. *Southern California Law Review* 66:501–66.

Nardulli, Peter F., James Eisenstein, and Roy B. Flemming. 1988. *The Tenor of Justice: Criminal Courts and the Guilty Plea Process*. Urbana: University of Illinois Press.

Obama, Barack. 2007. Address at the Howard University Convocation. September, 28, 2007. Washington, DC.

Oliss, Phillip. 1994. Mandatory minimum sentencing: Discretion, the safety valve, and the Sentencing Guidelines. *Cincinnati Law Review* 63:1851-1892.

O'Neill Shermer, Lauren, and Brian D. Johnson. 2010. Criminal prosecutions: Examining prosecutorial discretion and charge reductions in U.S. federal district courts. *Justice Quarterly* 27:394-430.

Ortiz, Natalie R., and Cassia Spohn. 2014. Mitigating the effect of a criminal record at sentencing: Local life circumstances and substantial assistance departures among recidivists in federal court. *Criminal Justice Policy Review* 25:3-28.

Ousey, Graham C., and Charis E. Kubrin. 2009. Exploring the connection between immigration and violent crime rates in U.S. cities, 1980–2000. *Social Problems* 56:447-473.

Packer, Herbert. 1968. *The Limits of the Criminal Sanction*. Stanford, CA: Stanford University Press.

Pager, Devah. 2003. The mark of a criminal record. *American Journal of Sociology* 108:937-975.

Pager, Devah. 2007. *Marked: Race, Crime, and Finding Work in an Era of Mass Incarceration*. Chicago, IL: University of Chicago Press.

Passel, Jeffrey S., and D'Vera Cohn. 2008. *U.S. Population Projections: 2005-2050.* Washington DC: Pew Research Center.

Paternoster, Raymond. 2011. Racial disparity under the federal sentencing guidelines pre-and post-Booker. *Criminology and Public Policy* 10:1063-1072.

Paternoster, Raymond, Robert Brame, Paul Mazerolle, and Alex Piquero. 1998. Using the correct statistical test for the equality of regression coefficients. *Criminology* 36: 859-866.

Payne, A. Abigail. 1997. Does inter-judge disparity really matter? An analysis of the effects of sentencing reforms in three Federal District Courts. *International Review of Law and Economics* 17:337-366.

Peterson, Ruth D., and John Hagan. 1984. Changing conceptions of race: Towards an account of anomalous findings of sentencing research. *American Sociological Review* 49:56-70.

Peterson, Ruth D. 2012. The Central Place of Race in Crime and Justice—The American Society of Criminology's 2011 Sutherland Address. *Criminology* 50:303-328.

Pettit, Becky, and Christopher J. Lyons. 2009. Incarceration and the legitimate labor market: Examining age-graded effects on employment and wages. *Law and Society Review* 43:725-756.

Pettit, Becky, and Bruce Western. 2004. Mass imprisonment and the life course: Race and class inequality in U.S. incarceration. *American Sociological Review* 69:151-169.

Pew Research Center. 2005. *Hispanics: A People in Motion*. Washington DC: Pew Research Center for the People and the Press-Pew Hispanic Center.

Pew Research Center. 2012. Public Opinion on Sentencing and Corrections Policy in America. Washington DC: Pew Research Center.

Pinchevsky, Gillian M., and Benjamin Steiner. 2013. Sex-based disparities in pretrial release decisions and outcomes. *Crime and Delinquency* 0011128713482415.

Portillos, Edwardo L. 1998. Latinos, gangs, and drugs. In *Images of Color, Images of Crime*. Los Angeles: Roxbury Publishing Company.

Pratt, Travis C. 1998. Race and sentencing: A meta-analysis of conflicting empirical research results. *Journal of Criminal Justice* 26:513-523.

Pratt, Travis C. 2009. *Addicted to Incarceration: Corrections Policy and the Politics of Misinformation in the United States*. Thousand Oaks, CA: Sage.

Provine, Doris Marie. 2006. Creating racial disadvantage: The case of crack cocaine. In *The Many Colors of Crime*, eds. Ruth D. Peterson, Lauren J. Krivo, and John Hagan. New York: New York University Press.

Provine, Doris Marie. 2007. *Unequal under Law: Race in the War on Drugs*. Chicago, IL: University of Chicago Press.

Pyrooz, David C., Scott E. Wolfe, and Cassia Spohn. 2011. Gang-related homicide charging decisions: The implementation of a specialized prosecution unit in Los Angeles. *Criminal Justice Policy Review* 22:3-26.

Quillian, Lincoln, and Devah Pager. 2001. Black neighbors, higher crime? The role of racial stereotypes in evaluations of neighborhood crime. *American Journal of Sociology* 107:717–767.

Quinney, Richard. 1970. *The Social Reality of Crime*. New Brunswick, NJ: Transaction.

Rehavi, M. Marit, and Sonja B. Starr. 2014. Racial disparity in federal criminal sentences. *Journal of Political Economy* 122:1320-1354.

Rehnquist, William H. 1993. Luncheon Address at U.S. Sentencing Commission Symposium "Drugs and Violence in America." June, 18, 1993. Washington, DC.

Reinarman, Craig, and Harry G. Levine. 1997. The crack attack: Politics and media in the crack scare. In *Crack in America: Demon Drugs and Social Justice,* eds. Craig Reinarman and Harry G. Levine. Berkeley, CA: University of California Press.

Reitz, Kevin R. 1998. Modeling discretion in American sentencing systems. *Law and Policy* 20:389-428.

Reitz, Kevin R. 2001. The Disassembly and Reassembly of U.S. Sentencing Practices. In *Sentencing and Sanctions in Western Countries*, eds. Michael Tonry and Richard S. Frase. New York: Oxford University Press

Richman, Daniel. 2008. Federal sentencing in 2007: The Supreme Court holds: The center doesn't. *Yale Law Journal* 117:1374-1418.

Rose, Dina R., and Todd R. Clear. 1998. Incarceration, social capital, and crime: Implications for social disorganization theory. *Criminology* 36:441-480.

Rosett, Arthur I., Donald Ray Cressey, and Henry E. Ruth. 1976. *Justice by consent: Plea Bargains in the American Courthouse*. Philadelphia: Lippincott.

Rossi, Peter H., and Richard A. Berk. 1997. Public Opinion on Sentencing Federal Crimes. Washington, DC: U.S. Sentencing Commission.

Russell-Brown, Katheryn. 2009. *The Color of Crime*, 2nd ed. New York: New York University Press.

Sampson, Robert J., and Janet L. Lauritsen. 1997. Racial and ethnic disparities in crime and criminal justice in the United States. *Crime and Justice* 21:311-374.

Savelsberg, Joachim J. 1992. Law that does not fit society: Sentencing guidelines as a neoclassical reaction to the dilemmas of substantivized law. *American Journal of Sociology* 97:1346–1381.

Schulhofer, Stephen J. 1992. Plea bargaining as disaster. *Yale Law Journal* 101:1979-2009.

Schulhofer, Stephen J. 1993. Rethinking mandatory minimums. *Wake Forrest Law Review* 28:199-222.

Schulhofer, Stephen J., and Ilene H. Nagel. 1989. Negotiated pleas under the federal sentencing guidelines: The first fifteen months. *American Criminal Law Review* 27:231-288.

Schulhofer, Stephen J., and Ilene H. Nagel. 1997. Plea negotiations under the federal sentencing guidelines: Guideline circumvention and its dynamics in the post-*Mistretta* period. *Northwestern University Law Review* 91:1284-1316.

Schwarzer, William W. 1992. Sentencing guidelines and mandatory minimums: Mixing apples and oranges. *Southern California Law Review* 66:405-411.

Schanzenbach, Max M., and Emerson H. Tiller. 2008. Reviewing the sentencing guidelines: Judicial politics, empirical evidence, and reform. *The University of Chicago Law Review* 75:715-760.

Scott, Ryan W. 2009. The effects of *Booker* on inter-judge sentencing disparity. *Federal Sentencing Reporter* 22:102-108.

Scott, Ryan W. 2010. Inter-judge sentencing disparity after Booker: A first look. *Stanford Law Review* 63:1-66.

Sevigny, Eric L., and Jonathan P. Caulkins. 2004. Kingpins or mules: An analysis of drug offenders incarcerated in federal and state prisons. *Criminology and Public Policy* 3:401-434.

Simon, Jonathan. 1993. *Poor Discipline: Parole and the Social Control of the Underclass, 1890-1990*. Chicago, IL: University of Chicago Press.

Simon, Jonathan. 2012. Mass incarceration: From social policy to social problem. In *The Oxford Handbook of Sentencing and Corrections*, eds. Joan Petersilia and Kevin R. Reitz. New York: Oxford University Press.

Singer, Judith D., and John B. Willett. 2003. *Applied Longitudinal Data Analysis: Modeling Change and Event Occurrence*. New York: Oxford University Press.

Sklansky, David A. 1995. Cocaine, race, and equal protection. *Stanford Law Review* 47:1283-1322.

Smith, Brent L., and Kelly R. Damphousse. 1998. Terrorism, politics, and punishment: A test of structural-contextual theory and the liberation hypothesis. Criminology, 36:67-92.

Spears, Jeffery, and Cassia Spohn. 1997. The effect of evidence factors and victim characteristics on prosecutors' charging decisions in sexual assault cases. *Justice Quarterly* 14:501-524.

Spitzer, Steven. 1975. Toward a Marxian theory of deviance. *Social Problems* 22:638–651.

Spohn, Cassia. 2000. Thirty years of sentencing reform: The quest for a racially neutral sentencing process. *Criminal Justice: The National Institute of Justice Journal* 3:427-501.

Spohn, Cassia. 2005. Sentencing decisions in three U.S. District Courts: Testing the assumption of uniformity in the federal sentencing process. *Justice Research and Policy* 7:1–27.

Spohn, Cassia. 2008. Race, sex, and pretrial detention in federal court: Indirect effects and cumulative disadvantage. *University of Kansas Law Review* 57:879-902.

Spohn, Cassia. 2009. *How Do Judges Decide? The Search for Fairness and Justice in Punishment.* Belmont, CA: Sage.

Spohn, Cassia. 2011. Unwarranted disparity in wake of the *Booker/Fanfan* decision: Implications for research and policy. *Criminology and Public Policy* 10:1119-1127.

Spohn, Cassia.2015. Evolution of sentencing research. *Criminology and Public Policy* 14:225-232.

Spohn, Cassia, and Jerry Cederblom. 1991. Race and disparities in sentencing: A test of the liberation hypothesis. *Justice Quarterly* 8:305-327.

Spohn, Cassia, John Gruhl, and Susan Welch. 1987. The impact of the ethnicity and gender of defendants on the decision to reject or dismiss felony charges. *Criminology* 35:175-190.

Spohn, Cassia., Dawn Beichner, and Erika Davis-Frenzel. 2001. Prosecutorial justifications for sexual assault case rejection: Guarding the "gateway to justice." *Social Problems* 48:206-235.

Spohn, Cassia, and Pauline K. Brennan. 2011. The joint effects of race/ethnicity and gender on substantial assistance departures in federal courts. *Race and Justice* 1:49-78.

Spohn, Cassia, and Miriam DeLone. 2000. When does race matter? An analysis of the conditions under which race affects sentence severity. *Sociology of Crime, Law, and Deviance* 2:3-37.

Spohn, Cassia, and Robert Fornango. 2009. U.S. Attorneys and substantial assistance departures: Testing for interprosecutor disparity. *Criminology* 47:813-846.

Spohn, Cassia, and David Holleran. 2000. The imprisonment penalty paid by young, unemployed black and Hispanic male offenders. *Criminology* 38:281-306.

Spohn, Cassia, and David Holleran. 2001. Prosecuting sexual assault: A comparison of charging decisions in sexual assault cases involving strangers, acquaintances, and intimate partners. *Justice Quarterly* 18:651-688.

Spohn, Cassia, Byungbae Kim, Steven Belenko, and Pauline K. Brennan. 2014. The direct and indirect effects of offender drug use on federal sentencing outcomes. *Journal of Quantitative Criminology* 30:549-576.

Spohn, Cassia, and Lisa L. Sample. 2008. The dangerous offender in federal court. *Crime and Delinquency* 29:3-31.

Stacey, Ann M., and Cassia Spohn. 2006. Gender and the social costs of sentencing: An analysis of sentences imposed on male and female offenders in three U.S. district courts. *Berkeley Journal of Criminal Law* 11:43–76.

Starr, Sonja B., and M. Marit Rehavi. 2012. Racial Disparity in the criminal justice process: Prosecutors, judges, and the effects of *United States v. Booker*. University of Michigan Law and Economics, Empirical Legal Studies Paper 12-021.

Starr, Sonja B., and M. Marit Rehavi. 2013. Mandatory sentencing and racial disparity: Assessing the role of prosecutors and the effects of Booker. *Yale Law Journal* 123:2-81.

Starr, Sonja B. 2012. Estimating gender disparities in federal criminal cases. University of Michigan Law and Economics Research Paper 12-018.

Steen, Sara, Rodney L. Engen, and Randy R. Gainey. 2005. Images of danger and culpability: Racial stereotyping, case processing, and criminal sentencing. *Criminology* 43:435-468.

Steffensmeier, Darrell, and Stephen Demuth. 2000. Ethnicity and sentencing outcomes in U.S. federal courts: Who is punished more harshly? *American Sociological Review* 65:705–729.

Steffensmeier, Darrell, and Stephen Demuth. 2001. Ethnicity and judges' sentencing decisions: Hispanic-Black-White comparisons. *Criminology* 39:145-178.

Steffensmeier, Darrell, John H. Kramer, and Cathy Streifel. 1993. Gender and imprisonment decisions. *Criminology* 31:411-446.

Steffensmeier, Darrell, Jeffery T. Ulmer, and John H. Kramer. 1998. The interaction of race, gender, and age in criminal sentencing: The punishment cost of being young, black, and male. *Criminology* 36:763-798.

Sterling, Eric E. 1995. The sentencing boomerang: Drug prohibition politics and reform. *Villanova Law Review* 40:383-427.

Stith, Kate. 2008. The arc of the pendulum: Judges, prosecutors, and the exercise of discretion. *The Yale Law Journal* 117:1420-1497.

Stith, Kate, and Steve Y. Koh. 1993. The politics of sentencing reform: The legislative history of the federal sentencing guidelines. *Wake Forrest Law Review* 28:223-290.

Stith, Kate, and Jose A. Cabranes. 1998. *Fear of Judging: Sentencing Guidelines in the Federal Courts*. Chicago, IL: University of Chicago Press.

Stolzenberg, Lisa, and Stewart J. D'Alessio. 1994. Sentencing and unwarranted disparity: An empirical assessment of the long-term impact of sentencing guidelines in Minnesota. *Criminology* 32:301-310.

Stolzenberg, Lisa, and Stewart J. D'Alessio. 1994. Sentencing and unwarranted disparity: an empirical assessment of the long-term impact of sentencing guidelines in Minnesota. *Criminology* 32:301-310.

Stolzenberg, Lisa, Stewart J. D'Alessio, and David Eitle. 2013. Race and cumulative discrimination in the prosecution of criminal defendants. *Race and Justice* 3: 275-299.

Stolzenberg, Ross M., and Daniel A. Relles. 1997. Tools for intuition about sample selection bias and its correction. *American Sociological Review* 62:494–507.

Stults, Brian J. and Eric P. Baumer. 2007. Racial context and police force size: Evaluating the empirical validity of the minority threat perspective. *American Journal of Sociology* 113:507-546.

Substance Abuse and Mental Health Services Administration.2003a. *Results from the 2002 National Survey on Drug Use and Health: National Findings.* Rockville, MD: Author.

Substance Abuse and Mental Health Services Administration, Office of Applied Studies. 2003b. *Emergency Department Trends from the Drug Abuse Warning Network, Final Estimates 1995-2002*. Rockville, MD: Author.

Substance Abuse and Mental Health Services Administration, Office of Applied Studies. 2006. *National Survey on Drug Use and Health: Summary of Methodological Studies*, 1971-2005. Rockville, MD: Author.

Substance Abuse and Mental Health Services Administration, Office of Applied Studies. 2007. *The DASIS Report: Cocaine Route of Administration Trends: 1995-2005*. Rockville, MD: Author.

Substance Abuse and Mental Health Services Administration, Office of Applied Studies. 2008. *National Household Survey on Drug Abuse Advance Report #18.* Rockville, MD: Author

Substance Abuse and Mental Health Services Administration.2011. *Results from the 2010 National Survey on Drug Use and Health: Summary of National Findings.* Rockville, MD: Author.

Substance Abuse and Mental Health Services Administration, Center for Behavioral Health Statistics and Quality. 2012. *The DAWN Report: Highlights of the 2010 Drug Abuse Warning Network (DAWN) Findings on Drug-Related Emergency Department Visits*. Rockville, MD: Author.

Sudnow, David. 1965. Normal crime: Sociological features of the penal code in a public defender office. *Social Problems* 12:255-276.

Swigert, Victoria Lynn, and Ronald A. Farrell. 1977. Normal homicides and the law. *American Sociological Review* 42:16-32.

Tabachnick, Barbara G., and Linda S Fidell. 2012. *Using Multivariate Statistics*, 6th ed. Boston, MA: Pearson.

Thompson, Larry D. 2002. United States Sentencing Commission Public Hearing. March 19, 2002. Washington, DC.

Tiede, Lydia Brashear. 2009a. The impact of the Federal Sentencing Guidelines and reform: A comparative analysis. *Justice System Journal* 30:34-49.

Tiede, Lydia Brashear. 2009b. The swinging pendulum of sentencing reform: Political Actors regulating district court discretion. *Brigham Young University Journal of Public Law* 24:1-48.

Tison, Elizabeth. 2003. Amending the Sentencing Guidelines for cocaine offenses: The 100-to-1 ratio is not as "cracked up as some suggest. *Southern Illinois University Law Journal* 27:413-436.

Tonry, Michael. 1992. Mandatory Penalties. In *Crime and Justice: A Review of Research*, Vol. 16, ed. Michael Tonry. Chicago, IL: University of Chicago Press.

Tonry, Michael. 1995. *Malign Neglect*. New York: Oxford University Press.

Tonry, Michael. 1996. *Sentencing Matters.* New York: Oxford University Press.

Tonry, Michael. 2001. Symbol, Substance, and Severity in Western Penal Policies. *Punishment and Society* 3:517-536.

Tonry, Michael. 2005. Purposes: The functions of sentencing and sentencing reform. *Stanford Law Review* 58:37-66.

Tonry, Michael. 2011. *Punishing Race: A Continuing American Dilemma*. New York: Oxford University Press.

Tonry, Michael, and Matthew Melewski. 2008. The malign effects of drug and crime control policies on Black Americans. *Crime and Justice* 37:1-44.

Turanovic, Jillian J., Nancy Rodriguez, and Travis C. Pratt. 2012. The collateral consequences of incarceration revisited: A qualitative analysis of the effects on caregivers of children of incarcerated parents. *Criminology* 50:913-959.

Turk, Austin. 1966. Conflict and criminality. *American Sociological Review* 31:338–352.

Ulmer, Jeffery T. 1997. *Social Worlds of Sentencing: Court Communities under Sentencing Guidelines.* Albany, NY: State University of New York Press.

Ulmer, Jeffery T. 2005. The localized uses of federal sentencing guidelines in four U.S. District Courts: Evidence of processual order. *Symbolic Interaction* 28:255–279.

Ulmer, Jeffery T. 2012. Recent developments and new directions in sentencing research. *Justice Quarterly* 29:1-40.

Ulmer, Jeffery T., and Mindy S. Bradley. 2006. Variation in trial penalties among serious violent offenses. *Criminology* 44:631-670.

Ulmer, Jeffery T., James Eisenstein, and Brian D. Johnson. 2010. Trial penalties in federal sentencing: extra-guidelines factors and district variation. *Justice Quarterly* 27: 560-592.

Ulmer, Jeffery T., and Brian D. Johnson. 2004. Sentencing in context: A multilevel analysis. *Criminology* 42:137-177.

Ulmer, Jeffery T., and John H. Kramer. 1996. Court communities under sentencing guidelines: Dilemmas of formal rationality and sentencing disparity. *Criminology* 34:383–408.

Ulmer, Jeffrey T., Megan C. Kurlychek, and John H. Kramer. 2007. Prosecutorial discretion and the imposition of mandatory minimum sentences. *Journal of Research in Crime and Delinquency* 44:427-458.

Ulmer, Jeffery T., and Michael T. Light. 2010. The stability of case processing and sentencing post-Booker. *Gender, Race, and Ethnicity* 143:143-177.

Ulmer, Jeffery T., and Michael T. Light. 2011. Disparity: Changes in federal sentencing after Booker and Gall? *Federal Sentencing Reporter* 23:333-341.

Ulmer, Jeffery T., Michael T. Light, and John H. Kramer. 2011a. Racial disparity in the wake of the Booker/Fanfan decision: An alternative analysis to the USSC's 2010 report. *Criminology and Public Policy* 10:1077-1118.

Ulmer, Jeffery T., Michael T. Light, and John H. Kramer. 2011b. The "liberation" of federal judges' discretion in the wake of the Booker/Fanfan decision: Is there increased disparity and divergence between courts? *Justice Quarterly* 28:799-837.

Unnever, James D. 1982. Direct and organizational discrimination in sentencing of drug offenders. *Social Problems* 30:212-225.

U.S. Department of Justice, Federal Bureau of Investigation. 1996. *Crime in the United States, 1995*. Washington, DC: Author.

U.S. Department of Justice. 2014. *Correctional Populations in the United States, 2013*. Washington, DC: Office of Justice Programs, Bureau of Justice Statistics.

U.S. Sentencing Commission. 1991. *Special Report to Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System*. Washington, DC: Author.

U.S. Sentencing Commission. 1995a. *Special Report to Congress: Cocaine and Federal Sentencing Policy*. Washington, DC: Author.

U.S. Sentencing Commission. 1995b. *A National Sample Survey, Public Opinion on Sentencing Federal Crimes*. Washington, DC: Author.

U.S. Sentencing Commission. 1997. *Special Report to Congress: Cocaine and Federal Sentencing Policy*. Washington, DC: Author

U.S. Sentencing Commission. 2002a. *Cocaine and Federal Sentencing Policy*. Washington, DC: Author.

U.S. Sentencing Commission. 2002b. *Federal Cocaine Offenses: An Analysis of Crack and Powder Penalties*. Washington, DC: Author.

U.S. Sentencing Commission. 2003. *Report to Congress: Downward Departures from the Federal Sentencing Guidelines*. Washington, DC: Author.

U.S. Sentencing Commission. 2004. *Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Federal Criminal Justice System Is Achieving the Goals of Sentencing Reform*. Washington, DC: United States Sentencing Commission.

U.S. Sentencing Commission. 2006. *Final Report on the Impact of United States v. Booker on Federal Sentencing*. Washington, DC: Author.

U.S. Sentencing Commission. 2007. *Report to Congress: Cocaine and Federal Sentencing Policy*. Washington, DC: Author.

U.S. Sentencing Commission. 2008. *Preliminary Crack Cocaine Retroactivity Report*. Washington, DC: Author.

U.S. Sentencing Commission. 2010a. *Results of Survey of United States District Judges January 2010 through March 2010*. Washington, DC: Author.

U.S. Sentencing Commission. 2010b. *Demographic Differences in Federal Sentencing Practices: An Update of the Booker Report's Multivariate Regression Analysis*. Washington, DC: Author.

U.S. Sentencing Commission. 2011a. *Report to Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System*. Washington, DC: Author.

U.S. Sentencing Commission. 2011b. *2011 Federal Sentencing Guidelines Manual*. Washington, DC: Author.

U.S. Sentencing Commission. 2011c. News Release. Washington, DC: Author.

U.S. Sentencing Commission. 2011d. *2011 Sourcebook of Federal Sentencing Statistics Manual*. Washington, DC: Author.

U.S. Sentencing Commission. 2011e. *U.S. Sentencing Commission Preliminary Crack Cocaine Retroactivity Data Report*. Washington, DC: Author.

U.S. Sentencing Commission. 2012. *Report on the Continuing Impact of United States v. Booker on Federal Sentencing*. Washington, DC: Author.

U.S. Sentencing Commission. 2014. *Recidivism Among Offenders Receiving Retroactive Sentencing Reductions: The 2007 Crack Cocaine Amendment.* Washington, DC: Author.

U.S. General Accounting Office. 1992. *Sentencing Guidelines: Central Questions Remain Unanswered.* Washington, DC: United States General Accounting Office.

U.S. General Accounting Office. 1993. *Mandatory minimum sentences: Are they being imposed and who is receiving them?* Washington, DC: Author.

U.S. General Accounting Office. 2003. *Departures from Sentencing Guidelines and Mandatory Minimum Sentences, Fiscal Years 1999-2001*. Washington, DC: Author.

Vincent, Barbara S., and Paul J. Hofer. 1994. *The Consequences of Mandatory Minimum Prison Terms: A Summary of Recent Findings*. Washington, DC: Federal Judicial Center.

von Hirsch, Andrew. 1976. *Doing Justice: The Choice of Punishments: Report of the Committee for the Study of Incarceration*. Boston, MA: Northeastern University Press.

Wakefield, Sara, and Christopher Uggen. 2010. Incarceration and stratification. *Annual Review of Sociology* 36:387-406.

Waldfogel, Joel. 1991. Aggregate inter-judge disparity in federal sentencing: Evidence from three district courts (D.Ct., S.D.N.Y., N.D.Cal.). *Federal Sentencing Reporter* 4:151–154.

Walker, Samuel. 1997. *Popular Justice: A History of American Criminal Justice*. New York: Oxford University Press.

Wang, Xia, and Daniel P. Mears. 2010a. A multilevel test of minority threat effects on sentencing. *Journal of Quantitative Criminology* 26:191-215.

Wang, Xia, and Daniel P. Mears. 2010b. Examining the direct and interactive effects of changes in racial and ethnic threat on sentencing decisions. *Journal of Research in Crime and Delinquency* 47:522-557.

Wang, Xia. 2012. Undocumented immigrants as perceived criminal threat: A test of the Minority threat perspective. *Criminology* 50:743-776.

Ward, Geoff, Amy Farrell, and Danielle Rousseau. 2009a. Race effects of representation among federal court workers: Does black workforce representation reduce sentencing disparities? *Annals of the American Academy of Political and Social Science* 623:121-133.

Ward, Geoff, Amy Farrell, and Danielle Rousseau. 2009b. Does race balance in workforce representation yield equal justice? Race relations of sentencing in federal court organizations. *Law and Society Review* 43:757-805.

Weidner, Robert R., Richard S. Frase, and Jennifer S. Schultz. 2005. The impact of contextual factors on the decision to imprison in large urban jurisdictions: A multilevel analysis. *Crime and Delinquency* 51:400-424.

Weinstein, Ian. 2003. Fifteen years after the federal sentencing revolution: How mandatory minimums have undermined effective and just narcotics sentencing. *American Criminal Law Review* 40:87-132.

Welch, Kelly. 2007. Black criminal stereotypes and racial profiling. *Journal of Contemporary Criminal Justice* 23:276-288.

Western, Bruce. 2006. Punishment and Inequality in America. New York: Russell Sage Foundation.

Western, Bruce, Jeffrey R. Kling, and David F. Weiman. 2001. The labor market consequences of incarceration. *Crime and Delinquency* 47:410-427.

Wheeler, Stanton, David Weisburd, and Nancy Bode. 1982. Sentencing the white collar offender: Rhetoric and reality. *American Sociological Review* 47:641-659.

Wilmot, Keith A., and Cassia Spohn. 2004. Prosecutorial discretion and real-offenses sentencing: An analysis of relevant conduct under the federal sentencing guidelines. *Criminal Justice Policy Review* 15:324-343.

Wilson, William Julius, 1987. *The Truly Disadvantaged: The Inner City, the Underclass, and Public Policy*. Chicago, IL: University of Chicago Press.

Wolfe, Scott E., David C. Pyrooz, and Cassia C. Spohn. 2011. Unraveling the effect of offender citizenship status on federal sentencing outcomes. *Social Science Research* 40:349-362.

Wooldredge, John. 2007. Neighborhood effects on felony sentencing. *Journal of Research in Crime and Delinquency* 44:238–263.

Wooldredge, John. 2009. Short-versus long-term effects of Ohio's switch to more structured sentencing on extralegal disparities in prison sentences in an urban court. *Criminology and Public Policy* 8:285-312.

Wooldredge, John. 2010. Judges' unequal contributions to extralegal disparities in imprisonment. *Criminology* 48:539-567.

Wooldredge, John, James Frank, Natalie Goulette, and Lawrence Travis. 2015. Is the Impact of Cumulative Disadvantage on Sentencing Greater for Black Defendants? *Criminology and Public Policy* 14:187-223.

Wooldredge, John, and Timothy Griffin. 2005. Displaced discretion under Ohio sentencing guidelines. *Journal of Criminal Justice* 33:301-316.

Wooldredge, John, Timothy Griffin, and Fritz Rauschenberg. 2005. (Un) anticipated effects of sentencing reform on the disparate treatment of defendants. *Law and Society Review* 39:835-874.

Wooldredge, John, and Amy Thistlewaite. 2004. Bilevel disparities in court dispositions for intimate assault. *Criminology* 42:417-456.

Wright, Ronald F. 2005. Trial distortion and the end of innocence in federal criminal justice. *University of Pennsylvania Law Review* 154:79-156.

Wright, Ronald, and Rodney Engen. 2006. The effects of depth and distance in a criminal code on charging, sentencing, and prosecutor power. *North Carolina Law Review* 84:1935-1982.

Wu, Jawjeong, and Cassia Spohn. 2009. Does an offender's age have an effect on sentence length? A meta-analytic review. *Criminal Justice Policy Review* 20:379-413.

Xie, Min, Janet L. Lauritsen, and Karen Heimer. 2012. Intimate partner violence in U.S. Metropolitan areas: The contextual influences of police and social services. *Criminology* 50:961-992.

Zatz, Marjorie S. 2000. The convergence of race, ethnicity, gender, and class on court decision making: Looking toward the 21st century. *Criminal Justice: The National Institute of Justice Journal* 3:503-552.

Zimring, Franklin E. 2005. Penal policy and penal legislation in recent American experience. *Stanford Law Review* 58:323-338.

Cases Cited

Mistretta v. United States, 1989. 488 U.S. 361.
Koon v. United States, 1996. 518 U.S. 81.
Blakely v. Washington, 2004. 542 U.S. 296.
United States v. Booker, 2005. 543 U.S. 220.
United States v. Fanfan, 2005. 543 U.S. 220.
Rita v. United States, 2007. 551 U.S. 338.
Gall v. United States, 2007. 552 U.S. 38.
Kimbrough v. United States, 2007. 552 U.S. 85.

Legislation Cited

Anti-Drug Abuse Act of 1986 (Pub. L. 99-570, 100 Stat. 3207)
Omnibus Anti-Drug Abuse Act of 1988 (Pub. L. 100-690, 102 Stat. 4181)
PROTECT Act of 2003 (Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today) (Pub. L. No. 108-21, 117 Stat. 650)
Fair Sentencing Act of 2010 (Pub. L. 111-220, 124 Stat. 2372)