Three directions for future research into sentencing discretion

-- Nancy J. King¹

The main paper is a wonderful compendium of the vast amount of research that has gone into studying sentencing discretion over the past half century. The few nits I might pick with the authors are minor compared to my general agreement with their assertions and proposals. The paper maps out many exciting avenues to pursue as reformers work to find ways to reduce corrections costs and recidivism through research-based reforms. My very brief comments here are directed to three areas where I believe research into sentencing discretion could be particularly helpful.

Let me begin by saying that I agree with the comments of Glenn Schmitt, encouraging those of us engaged in sentencing research to focus on questions relevant to actual choices that legislators and commissions are facing. Policymakers may seek different objectives – rather than simply downsizing prisons, they may be more interested in reducing the crime rate; maximizing victim satisfaction; increasing government accountability; reducing the frequency of wrongful convictions, etc. To be useful, sentencing research must work with the goals that policy makers identify. Even if all we researchers manage to do is help to ensure that the means that policymakers select to advance their aims do not backfire, then we have performed a valuable service.

The key to avoiding unintended consequences is understanding discretion. As many of those participating in this symposium have demonstrated, discretion can undermine or distort the goals

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of many sentencing reforms. The more we know about how criminal justice decision makers will use their discretion to respond to policy changes, the higher the likelihood that those changes will have their intended effect. In these brief remarks, I’d like to highlight three areas ripe for exploration.

• First, I wholeheartedly endorse the authors’ emphasis on *prosecutorial* discretion, and especially encourage more qualitative research as well as more research into structural features that influence the environment within which prosecutors exercise sentencing discretion.

• Second, I would like to echo earlier comments encouraging researchers to look more closely at exercise of sentencing discretion at the back end of the punishment process. Despite their importance, decisions after the initial sentencing, particularly those by administrative personnel, remain largely unstudied. Compared to judicial sentencing decisions, we know relatively little about the administration of good time, discretionary release, other forms of early release, and revocation.

• Third, I hope that in the coming years we will get beyond felony sentencing and learn much more about misdemeanor sentencing.

A. **Understanding Prosecutorial Discretion**

As the authors of the main paper emphasize, it is important to look beyond post-conviction sentencing data to understand how prosecutors’ choices impact sentencing. Using their charging and bargaining discretion, prosecutors find creative ways to circumvent and manipulate judicial and legislative efforts to calibrate punishment, including supposedly
mandatory minimum sentences. This means that the rules designed to define the prosecution’s bargaining options don’t always operate as their drafters hope. Instead, sentencing reforms may have their intended effect only in those cases that prosecutors choose to take to trial.

In cases that are settled without trial, prosecutors regularly negotiate around sentencing rules. Plea agreements in some jurisdictions routinely include defense waivers of the right to challenge violations of procedures for sentencing otherwise mandated by constitution and statute, as well as departures from statutory limitations on punishment itself. In the only empirical study of appeal waivers to date, Michael O’Neill and I found that in a random sample of 971 written plea agreements submitted to the United States Sentencing Commission between October 2003 and June 2004, 63% contained express waivers of the right to review errors in conviction or sentence, and in some districts almost every plea agreement contained such a waiver (King & O’Neill, 2005). The federal guidelines, supposedly mandatory at that time, turned out to be enforceable only in the minority of cases where their lawful application was not waived. Anecdotal reports suggest that since 2004 waivers of appellate and post-conviction review have become even more pervasive in federal plea agreements. State prosecutors sometimes secure waivers of review as well (La Fave et al., 2010).

Enforcing these waivers, some courts uphold punishments and sentences that otherwise would be unauthorized. The Supreme Court itself recently agreed to review whether an express sentence agreement trumps a statute designed to reduce crack sentences in federal court (Freeman). Even the factual basis requirement for a plea is waivable, so that the offense of conviction could be the offense the parties choose (King, 2007; La Fave et al., 2010). Courts
have varying tolerance for this sort of thing, but judges under pressure to move their dockets are not inclined to stand in the way of a case disposition about which no one is likely to complain (King, 2005). And presentence reports, which might help to check detours from law or fact, in some jurisdictions are either not prepared or ignored when the parties agree upon sentence.

Even where waivers of the right to challenge departures from law are not present, charge bargaining makes it difficult to use post-conviction sentencing data to measure what prosecutors are doing. This is one reason why more qualitative empirical research – interviewing and observing prosecutors at work – is essential. For example, even when initial charging data is available, so that one is able to track whether charges are dropped or added during plea negotiations, the presence or absence of dropped charges means little standing alone. Some prosecutor’s offices will start a case by charging high only to dismiss charges and enhancements upon reaching agreement, while others prefer to charge low and add charges if a plea and cooperation is not forthcoming. Adding to the uncertainty, initial charges are often themselves the process of negotiation. Without some qualitative understanding of local norms, charging and sentencing data easily can be misunderstood.

In addition to more qualitative research, the pervasive trading of charging and sentencing concessions by prosecutors suggests that researchers should pay attention to structural, non-negotiable, features with the potential to affect the exercise of sentencing and charging discretion by prosecutors. Many of you have already examined “contextual impacts” on judicial sentencing (e.g., Ulmer & Johnson, 2004). What I have in mind here is that instead of trying to isolate the effects of contextual features that policy makers cannot directly change such as unemployment,
racial composition, or region, research should examine features subject to legislative control. Caseload and jail capacity are useful starts. A tried and true method of influencing prosecutorial discretion is legislation that exploits the power to control a prosecutor’s budget. Funding choices by legislators, such as providing resources for prosecutors to hire additional staff for prosecuting particular crimes, has proven to be an effective way to affect change (Levine, 2008). Let me illustrate with a few other examples of such structural features worthy of exploration.

**Access to Information.** Does a prosecutor’s ability to learn what other prosecutors are doing change punishment outcomes? Access to information about charging and bargaining practices is part of the framework within which prosecutors decide cases, it is not the subject of negotiation itself. Many concerned about regulating prosecutorial discretion have called for increased transparency, of course (Barkow, 2009; Bibas, 2009; Forst & Bushway; Wright, 2005). But public disclosure of this information will face many barriers. Written plea agreements are not always the norm. The terms of an agreement between prosecutor and defendant may not even be spelled out on the record during the plea colloquy. Where agreements are recorded in writing, those agreements are not always made part of the court file. And when they are, they are not always available to researchers. Agreements *not* to prosecute may never see the light of day.

This lack of ready access to the terms by which criminal matters are settled should not be attributed to fear of accountability. There are compelling reasons to conceal from public view a prosecutor’s discretionary decisions to reduce or decline punishment. For example, when federal courts began to post plea agreements on PACER along with other documents in criminal case files, contributors to [www.whosarat.com](http://www.whosarat.com) began extracting from those plea agreements the names
of cooperators and posting them so that snitches would be exposed. As a result, several federal courts have ceased posting plea agreements on PACER to protect the safety of those who cooperate and to avoid undermining government efforts to solve crime (Memo to Capra).

Hiding these decisions can also be the point of the discretionary decision itself, as with deferred prosecution agreements never to file or bring charges if the defendant fulfills the stated conditions. In one of every eight cases where a drug charge is the highest charge at arrest in SCPS data, for example, reportedly something happens to that charge other than dismissal or conviction or acquittal - including diversion or deferral. As Margaret Love has recently reported, in twenty states deferral includes “expungement or sealing of the entire case record” (Love, 2010). For these and other reasons, we should not expect prosecutors to willingly share with the public detailed information about their discretionary decisions.

Yet increased information exchange among prosecutors does seem more likely. The direct costs of collecting and maintaining criminal justice data continue to decline. In the past couple of decades, technology and innovations in information production and dissemination now available for court records (NCSC) should make it easier for prosecutors to track how they are exercising their discretion. As more decisions are recorded electronically and collection and storage becomes cheaper, anonymized or aggregated data involving and plea agreements should be an attractive resource for internal management declinations (e.g., Miller and Wright).

We should monitor if and how increased access to this sort of information changes the exercise of discretion and punishment outcomes. As recently as five years ago, more than 20%
of all prosecutors’ offices in the country were staffed by a single part-time prosecutor; another 10% had a full time prosecutor but no assistant prosecutors (Perry, 2006). If these relatively isolated prosecutors receive more information about what other prosecutors in a state are doing, would it change their plea agreements and sentences? Just as judges respond to anchoring effects when provided information about going rates (e.g., judges who have known nothing but guidelines sentencing exercise their discretion differently than judges experienced in sentencing without guidelines), access to information about prosecutorial bargaining practices could have a similar effect on prosecutorial discretion. Non-negotiable reporting requirements may change discretion as well. For example, how, if at all, has the duty to notify victims changed sentencing decisions of prosecutors?

*Prosecutor Selection Systems.* Another non-negotiable aspect of the framework within which almost all prosecutors make their decisions is political: prosecutors are elected in all but a few jurisdictions. About 15% of these are contested elections (Wright, 2009). How do prosecutor elections affect sentencing? Gregory Huber and Sanford Gordon have found that in Pennsylvania elected trial judges become more punitive as election day approaches, and that in Kansas, trial judges elected in partisan competitive districts behave more punitively than their peers in that state’s retention districts (Gordon and Huber, forthcoming; Huber and Gordon, 2004). Ronald Wright recently found that in contested prosecutor elections, candidates for prosecutor tend to focus on prominent criminal trials instead of on the many other measures public might use to evaluate competent and sound management (Wright, forthcoming). New research using commission data from North Carolina shows that in those years that a prosecutor is up for an election there are on average more than five times the number of jury trials (which as
we all know, carry higher sentences) than in years not up for election (Bandyopadhyay & McCannon). States considering reforms in the selection of prosecutors - shifting from partisan to non-partisan or retention elections, reevaluating the number of years between elections, or changing other aspects of the selection process should be aware of how those changes could affect sentencing discretion.

**Prosecutor Office Structure.** Many non-negotiable aspects of a prosecutor’s life are imposed by legislatures, but some are internal policies applied in individual offices. What aspects of office structure are correlated with differences in the way sentencing discretion is used? Prosecutor’s offices have undergone significant change in the past 25 years (Bibas, 2009; Worral & Nugent-Borakove, 2008). Many have changed their structures to adopt community prosecution strategies in response to grant opportunities, for example, but according to a recent government report, very little is known about the effects of these changes (Goldkamp, et al). How does decentralizing the prosecution function – breaking up the office into neighborhoods with vertical rather than horizontal prosecution authority affect discretion or change outcomes in one direction or another? Presently research is underway in several cities, including Indianapolis, where researchers are tracking the effect of community prosecution policy on sentence length, ratio of pleas to lesser charges and pleas as charged, and ratio of convictions to cases charged (NDAA, 2007).

**B. Backend discretion**

Compared to the initial setting of sentence by the judge, we know relatively little about the discretionary decisions that affect a defendant’s sentence after his commitment to a
corrections facility. Many aspects of the back end of sentencing remain a mystery despite their importance. Admittedly, because so many states have adopted determinate sentences with mandatory release for some or all offenses, discretionary release on parole accounts for far fewer releases from prison than it did thirty years ago, fewer than one in four releases is discretionary compared to three in four in 1977. But given our state prison populations, one in four releases is a significant number. The back-end of sentencing takes on even more importance when one adds to the practice of discretionary parole release all of the other sentencing determinations made after commitment, even in mandatory release cases:

- administrative decisions to grant or withhold more or less good time (Demleitner, 2009);
- decisions to grant early geriatric or “compassionate release,” now authorized in the vast majority of states;
- “second-look” decisions, by which trial judges are allowed to revise sentences upon application of the prisoners (Klingele, forthcoming 2010);
- decisions to alleviate overcrowding by releasing large numbers of inmates, a not uncommon occurrence in several states (Archibold, 2010; Raymond, 2010; Stockinger, 2010);
- decisions to reduce terms of supervised release upon successful completion of reentry court programs (Taylor, 2010); and
- decisions to revoke release (Grattet et al., 2009).

Kevin Reitz estimates that in New Jersey, for example, judges control less than a fifth of a prisoner’s actual sentence, with the parole board and department of corrections together dictating more than 80 percent of the term of actual confinement (Reitz, forthcoming).
Concentrating research efforts only upon the initial judicial sentence decision in these circumstances seems odd indeed. As increasing attention is focused on release and reentry, sentencing research has not kept pace.

The changes have been dramatic. Victim input into parole decisions has been regularized. More parole release authorities now use actuarial risk assessment instruments, some employing dynamic factors in the mix, as described the fascinating panel earlier at this conference (Hanna-Moffet; Caplan, 2010). In my home state of Tennessee, the Board of Probation and Parole and the Department of Corrections announced recently that adopting a new evidence-based risk assessment program for release reduced recidivism so effectively that they have pushed off the projected need for new prison beds for several years (Johnson, 2010). Federal funding has launched new institutions with coordinating capacity such as the National Parole Resource Center and the National Reentry Resource Center. The new draft model penal code on sentencing endorses a second-look mechanism for reducing sentences (ALI, 2009). Experimental programs for determining who gets out when and why are starting up all over the country.

Rather than repeat the discussion from the earlier panel, let me simply echo my agreement that we need to learn much more about all of this, particularly how research-based instruments are being used in the field and for which decisions, how their use changes the experience of prisoners, and how well they advance their intended goals. Researchers working on decision making by prosecutors and judges must work closely with those laboring to reform release, reentry and revocation decision making after commitment (Wolff, 2008). Technology advancements allow and economic necessity compels greater coordination.
C. **Misdemeanors**

Finally, I would like to make a pitch for more research into misdemeanor sentencing. Sentencing research has a huge blind spot, having almost entirely ignored most of the sentencing that goes on in this country. Sentencing research, like much of criminal justice research, is not only skewed to the largest urban jurisdictions ignoring most of the nation’s smaller courts and communities, it is also skewed to the most serious crimes. Yet for every person charged with a felony, three others are charged with a misdemeanor. The overwhelming number of misdemeanors as compared to felonies is even more lopsided when comparing convictions rather than charges. Describing sentencing in America based on information about felony sentences is like someone describing consumer behavior based only on the spending habits of the 10 or 20% of Americans with the highest incomes.

The little research that is available suggests that misdemeanor sentencing involves far fewer trials, and, even less elastic “going rates.” Only a small percentage of all misdemeanor convictions result in an initial sentence to incarceration. Instead probation, time served, and fines are the norm, and sentencing often occurs at the same time as conviction in a single abbreviated proceeding (National Center for State Courts 2009; Feeley, 1992). For example, in New York City in 2006, 45% of A misdemeanors, 67% of B misdemeanors, and 92% of lesser offenses were disposed of at arraignment, and less than .3% of misdemeanor and violation cases were tried (Howell). In Los Angeles in 2005 about two-thirds of misdemeanor dispositions occurred at arraignment (Kallman, 2003). Yet even the most basic sentencing research that has been
ongoing for years with felonies – variance, racial disparity, trial penalty, judicial bias, etc, is missing for these cases.

As Malcom Feeley explained so well, in misdemeanor cases, “the process is the punishment” (1992). This suggests that changes in the criminal process, particularly changes to features that define the framework within which settlement takes place, will have a greater impact on sentencing outcomes than they would in felony cases. For example, reform measures that cap defender and judicial caseloads, improve access to pretrial release, and change information available to parties and judges may have significant effects on sentences in misdemeanor cases (NACDL, 2009).

The reality is that the number of individuals and families affected by misdemeanor sentences far exceeds those affected by felony sentences. If we researchers truly care about informing sentencing policy that makes a difference, misdemeanor sentencing must be one our next frontiers.

References


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Memo to Professor Capra from Judge Baylson, April 7, 2010, Reproduced in materials for the Conference on Privacy and Internet Access to Court Files, held April 13, 2010 at Fordham Law School.


*Freeman v. United States*, 09-10245, ___ S.Ct. ___ (Sept. 28, 2010) (agreeing to decide “Under 18 U.S.C. § 3582(c)(2), which provides that a district court may reduce a term of imprisonment after it has been imposed if the defendant ‘has been sentenced to a term of imprisonment based on a sentencing range that has subsequently been lowered by the Sentencing Commission,’ is a defendant ineligible for a sentence reduction solely because the district court accepted a Rule 1(c)(1)(C) plea agreement?”).