

Fact Sheet:

No Evidence that Judicial Discretion Increases Racial Disparity

The Supreme Court's decision in *United States v Booker*, 543 U.S. 220 (2005), solved a Sixth Amendment constitutional violation with the federal sentencing guidelines.

- The Court made the sentencing guidelines “effectively advisory” by striking portions of the Sentencing Reform Act of 1984 that had made the guidelines mandatory in practice.
- Subsequent decisions, such as *Rita*, *Gall*, *Kimbrough*, and *Pepper*¹ reaffirmed the importance of judicial discretion in implementing the statutory directives of 18 U.S.C. § 3553(a).
- In a 2012 report, the U.S. Sentencing Commission found that the guidelines “have remained the essential starting point in all federal sentences and have continued to exert significant influence on federal sentencing trends over time.”² (USSC Report, Part A, at 3)
- Nonetheless, the Commission has proposed several statutory changes that would restore a mandatory sentencing system. (USSC Report, Part A, at 111-114)³
- One of the “Key Findings” of the USSC Report states: “Demographic factors (such as race, gender, and citizenship) have been associated with sentence length at higher rates in the *Gall* period than in previous periods” (USSC Report, Part A, at 8). The Commission particularly claims that Black males have been treated more harshly after *Booker* and other cases. (Part E, p. 1)

In fact, the best and most complete empirical analyses show that *Booker* and advisory sentencing guidelines have *not* increased racial or ethnic disparity.

- A study soon to be published in the *Yale Law Journal* finds “no evidence that *Booker* increased racial disparity in the exercise of judicial discretion; if anything it may have reduced it.”⁴ The article describes problems with the methods used by the U. S. Sentencing Commission to assess demographic disparity, and analyzes additional data with sophisticated econometric models to improve on past research. Most of the racial disparity uncovered “can be explained by prosecutors’ decisions to bring mandatory minimum charges.”⁵
- Other econometric research found that “racial disparities are smaller during periods of deferential review” than under *de novo* review.⁶ Sentences below the guideline range increased for all groups after *Booker*; the somewhat lesser increases for Black defendants was due to more being *sentenced at the statutory mandatory minimum*, which reflects prosecutorial, not judicial, discretion.
- The message from the new econometric research is that “judicial discretion does not contribute to, and may in fact mitigate, racial disparities in Guidelines sentencing. Policymakers interested in redressing racial disparity today should pay much closer attention to the effects of mandatory minimums and their effect on prosecutorial and judicial discretion.”⁷

¹ *Rita v. United States*, 551 U.S. 338 (2007); *Gall v. United States*, 552 U.S. 38 (2007); *Kimrough v. United States*, 552 U.S. 85 (2007); *Pepper v. United States*, 131 S. Ct. 1229 (2011).

² U.S. Sentencing Commission, *Report on the Continuing Impact of United States v. Booker on Federal Sentencing* (2012) [hereinafter USSC Report].

³ Amy Baron-Evans & Thomas W. Hillier, II, *The Commission's Legislative Agenda to Restore Mandatory Guidelines*, (forthcoming) 25 Federal Sentencing Reporter (April, 2013). Available at SSRN: <http://ssrn.com/abstract=2252105>

⁴ Sonja B. Starr & M. Marit Rehavi, *Mandatory Sentencing and Racial Disparity: Assessing the Role of Prosecutors and the Effects of Booker*, (forthcoming) *Yale Law Journal*, Fall 2013, at 39.

⁵ *Id.*, at 1.

⁶ Joshua B. Fischman & Max M. Schanzenbach, *Racial Disparities Under the Federal Sentencing Guidelines: The Role of Judicial Discretion and Mandatory Minimums*, 9 *J. Empirical Legal Stud.* (2012), at 757.

⁷ *Id.*, at 761.

- Criminologists have also re-analyzed the data used by the U.S. Sentencing Commission and found that relatively minor variations in the statistical model it used have profound effects on results. These authors conclude: “current research—theirs or ours—is a long way from demonstrating that the *Gall* period has caused greater black-white federal sentencing disparity.”⁸ In a major review of this research another expert noted that there is “no evidence of an urgent need for legislation to counteract the supposedly deleterious effects of increased judicial discretion.”⁹

The Commission highlights a general finding, but results of specific analyses are *not* consistent with any claim that increased judicial discretion leads to increased demographic disparity.

- In the summary of its report the Commission notes an increase in the sentencing gap between Black and White males in the overall caseload. But results from its more detailed analyses show no link to judicial discretion. *No statistically significant differences* were found between these groups when judicial discretion was at its peak—defendants sentenced below the guideline range without government sponsorship. No significant differences were found in these cases during either the PROTECT Act or the post-*Gall* periods. (USSC Report, Part E, p. 19, Figure E-13)
- The Commission attempted to explain its results by citing differences in the odds of receiving a below-range sentence without government sponsorship. But the gap between Black and White males in these odds were the *same* in the *Gall* period as in the PROTECT Act period, and were actually lowest in the *Booker* period. (USSC Report, Part E. at 22, Figure E15)
- The only consistent, statistically significant differences in sentence lengths between Black and White male offenders were among cases *sentenced within the guideline range* (USSC Report, Part E, p. 14, Figure E-7)—i.e. cases *not affected* by the Commission’s proposals for statutory changes.

The Commission’s statistical model does not properly measure the effects of *Booker* or the most important sources of demographic disparity in federal sentencing today.

- The Commission includes control variables in its model that mask the two biggest sources of demographic disparity: 1) prosecutors’ decisions and 2) unsound laws with adverse impacts. And the model does not measure the key benefit of *Booker* in decreasing disparity from these sources—increased rates of below-range sentences imposed by judges without government sponsorship.¹⁰
- After *Booker*, judges have helped alleviate unduly harsh sentences imposed on all defendants, and especially African-Americans, who are disproportionately sentenced under unsound guidelines, such as those for crack cocaine and so-called “career offenders.” In 2010 alone, judges saved more than 860 Black defendants sentenced under either the crack or career offender guidelines over 3300 years of unnecessary incarceration. More than 230 defendants of other races were likewise spared excessive, and expensive, incarceration under these two unsound guidelines.¹¹
- The gap in average prison time served between Blacks and other groups, which widened after the guidelines and mandatory minimum penalty statutes were enacted in the mid-1980s, has finally begun to narrow thanks to *Booker* and the systemic changes it helped bring about.¹²

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⁸ Jeffrey Ulmer & Michael Light, *The USSC’s 2012 Booker Report’s Characterization of the Penn State Studies: Setting the Record Straight*, (forthcoming) 25 Federal Sentencing Reporter (April 2013).

⁹ Rodney Engen, *Racial disparity in the wake of Booker/Fanfan: Making sense of “messy” results and other challenges for sentencing research*, 10 J. of Crim. & Pub. Pol’y 1139 (2011).

¹⁰ Paul J. Hofer, *The Commission Defends an Ailing Hypothesis: Judicial Discretion and Demographic Disparity* (forthcoming), 25 Federal Sentencing Reporter (April, 2013). Available at SSRN: <http://ssrn.com/abstract=2252159>

¹¹ These estimates are based on the increase in the rate of NGS below-range sentences for crack and career offenders in fiscal year 2010 as compared to the rate in 2003 (prior to the *Blakely* decision) and the average extent of these reductions.

¹² *Supra*, note 10.