

U.S. Sentencing Commission Report Suggesting that Increased Judicial Discretion Leads to Greater Racial Disparity is Based on a Flawed Analysis and is Being Misused to Support Calls for a Mandatory Sentencing System that Would Increase Racial Injustice

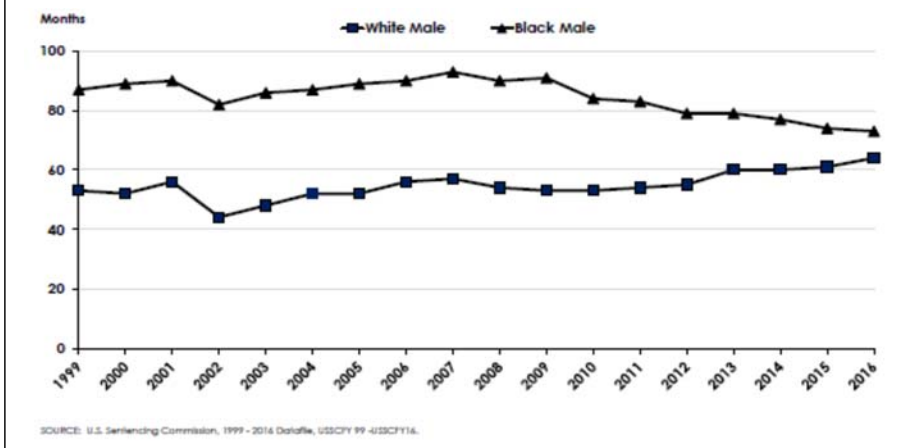
Summary

- In November 2017, the U.S. Sentencing Commission issued the third in a series of reports examining the correlation of demographic factors, most notably race, and the length of sentence in federal criminal cases in the years after the Supreme Court's 2005 decision in *United States v. Booker*. The *Booker* decision made the U.S. Sentencing Guidelines advisory rather than mandatory and therefore gave federal judges greater discretion at sentencing. All three reports, including the most recent, make the claim that "the gap between the sentence lengths for Black and White male offenders [has] increas[ed]"¹ following *Booker*.
- These findings have been cited by proponents of mandatory sentencing regimes. Most notably, the Hon. William Pryor, acting Chair of the Sentencing Commission, has recently called for a new mandatory Guidelines system, claiming that "the advisory system" has resulted in "growing disparities," and that Commission analyses "establish that . . . differences in sentence length are associated with race and gender."²
- In fact, the sentencing gap between White and Black defendants has decreased significantly since *Booker* was decided 12 years ago. The claim that increased judicial discretion has led to increased disparity is based on a controversial statistical model, which has been sharply criticized by credible outside researchers. The criticisms include the Commission's failure to account for: (1) the impact of mandatory minimums, which constrain judicial discretion and disparately prevent reductions in sentence for black defendants, (2) racial disparities in prosecutors' charging and bargaining decisions, and (3) the adverse racial impact of unsound rules in the Sentencing Guidelines. These failures in methodology have been repeatedly noted, but the Commission has not adequately addressed the criticisms, adapted its model, or properly tested its robustness and limits.
- Racial disparity is a serious problem in the federal criminal justice system. Nearly 78 percent of federal defendants are non-White or Hispanic, and mandatory minimums are disproportionately charged against Black defendants. While many studies have shown that racial bias infects most aspects of human behavior (and is surely present among lawyers and judges), the suggestion that increased judicial discretion leads to greater racial disparity in the criminal justice system is simply wrong. Constraining judicial discretion only exacerbates unjust sentencing rules and biased enforcement and charging decisions.
- The most problematic sources of unwarranted racial disparity today are mandatory minimums and prosecutorial decisions, not judicial discretion. A mandatory Guidelines scheme would amount to mandatory minimums in all cases and transfer control over all sentences to prosecutors. Unfortunately, the Commission's report selectively highlights data it claims to show racial disparity in judges' exercise of discretion, while omitting or minimizing data showing greater racial disparity in prosecutorial decision-making.
- The Sentencing Commission should focus its efforts on reducing racial disparity that is built into the Sentencing Guidelines. The severity of the Guidelines and their over-emphasis on unjust rules are significant drivers of unwarranted racial disparity. For example, criminal history increases guideline sentences in multiple ways, often exponentially. As numerous studies show, racial minorities are arrested and convicted in disproportionate numbers relative to similarly situated whites due to biased police practices, including racial profiling.³ Thus, in many cases, criminal history has an unjustified disparate impact on racial minorities. The Commission can address these problems by, among other things, de-emphasizing criminal history and reducing severity overall.

Research Shows that the Most Problematic Sources of Unwarranted Racial Disparity Today Are Mandatory Minimums and Prosecutorial Decisions, *Not* Judicial Discretion.

- The racial “gap” the Commission claims has grown is *not* a gap in average sentence lengths. As shown in Figures 1 and 2 below, the large gap in average sentences between black and white defendants that appeared with the advent of mandatory guidelines and mandatory minimums has shrunk dramatically in recent years. Changes in unjust laws, such as lessening the disparate treatment of powder and crack cocaine, and judges’ ability to reject unsound guidelines that have adverse racial impacts, such as the so-called “career offender” guideline, have contributed to narrowing the gap.

Fig. 1. Average Sentences for White Male and Black Male Offenders Fiscal Years 1999-2016



The Commission argues that “simplistic” analyses like that in Figure 1 of its report can be “misleading” because they “might appear to indicate that demographic factors correlate with sentence length, when the actual correlation may be attributable to other, non-demographic factors.”⁴ The Commission prefers a complex and controversial multivariate regression analysis, which it claims shows an increased gap following *Booker* in 2005.

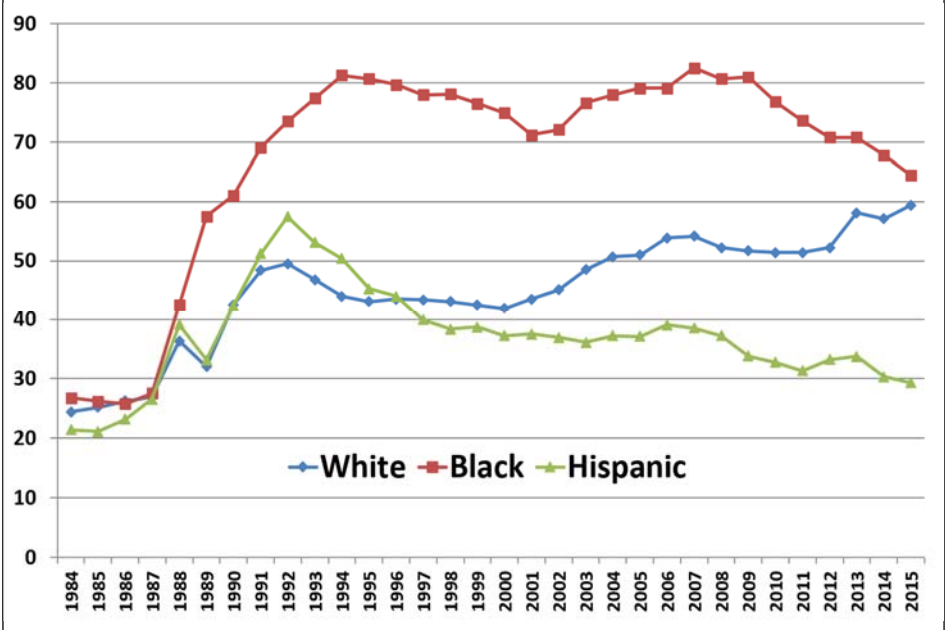
In theory, multivariate regression analysis controls for all “legally relevant” factors, and any racial differences remaining reflect bias, unconscious stereotypes, or other “differential treatment discrimination.”⁵ But the Commission’s multivariate analysis ignores racial disparity that is caused by many of the factors for which it does control, and does not control for many factors that significantly impact judicial discretion.

- The Commission compares sentences among groups after controlling for some “legally relevant” factors, *e.g.*, guideline provisions. Disparity *caused* by unsound rules, or prosecutors’ manipulation of those rules, isn’t even considered. For example, repeated analyses have shown that among defendants who are eligible for the most severe mandatory enhancements (such as those under 21 U.S.C. § 851 and 18 U.S.C. § 924(c)), prosecutors charge eligible Black defendants at a higher rate than eligible White defendants.⁶ The Commission’s analysis ignores this disparity by incorporating it in the “presumptive sentence.” Likewise, it ignores unwarranted racial disparity that is built into unsound rules, such as the “career offender” guideline,⁷ the § 851 enhancement, and the remaining 100:28 powder to crack disparity, by incorporating them in the presumptive sentence.
- The Commission’s model does not account for factors that significantly impact judicial discretion. Research outside the Commission has repeatedly found that mandatory minimums are a primary source of racial disparity, and that increased judicial discretion after *Booker* likely mitigates racial disparity when not blocked by mandatory minimums. African Americans are charged with mandatory minimums more often than Whites, so mandatory minimums prevent or limit the extent to which judges can downwardly depart for African Americans more than for Whites.⁸ The Commission does not accurately account for this effect.⁹ Not only do mandatory penalty statutes wielded by prosecutors limit judicial discretion, but prosecutorial practices unrelated to mandatory minimums also limit and control judicial discretion. Prosecutors can disparately prevent or limit,

via plea agreements, the grounds and extent of downward departures and variances at sentencing.¹⁰ But, as the Commission admits in a footnote, it “does not have ready access to data related to prosecutorial decision making.”¹¹ As it has also admitted, it “lack[s] good data” on “all legally relevant considerations that might help explain differences in sentences,” particularly “regarding circumstances that might justify departure from the guidelines,” and this lack “can cause some legally appropriate differentiations among offenders to appear as discrimination.”¹² The Commission’s model does not capture the effects of any of these factors and dynamics.

- The Commission’s finding that there is no post-*Booker* disparity in sentence length between Black and White males who received government-sponsored “substantial assistance” departures,¹³ is consistent with research showing that mandatory minimums are a significant contributor to disparity. Substantial assistance departures, unlike other types of departures, allow judges to sentence below an otherwise applicable mandatory minimum. In this circumstance, when judges have the most discretion, disparity between Black and White males is nonexistent.
- The Commission’s own data show greater racial disparity associated with other government-sponsored below guideline sentences than with judge-initiated below-guideline sentences, but that information is omitted from or minimized in its report, as explained in the next section.
- Further calling into question any conclusion that increased judicial discretion results in increased racial disparity, results fluctuate year to year regardless of the degree of constraint on judicial discretion, and different models yield different results.¹⁴ The current report shows a difference in sentence length between Black and White males who received a below-guideline sentence in the first three years after *Booker*, then *no* difference in the next four years after judicial discretion was *further* increased by *Gall* and *Kimbrough*, then a difference re-appears in the next four years following no change in law.¹⁵ A previous Commission study covering 1999-2009 found the greatest difference in sentence length between Black and White defendants in 1999 and 2000 when the guidelines were mandatory.¹⁶ Researchers at Penn State University found that sentence length differences between Black and White males were significantly less after *Booker* than before *Koon* when judicial discretion was more constrained than at any time other than after the Protect Act.¹⁷

Fig. 2 Average Prison Term Served in Months All Defendants – 1984-2015



As shown in Figure 2, which first appeared in the Commission’s Fifteen Year Review covering the years 1984-2002,¹⁸ there was little difference in average prison terms among races when judges had complete discretion before 1988 (and when sentences were far lower overall), but a large gap appeared immediately upon implementation of mandatory guidelines and mandatory minimums. Sentences for offenses disproportionately charged against African Americans were radically increased by these laws and guidelines, even though the increases did not advance the purposes of sentencing. This resulted in severe adverse impact discrimination.¹⁹

- Trend data as in Figures 1 and 2 have several advantages to the Commission’s narrow analyses. Trend data reflect *all* factors affecting sentences, while the Commission’s regression analysis removes important influences. Regression analysis can be a useful tool when used properly and in conjunction with other statistical methods, but trend data provide the “big picture,” which should then be supplemented with a variety of analyses focusing on policy changes, mandatory minimums, and charging and bargaining decisions that ultimately affect sentences.²⁰

Misuse of the Commission’s Reports

- The Commission states that its report “should not be taken to suggest discrimination on the part of judges,”²¹ and Chair Pryor stated, “I do not suggest that federal judges are biased,” in a speech proposing to adopt mandatory guidelines.²²
- Yet the statistical model the Commission used was developed to study whether judges discriminate,²³ and the only hypothesis the Commission tests is that judicial discretion causes racial disparity.²⁴ And to advance that hypothesis, the Commission’s report selectively highlights data it claims demonstrates racial disparity in judges’ exercise of discretion, while omitting or minimizing data showing greater racial disparity in prosecutorial decision-making. Even taking the Commission’s study on its own terms and aside from its flaws, this is a problem when it is being used to promote a mandatory sentencing regime that would transfer control over all sentences from judges to prosecutors.
- For example, a “Key Finding” is that “Black male offenders were 21.2 percent less likely than White male offenders to receive a non-government sponsored downward departure or variance during the post-Report period.”²⁵ The Commission declined to perform (or report) the same analysis on government-sponsored below-guideline sentences, arguing that it lacks data regarding which defendants were eligible for such below-guideline sentences in the first place.²⁶ But the very same argument applies to non-government sponsored below-guideline sentences.²⁷
- The Commission’s use of multivariate regression analysis in this context is unnecessary and misleading, because it implies that it controlled for legally relevant differences among cases regarding eligibility for departures and variances, when in fact it did not. Simple comparison of rates of various types of below-guideline sentences among male defendants shows that the difference in rates between Black and White males was *greater* for government-sponsored below-range sentences than for judge-initiated below-guideline sentences (the latter of which may be explained by mandatory minimums and plea bargains).²⁸

Rate of Below-Guideline Sentences for Male Defendants in Report Period (2012-2016)			
Type of Below-Guideline Sentence	White Males	Black Males	Difference
Judge-Initiated	26.6%	22.5%	4.1%
Government-Sponsored: Non-Substantial Assistance	13.8%	8.4%	5.4%
All Government-Sponsored: Substantial Assistance and Other	31.2%	24.6%	6.6%

- Another “Key Finding” is that “when Black male offenders did receive a non-government sponsored departure or variance, they received sentences 16.8 percent longer than White male offenders who received a non-government sponsored departure or variance.”²⁹ Revealed many pages later—and not a “Key Finding”—is that

when Black males received a government-sponsored below-guideline sentence for reasons other than substantial assistance, their sentences were 28.7% longer than White males who received such a sentence,³⁰ a difference nearly 12% greater than the reported difference between these groups in judge-initiated below-guideline sentences.

- As the Commission correctly notes, “‘other government-sponsored below range sentences’ . . . typically result from plea agreements.”³¹ In fiscal year 2016, 72.2% of other government-sponsored below-range sentences were pursuant to plea agreements; 48.3% of those were binding on the defendant, and 51.7% were also binding on the sentencing judge.³² Prosecutors controlled the grounds for, and extent of, departures and variances in at least these 72.2% of cases.³³
- Unfortunately but unsurprisingly, press accounts describe the Commission’s report as finding that racial disparities are driven by judicial discretion when judges “voluntarily” depart or vary without a government motion.³⁴ And Chair Pryor, while disclaiming bias among judges, nonetheless points to the reports as support for constraining judicial discretion by means of a new mandatory Guidelines system.
- Calls to end the advisory system make sense only if the risk that judicial discretion causes unwarranted racial disparity outweighs the costs of a mandatory system. From all available data, it does not.

¹ USSC, *Demographic Differences in Sentencing: An Update to the 2012 Booker Report* at 2 (2017).

² William H. Pryor, Jr., *Returning to Marvin Frankel’s First Principles in Federal Sentencing*, 29 Fed. Sent’g Rep. 95, 97 (2016).

³ Baron-Evans & Patton, *A Response to Judge Pryor’s Proposal to “Fix” the Guidelines: A Cure Worse than the Disease*, 29 Fed. Sent. R. 104, 112-13 (Dec. 1, 2016-Feb. 1, 2017) (summarizing numerous studies).

⁴ *Supra* note 1, at 3-4.

⁵ Eric P. Baumer, *Reassessing and Redirecting Research on Race and Sentencing*, 30 Justice Quarterly 231, 247 (2013) (differentiating differential treatment discrimination from disparate impact discrimination).

⁶ See USSC, *2011 Report to the Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System* at 257 (30 percent of eligible African American offenders received § 851 enhancements, while 25 percent of eligible White offenders received the enhancement); USSC, *Fifteen Years of Guidelines Sentencing* at 90 (2004) (African Americans were 48 percent of offenders eligible for a § 924(c) enhancement, but 64 percent of those who received it).

⁷ Where judges do not depart or vary from the career offender guideline, the adverse impact of that guideline is unmeasured in the Commission’s study. Where judges do depart or vary downward, it is treated as legally relevant and a departure dummy variable adjusts the predicted sentence by the average departure amount before assessing whether there is racial bias. In this way, any difference in below-guideline rates among groups is treated as legally relevant.

⁸ See Sonya B. Starr & M. M. Rehavi, *Mandatory Sentencing and Racial Disparity: Assessing the Role of Prosecutors and the Effects of Booker*, 123 Yale L. J. 2, 20, 71 (2013) (finding “no evidence that Booker increased racial disparity in the exercise of judicial discretion; if anything it may have reduced it” and that prosecutors’ decisions to bring mandatory minimum charges are an important source of racial disparity); 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. 729, 761 (2012) (finding “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.”).

⁹ The Commission attempts to account for the effects of statutory mandatory minimums in two ways: 1) by defining the presumptive sentence as the minimum of the guideline range OR any mandatory statutory penalty that exceeds the guideline minimum, and 2) by including a “dummy variable” indicating whether a statutory minimum applied at sentencing. Together, these controls do not accurately reflect the various ways that statutory minimums limit judicial discretion and affect sentences. For example, the dummy variable averages the effect of unwaived mandatory minimums across: 1) cases where the minimum has already affected the presumptive sentence (and where judges cannot sentence below the presumptive sentence), 2) cases where the statutory minimum is slightly below the guideline range (and may limit the extent of any departure), and 3) cases where the statutory minimum is far below the guideline minimum (and may not limit judicial discretion at all). The dummy applies the same “control” adjustment to these very different situations.

¹⁰ Prosecutors can prohibit or limit defense arguments in any plea agreement, and can bind judges in binding plea agreements pursuant to Fed. R. Crim. P. 11(c)(1)(C).

¹¹ *Supra* note 1, at 3 n.10

¹² USSC, *Fifteen Years of Guidelines Sentencing* at 119. “Data are collected on the reasons for departure in cases that receive one, but whether the same circumstances are present in cases that do not receive a departure is not routinely collected.” *Id.*

¹³ *Supra* note 1, at 11, fig. 6.

¹⁴ 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).

¹⁵ *Supra* note 1, at 13, fig.10.

¹⁶ This model showed differences of 14.2% in 1999; 10.2% in 2000; 8.2% in 2001; none in 2002; none “pre-Protect” (10/1/02-4/30/03); none “post-Protect” (5/1/03-6/24/04); 7.4% “post-Booker” (1/12/05-12/10/07); and 10% “post-Gall” (12/11/07-9/30/09). See USSC, *Demographic Differences in Federal Sentencing Practices: An Update of the Booker Report’s Multivariate Regression Analysis* at 14-16 (2010); USSC, *Final Report on the Impact of United States v. Booker on Federal Sentencing* 109 (2006).

¹⁷ Jeffery T. Ulmer, Michael T. Light, & John H. Kramer, *Racial disparity in the wake of the Booker/Fanfan decision: An alternative analysis to the USSC’s 2010 report*, 10 Criminology & Pub. Pol’y 1077, 1098-1100 (2011); see also *id.* at 1094, 1096, 1106.

¹⁸ See USSC, *Fifteen Years of Guideline Sentencing* at 116, fig. 4.2 (2004). While figure 1 counts probation sentences as 0 months, figure 2 includes only prison terms, and also includes females and Hispanics. The data sources for figure 2 are U.S. Sentencing Commission, 1984-1990 AO FPSSIS Datafiles; 1991-2015 USSC Individual Datafiles. Time served is estimated from the sentence imposed. In the Individual Datafile, TIMESERV assumes good time credits will be applied. Offenders receiving no term of imprisonment are excluded [SENTIMP=1,2]. Figure 2 appears in Baron-Evans & Patton, *supra* note 3.

¹⁹ USSC, *Fifteen Years of Guideline Sentencing* at 116, 131-134 (2004).

²⁰ See, e.g., *supra*, note 8.

²¹ *Supra*, note 1, at 18.

²² *Supra* note 2, at 98.

²³ Baumer, *supra* note 5.

²⁴ Paul J. Hofer, *The Commission Defends an Ailing Hypothesis: Does Judicial Discretion Increase Sentencing Disparity?*, 25 Fed. Sent’g Rep. 311 (June 2013).

²⁵ *Supra* note 1, at 2.

²⁶ *Supra* note 1, at 14.

²⁷ See note 12, *supra*, and accompanying text.

²⁸ USSC, Individual Datafiles FY 2012-2016.

²⁹ *Supra* note 1, at 2.

³⁰ *Supra* note 1, at 12, fig. 8.

³¹ *Supra* note 1, at 14.

³² USSC, 2016 Sourcebook of Federal Sentencing Statistics, tbl. 28A.

³³ Another 15.7% of other government-sponsored below-range sentences were by government motion without a plea agreement, and 11.7% were by joint motion. *Id.* Prosecutors may or may not have controlled the grounds for or extent of the reduction in those cases.

³⁴ See, e.g., Christopher Ingraham, *Black men sentenced to more time for committing the exact crime as a white person, study finds*, Washington Post (Nov. 16, 2017).