

## Judicial Discretion Proposal - Draft

In 1981, the Washington State Legislature passed the Sentencing Reform Act which moved the state from an indeterminate sentencing system to a determinate (guideline) system. One of the primary goals of Washington and other states that made this same move was to reduce unwarranted disparity in sentencing. Washington's legislature declared that the primary purpose of the SRA is "...to make a criminal justice system accountable to the public by developing a system for sentencing of felony offenders which structures, but does not eliminate, discretionary decisions affecting sentences."<sup>1</sup>

The SGC was directed to recommend changes to the sentencing grid through increasing judicial discretion, among other things. There are two ways that judicial discretion can be increased in sentencing, by broadening ranges in the guidelines and by removing mandatory minimums.

### Broadening Sentencing Grid Ranges

Sentencing disparity has decreased in Washington since it moved to a guideline system. A concern of the SGC was if broadening the sentencing ranges would cause unwarranted disparity to increase. Predicting changes in the sentencing behavior of Superior Court judges who are given increased discretion is not possible, however, there is research available that may offer some insight as to what one could expect.

In 2005, United States v Booker<sup>2</sup> determined that U.S. sentencing guidelines must be advisory if they are to comply with the Sixth Amendment. In one day, the federal system went from a mandatory guideline system to an advisory one. Many researchers have taken advantage of this "natural experiment" to analyze federal sentencing data for the impact of judicial discretion and unwarranted disparity as judges were released from more structured guidelines. The United States Sentencing Commission has published several reports on federal sentencing trends post-Booker that suggest an increase in judicial discretion leads to greater racial disparity.<sup>3</sup> However, this work has been soundly discounted by researchers for its flawed analyses.<sup>4, 5, 6, 7, 8</sup>

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<sup>1</sup> Revised Code of Washington 9.94A.010.

<sup>2</sup> United States v. Booker, 543 U.S. 220(2005)

<sup>3</sup> See <https://www.ussc.gov/research/topical-index-publications#booker> for list of publications.

<sup>4</sup> Federal defender Fact Sheet (2018, Jan). Retrieved on April 2, 2019, from [https://www.fd.org/sites/default/files/criminal\\_defense\\_topics/essential\\_topics/sentencing\\_resources/fact\\_sheet\\_-\\_ussc\\_report\\_on\\_racial\\_disparity\\_is\\_flawed\\_and\\_being\\_misused\\_-\\_january\\_2018\\_-\\_final.pdf](https://www.fd.org/sites/default/files/criminal_defense_topics/essential_topics/sentencing_resources/fact_sheet_-_ussc_report_on_racial_disparity_is_flawed_and_being_misused_-_january_2018_-_final.pdf)

<sup>5</sup> Fischman, J. B., and Schanzenback, M. M. (2012). Racial disparities under the federal sentencing guidelines: The role of judicial discretion and mandatory minimums. Retrieved from [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1636419](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1636419).

<sup>6</sup> Starr, S. B. (2013). Did Booker increase sentencing disparity? Why the evidence is unpersuasive. Federal Sentencing Reporter, 25(5), p323-326.

<sup>7</sup> Starr, S. B. and Rehani, M. M. (2013). Mandatory sentencing and racial disparity: assessing the role of prosecutors and the effects of Booker, *The Yale Law Journal*, 123(2).

<sup>8</sup> Brashar Tiede, L. (2009). The impact of the federal sentencing guidelines and reform: A comparative analysis. Retrieved from <https://www.ncsc.org/~media/Files/PDF/Publications/Justice%20System%20Journal/The%20Impact%20of%20the%20Federal%20Sentencing.ashx>

Researchers who have compared federal sentencing data before and after Booker concluded that, in varying degrees, greater judicial discretion does not lead to increased disparity.<sup>9, 10, 11, 12</sup> Fischman and Schanzenback reported that “our findings suggest that judicial discretion does not contribute to, and may in fact mitigate, racial disparities in Guidelines sentencing.”<sup>13</sup> Starr saw a statistically significant reduction in disparity<sup>14</sup> and Bennett reported that an increase in judicial discretion did not significantly change the length of most defendant’s sentences.<sup>15</sup> Because Booker changed the limits on federal judicial discretion instantaneously, it was believed that if judges were inclined to exercise their discretion, the impact would be seen immediately after the change. There was no study found that reported a dramatic increase or decrease immediately following Booker.

The National Center for State Courts compared three states (Virginia, Michigan and Minnesota) that are at different locations on the “mandatory-voluntary” guidelines continuum. Virginia is more voluntary, Minnesota is more mandatory and Michigan is located in between. When looking at whether guidelines limit unwarranted sentencing disparity, their data showed that “the discretion afforded judges under more voluntary guidelines does not result in discriminatory sentences.”<sup>16</sup>

Broadening sentencing ranges has consequences. Narrower ranges lead to better predictability which leads to better forecasting trends. Narrower ranges lead to greater uniformity in sentencing. One of the purposes of the SRA listed in Washington statute is “Be commensurate with the punishment imposed on others committing similar offenses,”<sup>17</sup> in other words, treat similar defendants and similar cases similarly. Yet, there is much to be gained by increasing the ranges. Broader ranges increase judicial discretion. Increasing judicial discretion allows judges to shape a sentence to the circumstances of the defendant and the situation. Many studies have shown that this can be done with little to no increase in unwarranted disparity. When commenting on the post-Booker era, Hillier and Baron-Evans state that “defendants of all groups are treated more fairly when judges can discount unjustified and excessively severe rules and take greater account of relevant differences among defendants.”<sup>18</sup>

### Mandatory Minimums

Many of the studies on judicial discretion included discussions on mandatory minimums and their effect on unwarranted disparity. “Research outside the [United States Sentencing] Commission has repeatedly found that mandatory minimums are a primary source of racial disparity, and that increased judicial

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<sup>9</sup> Ulmer, J., Light, M. T. and Kramer, J. (2011). 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(6), p 799-837.

<sup>10</sup> Starr, S. B. and Rehavi, M. M. (2013). Mandatory sentencing and racial disparity: assessing the role of prosecutors and the effects of Booker, *The Yale Law Journal*, 123(2).

<sup>11</sup> Ostrom, B. J., Ostrom, C. W., Hanson, R. A. and Kleiman, M. (2008). Assessing consistency and fairness in sentencing: a comparative study in three states. Retrieved from <https://www.ncsc.org/~media/Microsites/Files/CSI/Assessing%20Consistency.ashx>.

<sup>12</sup> Hillier II, T. W. and Baron-Evans, A. (2010). Six years after Booker, the evolution has just begun. *Federal Sentencing Reporter*, 23(2), p 132-137.

<sup>13</sup> Fischman, J. B., and Schanzenback, M. M. (2012). Racial disparities under the federal sentencing guidelines: The role of judicial discretion and mandatory minimums. Retrieved from [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1636419](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1636419).

<sup>14</sup> Starr, S. B. (2013). Did Booker increase sentencing disparity? Why the evidence is unpersuasive. *Federal Sentencing Reporter*, 25(5), p323-326.

<sup>15</sup> Bennett, M. W. (2014). *Confronting cognitive “anchoring effect” and “blind spot” biases in federal sentencing: A modest solution for reforming a fundamental flaw*. *Journal of Criminal Law & Criminology*, 104(3).

<sup>16</sup> Ostrom, B. J., Ostrom, C. W., Hanson, R. A. and Kleiman, M. (2008). Assessing consistency and fairness in sentencing: a comparative study in three states. Retrieved from <https://www.ncsc.org/~media/Microsites/Files/CSI/Assessing%20Consistency.ashx>.

<sup>17</sup> Revised Code of Washington 9.94A.010.

<sup>18</sup> Hillier II, T. W. and Baron-Evans, A. (2010). Six years after Booker, the evolution has just begun. *Federal Sentencing Reporter*, 23(2), p 132-137.

discretion after Booker likely mitigates racial disparity when not blocked by mandatory minimums.”<sup>19</sup> Several studies observed that mandatory minimums limit judicial discretion.<sup>20, 21, 22, 23</sup> As noted by Starr and Rehavi, “Flexibility allows appropriate tailoring of both charges and sentences to the circumstances of individual cases, so as to avoid unduly harsh punishments when they are not justified.”<sup>24</sup> Mandatory minimums remove a judge’s ability to consider all relevant facts when sentencing.

In addition to curtailing judicial discretion, analyses showed that mandatory minimums have a disparate impact on minorities as well.<sup>25, 26, 27, 28</sup> While analyzing the sentence gap between Blacks and Whites, Starr found that “about half to the entire gap can be explained by prosecutor’s initial charging decision, specifically the decision to charge an offense with a mandatory minimum.”<sup>29</sup>

The American Law Institute has long recommended elimination of mandatory minimum penalties. Their reasons are that such sentences create disproportionate punishments, are absent judicial discretion, and are excluded from the prioritization of correctional resources. They also cite an unequal application of this penalty due to the plea bargaining process and selective charging by prosecutors. This uneven application was affirmed by members of the SGC to be an issue in Washington, as well. ALI states that the use of mandatory minimums “shifts the power to individualize punishments from courts to prosecutors.”<sup>30</sup>

### Sharing Sentencing Outcomes

One U.S. District Court judge wrote that judges “are not typically rogue intellectuals looking to impose their idiosyncratic views of criminal justice policy on the world” and added that they are responsive to information about the outcomes of similar cases.<sup>31</sup> The Superior Court judges on the SGC have indicated they feel the same way and desire to know before sentencing what the sentencing outcomes are for similar cases across the state.

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<sup>19</sup> Federal defender Fact Sheet (2018, Jan). Retrieved on April 2, 2019, from [https://www.fd.org/sites/default/files/criminal\\_defense\\_topics/essential\\_topics/sentencing\\_resources/fact\\_sheet\\_-\\_ussc\\_report\\_on\\_racial\\_disparity\\_is\\_flawed\\_and\\_being\\_misused\\_-\\_january\\_2018\\_-\\_final.pdf](https://www.fd.org/sites/default/files/criminal_defense_topics/essential_topics/sentencing_resources/fact_sheet_-_ussc_report_on_racial_disparity_is_flawed_and_being_misused_-_january_2018_-_final.pdf)

<sup>20</sup> Fischman, J. B., and Schanzenback, M. M. (2012). Racial disparities under the federal sentencing guidelines: The role of judicial discretion and mandatory minimums. Retrieved from [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1636419](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1636419).

<sup>21</sup> Spohn, C. (2000). Thirty years of sentencing reform: the quest for a racially neutral sentencing process. Retrieved from <https://www.ncjrs.gov/App/Publications/abstract.aspx?ID=185535>.

<sup>22</sup> Starr, S. B. and Rehavi, M. M. (2013). Mandatory sentencing and racial disparity: assessing the role of prosecutors and the effects of Booker, *The Yale Law Journal*, 123(2).

<sup>23</sup> Bowman III, F. O. (2005). The failure of the federal sentencing system: A structural analysis. *Columbia Law Review*, Vol 100.

<sup>24</sup> Starr, S. B. and Rehavi, M. M. (2013). Mandatory sentencing and racial disparity: assessing the role of prosecutors and the effects of Booker, *The Yale Law Journal*, 123(2).

<sup>25</sup> Federal defender Fact Sheet (2018, Jan). Retrieved on April 2, 2019, from [https://www.fd.org/sites/default/files/criminal\\_defense\\_topics/essential\\_topics/sentencing\\_resources/fact\\_sheet\\_-\\_ussc\\_report\\_on\\_racial\\_disparity\\_is\\_flawed\\_and\\_being\\_misused\\_-\\_january\\_2018\\_-\\_final.pdf](https://www.fd.org/sites/default/files/criminal_defense_topics/essential_topics/sentencing_resources/fact_sheet_-_ussc_report_on_racial_disparity_is_flawed_and_being_misused_-_january_2018_-_final.pdf)

<sup>26</sup> Starr, S. B. (2013). Did Booker increase sentencing disparity? Why the evidence is unpersuasive. *Federal Sentencing Reporter*, 25(5), p323-326.

<sup>27</sup> Fischman, J. B., and Schanzenback, M. M. (2012). Racial disparities under the federal sentencing guidelines: The role of judicial discretion and mandatory minimums. Retrieved from [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1636419](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1636419).

<sup>28</sup> Starr, S. B. and Rehavi, M. M. (2013). Mandatory sentencing and racial disparity: assessing the role of prosecutors and the effects of Booker, *The Yale Law Journal*, 123(2).

<sup>29</sup> Starr, S. B. and Rehavi, M. M. (2013). Mandatory sentencing and racial disparity: assessing the role of prosecutors and the effects of Booker, *The Yale Law Journal*, 123(2).

<sup>30</sup> American Law Institute. (April, 2017). Model penal code: Sentencing (Proposed final draft). Philadelphia, PA: Author.

<sup>31</sup> Lynch, G. E. (2005). Sentencing: Learning from, and worrying about, the states. *Columbia Law Review*, 105(4), p 933-942.

The Washington State Statistical Analysis Center, through federal grant funding, has partnered with the Economic Research Data Center at OFM to develop a new justice data warehouse similar to the ERDC's P20W data warehouse (P20W data warehouse has longitudinally-linked data from early learning, K-12 education, K-12 discipline, higher education, and workforce data). In addition to the Jail Booking and Reporting System data, the justice data warehouse has added prison admission data from DOC, court data from AOC, and sentencing data from the Caseload Forecast Council. All the records in the justice data warehouse will be linkable with the P20W data, thus providing a data-rich source for studies.

Recommendation

Investigate the feasibility of creating a user interface into the justice data warehouse that would allow judges to query records of similar cases and observe what the sentencing outcomes were across the state to aid in their sentencing decision.

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