

## Judicial Discretion Lit Review

**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).**

“...the return of substantial discretion has not significantly altered the length of most defendants’ sentences. I suggest that this is due primarily to the anchoring effect.” (p 492)

“The gravitational pull of the Guidelines appears to be so strong that the change from mandatory to advisory Guidelines has had little to no impact on the average length of federal sentences.” (p 521)

“...the post-*Booker* broadening of judicial discretion has had virtually no impact on mitigating the harshness of sentencing under advisory guidelines rather than mandatory Guidelines.” (p 521)

**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)**

“While many studies have shown that racial bias infects most aspects of human behavior...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 decision, not 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.”

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

“Fortunately, however, the Commission’s conclusions are unsupported. The best available evidence suggests that racial disparity in the federal criminal justice system is a persistent problem.” (p 323)

“...there is good reason to believe that mandatory minimums are an important source of racial disparity in sentences.” (p 323)

“Constraining judicial discretion, historically, strengthens the power of prosecutors, whose charging and bargaining decisions more directly determine the sentence.” (p 324).

“...we found that the Black-White sentence gap was heavily driven by the cases in which judges have the least sentencing discretion – those with mandatory minimums.” (p 324)

“...we find no evidence that *Booker* increased aggregate sentence disparity – in fact, we find a small but statistically significant *reduction* of disparity in *Booker*’s immediate wake. Nor do we find any notable racially disparate changes in charging, charge bargaining, fact-finding, or departures.” (p 325)

“...there is no convincing evidence that the Black-White sentence gap is larger after *Booker* or its progeny, and certainly no evidence that the gap grew *because of Booker*.” (p 325)

**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).**

“We find that racial disparities are either reduced or little changed when the Guidelines are made less binding. Racial disparities increased after recent Supreme Court decisions declared the Guidelines to be advisory; however, we find that this increase is due primarily to the increased relevance of mandatory minimums, which have a disparate impact on minority offenders. Our findings suggest that judicial discretion does not contribute to, and may in fact mitigate, racial disparities in Guidelines sentencing.” (p 1)

“Theory alone cannot determine how expanding judicial discretion affects racial disparities. Judges’ decisions may be influenced by subconscious bias or racial stereotyping, in which case expanding judicial discretion would likely increase racial disparities. On the other hand, judicial discretion could reduce racial disparity by mitigating bias from other actors. For example, racial disparities could be the result of prosecutorial bias or sentencing policies that have a disparate impact against minorities.” (p 2)

“We find that racial disparities were generally lower during periods when judges had wider discretion, suggesting that judges exercise discretion in a manner that mitigates disparity.” (p 2)

“Taken together, our results support two important conclusions. First, racial disparities under the Guidelines are not attributable to judicial discretion; in fact, judicial discretion likely reduces racial disparities, at least in the current federal Guidelines regime. Second, mandatory minimums have become more important in the post-*Booker* era and may need serious reevaluation in light of the potential disparities they produce.” (p 3)

“One effect of mandatory minimums has been to transfer discretion from judges to prosecutors.” (p 9)

“We have some evidence that when mandatory minimums are less relevant, sentences fell by the same proportion of whites and blacks. In short, our findings suggest that judicial discretion does not contribute to, and may in fact mitigate, racial disparities in Guidelines sentencing. Policy makers 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.” (p 23)

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>.

“...other argue that racial disparities in sentence severity reflect difference in crime seriousness, prior criminal record, and other legally relevant factors that judges consider in determining the appropriate sentence.” (p 427).

“The National Research Council’s Panel on Sentencing Research characterized the sentencing decision as ‘the symbolic keystone of the criminal justice system,’ adding: ‘It is here that conflicts between the goals of equal justice under the law and individualized justice with punishment tailored to the offender are played out’ (Blumstein et al. 1983, 39)” (p 436)

“...legislators at the State and Federal levels abandoned indeterminate sentencing and embraced determinate sentencing, sentence guidelines, mandatory minimum sentences, and other reforms designed to constrain judicial discretion. The fact that racial discrimination persists despite these policy changes suggests that reformers may have had unrealistic expectations about the ability of the reforms to alter the sentencing process and/or that the reforms themselves have not been implemented as intended.” (p 481)

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

“...the complexity and rigidity of the guidelines have severely constrained judicial sentencing discretion while conferring on prosecutors a vastly increased ability to influence a defendant’s sentence.” (p 1315)

“The available evidence suggests that the guidelines have succeeded in reducing judge-to-judge disparity within judicial districts.” (p 1326)

“The guidelines were undeniably intended to restrict, though never to eliminate, judicial sentencing discretion. The degree to which fact-based guidelines actually restrict judicial sentencing discretion depends on two factors: the structure of the sentencing grid and the nature of the judicial departure power. As a general matter, the more complex the grid, the more constraints are placed on judicial discretion.” (p 1333)

“That is, increasing the complexity of a sentencing guidelines system tends to confer power on prosecutors while limiting the power of judges.” (p 1340)

“Finally, the Justice Department’s consistent push for harsher sentencing laws and the progressive diminution of the Department’s traditional respect for the role of the judiciary at sentencing has been accompanied by decreasing deference to the U.S. Sentencing Commission as an authoritative source of sentencing law and policy.” (p 1340)

**Brashear 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>.**

“This analysis suggests that long-existing federal Sentencing Guidelines scheme, whether mandatory or advisory, reduce disparities in sentences when judges apply the Guideline ranges, but not disparities associated with the choice of whether to apply those ranges.” (p 34)

“The analysis shows that legal regulation has an enormous impact on disparity of sentencing outcomes. When judges are constrained by Sentencing Guideline table ranges, sentences are longer and defendants are more likely to be treated similarly than when they depart. This result occurred both nationally and by circuit.” (p 44)

“Before the PROTECT Act and again after *Blakely/Booker*, disparity in judges’ decision and departure rates varied by circuit, showing that the Guidelines were unable to eliminate disparity in all areas.” (p 45)

“...the USSC analyzes sentence length, departure rates, and disparity by grouping all crimes of a certain type together (such as drug crimes) without controlling for individual difference in fact patterns.” (p 45)

“Regulation that limits judicial discretion results in higher sentences and less disparity in outcomes. Judges who use the Guideline tables sentence defendants more severely, but the disparity of sentencing outcomes across a nationwide or circuit population is smaller than when compared with cases where judges choose to depart. (p 46)

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

“...Professor King and her coauthors identify systematic sentencing disparities based on mode of trial. Surprisingly, the nature of the disparities is inconsistent from jurisdiction to jurisdiction and from crime to crime, most likely because of local variations in the way in which trial modality and plea bargaining are used by prosecutors and defense lawyers.” (p 938)

“...judges (contrary to the image sometimes held by members of Congress) are not typically rogue intellectuals looking to impose their idiosyncratic views of criminal justice policy on the world. Rather, the most common question judges ask in thinking about a sentence is, what have other judges done with similar cases? Judges appreciate the importance of horizontal equity in sentencing...They are thus highly responsive to advisory guidelines and to information about the outcomes of similar cases before other courts.” (p 940)

**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.**

“Sentencing practices have long exhibited the tension between formally rational reform efforts designed to promote uniformity and control discretion and substantively rational interests in flexibility, individualized (and localized) sentencing.” (p 800)

“Pre-Booker research has detected considerable between-district variation in sentencing severity...However, with the exception of two recent USSC reports, all of the published research reporting moderate extralegal federal sentencing disparity is based on pre-Booker data and the overwhelming majority on the pre-PROTECT Act data.” (p 802)

“While the PROTECT Act did appear to reduce the level inter-district variation compared to the pre-PROTECT period (5.8 versus 6.6), so too did the Booker decision (5.2% compared to 5.8% and 6.6%). This is interesting finding considering that Booker has arguable been the greatest expansion of judicial discretion in the guidelines era.” (p 816).

“In other words, our models show that the liberalization of judicial discretion has resulted in significantly less racial disparity compared to the pre-PROTECT era.” (p 822)

“The aftermath of the Booker decision provides an opportunity to examine what happens when legal decision-makers are released from relatively strong formal rational decision-making constraints, and are given more room to base their decisions on substantively rational criteria. (P 829)

“In general, increased discretion and room for substantive rationality have not resulted in greater extralegal disparity.” (p 830)

“In fact, gender and race differences in sentence length are slightly, but significantly, smaller post-Booker compared to the pre-PROTECT period, and most of the effects of other extralegal characteristics have changed little in the incarceration decision. Furthermore, inter-district variation in sentencing has not increased significantly post-Booker or Gall.” (p 830)

**Shepherd, J. (2007). Blakely’s silver lining; sentencing guidelines, judicial discretion, and crime. *Hastings Law Journal*, 58(3), p 533-590.**

“I demonstrate theoretically and empirically that alternatives to guidelines that expand judicial discretion may decrease crime. This is because, contrary to the expectations of many of the original tough-on-crime supporters, the reduced discretion under guidelines is associated with increases in crime, not decreases. Moreover, the increase has been substantial. In states with guidelines, the guidelines are associated with approximately an 8% increase in violent crime and a 7% increase in property crime, after controlling for other variables.” (p 535)

“The results indicate that sentencing guidelines are associated with an increase in almost all crime rates. The more mandatory are the guidelines, the larger is the increase in crime. The results are consistent across the model’s three variations.” (p 574)

“I check whether the positive relationship between crime and sentencing guidelines is due not to guidelines increasing crime, but to increasing crime causing states to adopt guidelines. The evidence suggests that it is unlikely that the positive relationship between crime rates and guidelines is explained by reverse causation.” (p 581)

"I show that, contrary to the motivating expectations of the original tough-on-crime supporters of guidelines, sentencing guidelines are associated with increases, not decreases, in crime." (p 586)

"The effects are not only statistically significant, but also large. On average, sentencing guidelines are associated with an increase in violent crimes of 8% and an increase in property crimes of 7%." (p 586)

"The results suggest that crime increased even though sentencing guidelines were generally accompanied by increases in both the incarceration rate and average sentence length." (p 586)

**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).**

"...findings from our recent study showing that while a black-white gap appears to be introduced during the criminal justice process, it appears to stem largely from prosecutors' charging choices, especially decisions to charge defendants with 'mandatory minimum' offenses." (p 5)

Research shows that it is not judges' choices that appear to be principally responsible for a black-white sentence-length gap of about 10%. 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. (p 7)

"...the gap in sentences for similar black and white arrestees was, if anything, slightly smaller by the end of 2009 than it was just before Booker." (p 8)

"Booker's effects on Guidelines compliance were not slow or subtle – departure rates immediately and dramatically spiked. That is, Booker was a sudden shock to the scope of judicial discretion, and, if judges were included to exercise their discretion in ways that widen the black-white gap, one would expect to see disparity jump in response to that shock, right after Booker." (p 9)

"What we can say is that nothing in these data suggests that judges' use of their post-Booker discretion exacerbated racial disparity." (p 9)

"Constraints on judges generally empower prosecutors by making their choices more conclusive determinants of the sentence." (p 10)

"Between the underlying criminal conduct and the sentence, there are many points in the process where disparities could be introduced." (p 18)

"Our research suggests that racial disparities in recent years have been largely driven by the cases in which judges have the least sentencing discretion: those with mandatory minimums. Our assessment of *Booker* is more tentative, but we find no evidence that it *increased* racial disparity." (p 78)

"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. Efforts to eliminate unwarranted disparities are important, but they should not come at the cost of unwarranted uniformity." (p 79)

**Yang, C. S. (2013). Free at last? Judicial discretion and racial disparities in federal sentencing,(Coase-Sandor Institute for Law & Economics Working Paper No. 661). Retrieved from [https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=1663&context=law\\_and\\_economics](https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=1663&context=law_and_economics).**

“After Booker, prosecutors have commented that they are far less willing to forego charging mandatory minimums when judges ultimately sentence defendants to terms far below the Guidelines recommended minimum sentence. Consistent with this story, I find evidence that increased judicial discretion via Booker changes the prosecutorial treatment of statutory mandatory minimums.” (p 3)

“However, the trend in the gap in sentence length between black and white defendants changes post Booker as sentence lengths for black and white defendants diverge. The evidence is even more striking excluding cases with mandatory minimums, where it is apparent that sentence lengths for white defendants decrease post Booker, while black sentence lengths continue to rise, increasing the racial disparities in sentence length.” (p 12)

“I find evidence that increased judicial discretion via Booker has led to large and robust increases in racial disparities in sentencing.” (p 23)

“An increase in disparities in the wake of increased judicial discretion can reflect unwarranted disparities if judicial bias enters into decision-making. On the other hand, disparities may be warranted if expanded discretion allows judges to tailor a sentence to the unique circumstances of an offender.” (p 24)

**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>.**

“More narrow sentence ranges lead to slightly more predictable sentences.” (p 2)

“The discretion afforded judges under more voluntary guidelines does not result in discriminatory sentences. Drawing on the Virginia experience, there is no suggestion in the results of a direct trade-off between predictability and proportionality on one hand and increased discrimination on the other. A voluntary guidelines system with substantial sentencing ranges does not necessarily lead to increases in discrimination, as many observers might have expected.” (p 3)

“A valuable by-products of guidelines is that the extent to which they might fall short in achieving predictability, proportionality and non-discrimination is observable and hence correctable through appropriate refinements to the guidelines.” (p 3)

“Minnesota’s sentencing commission has responded to the upward-departure problem identified in Blakely by increasing the size of the recommended sentencing ranges. Wider sentencing ranges within the grid cells should significantly lower judicial departure rates.” (p 4)

“Because crossing a threshold carries an increase in the severity of penalty, it is important that adjacent levels should be formally and meaningfully distinct from one another. If not, proportionality is violated.” (p 10)

“The news from the current research is that while a small number of statistically significant racial effects were found across the three states, all were substantively small with minimal impact on actual sentence decisions.” (p 15)

In Michigan, a single set of guidelines with vary large ranges is applied differently in different parts of the state. This is an example of how “geographical disparities undermine the goal of statewide consistency.” (p 16)

“There is no evidence of a direct trade-off between predictability and proportionality on one hand and undesirable racial, gender, or age disparities on the other hand. In fact, a voluntary guideline system, such as the one in Virginia, with substantial sentencing ranges exhibits no measurable discrimination.” (p 17)

**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.**

“The results was two decades of unfairness, pernicious uniformity, and a bloated prison population. Booker and its progeny have altered this dubious course. Judges can now impose individualized sentences that best advance the purposes of sentencing in consideration of all relevant facts...” (p 133)

“Similarly, the ‘battle cry of disparity’ has no credible voice post-Booker. When judges decline to follow guidelines that create unwarranted disparity or excessive uniformity, they are moving toward treating similar defendants similarly and different defendants differently based on the purposes of sentencing rather than unsound guideline rules.” (p 134)

“The fact is, 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.” (p 135)

“Regional differences always existed and always will.” (p 135)