Negative Brief: Mandatory Minimums

By Jonathan T. Helton

The AFF case abolishes mandatory minimum sentences for drug offenses. These laws apply to individuals who have violated a federal drug law. AFF argues that these mandatory minimums create racial disparities and overcrowd the U.S. prison system. Your response will be that biased judges are the real drivers behind racial disparities and that repealing mandatory minimums will enable them and worsen the situation. Further, there are already exceptions to mandatory minimums and close to 50% of individuals who could serve a mandatory minimum number of years don’t.

You need to understand the 2005 Supreme Court decision in *Booker v. United States* (henceforth known as “Booker”). Congress enacted sentencing “guidelines” decades ago and then made them mandatory in 2003. These are not the same as “mandatory minimums” but they have a similar effect. The guidelines took away much of the discretion of judges and gave them a narrow window of penalties they could impose for federal crimes (including those with no mandatory minimum). Federal judges started following the guidelines (even before they were mandatory). They were designed to reduce disparity (different people getting unjustly different sentences for the same crime) and ensure solid “tough on crime” law enforcement (to prevent judges from being too lenient on bad criminals). In the 2005 Booker decision, the Supreme Court ruled that Congress couldn’t make the guidelines mandatory. The evidence in this brief claims that this experiment with mandatory versus advisory standards is a good model for the difference between mandatory minimums (status quo) and what would happen without them (AFF Plan). The mandatory standards before Booker were reducing racial disparities by their uniformity, because it reduced the discretion and opportunity for bias among judges issuing sentences. Once Booker relaxed the standards, NEG evidence shows more and more racial disparity in sentencing. This proves that when you give judges more discretion, racial bias increases, and that’s what will happen when mandatory minimums are repealed.

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Negative: Mandatory Minimums

INHERENCY

1. The 5K1.1 exception

Prosecutors’ leeway and Sentencing Guideline Section 5K1.1 (reduce sentence in return for ratting out other bad guys)

Prof. Mona Lynch, Dr. Matt Barno and Prof. Marisa Omori 2021 (Lynch is a professor in the Department of Criminology, Law & Society at the University of California, Irvine. Barno is a graduate of Harvard Law School (2015) and a current PhD candidate in the Department of Criminology, Law & Society at the University of California, Irvine. Omori is an assistant professor in the Department of Criminology and Criminal Justice at the University of Missouri—St. Louis.) “Prosecutors, court communities, and policy change: The impact of internal DOJ reforms on federal prosecutorial practices” 4 July 2021 <https://onlinelibrary.wiley.com/doi/10.1111/1745-9125.12275?af=R> (accessed July 25, 2021)

We then analyze changes in the use of particular prosecutorial tools. Although binding mandatory minimum sentences are intended to apply mechanically whenever evidentiary criteria are met, in reality the application of a binding mandatory minimum sentence is largely within the purview of federal prosecutors, who control both the disclosure of facts that trigger mandatory minimum eligibility and the application of 5K1.1 substantial assistance motions that permit defendants to be sentenced below the statutory minimum (Fischman & Schanzenbach, [2012](https://onlinelibrary.wiley.com/doi/10.1111/1745-9125.12275?af=R#crim12275-bib-0017); Lynch & Omori, [2014](https://onlinelibrary.wiley.com/doi/10.1111/1745-9125.12275?af=R#crim12275-bib-0046); Rehavi & Starr, [2014](https://onlinelibrary.wiley.com/doi/10.1111/1745-9125.12275?af=R#crim12275-bib-0053); Yang, [2015](https://onlinelibrary.wiley.com/doi/10.1111/1745-9125.12275?af=R#crim12275-bib-0090)). We also consider how charging policy mandates might influence prosecutor-endorsed downward departures from the guideline-recommended sentence. Endorsement of downward departures is one of the primary mechanisms whereby federal prosecutors can exert influence over final sentence lengths. We contrast these measures of prosecutorial practices with judicial downward departures from the guidelines recommended sentence, which are less likely to change as a result of DOJ policies.

2. The safety valve

“Safety valve” provision 3553(f) allows court to disregard mandatory minimums

Charles Doyle 2018 (Senior Specialist in American Public Law with the Congressional Research Service) “Mandatory Minimum Sentencing of Federal Drug Offenses” 11 January 2018 <https://fas.org/sgp/crs/misc/R45074.pdf> (accessed July 26, 2021)

The Commission’s 1991 report observed that from 1984 to 1990 four drug-related statutes accounted for roughly 94 percent of the mandatory minimum offenses regularly prosecuted. The Commission’s initial report was quickly followed by a Department of Justice study that concluded that a substantial number of those sentenced under federal mandatory minimums were nonviolent, first-time, low-level drug offenders. Congress responded with the safety valve provisions of 18 U.S.C. § 3553(f), under which the court may disregard various drug mandatory minimums and sentence an offender within the applicable sentencing guideline range as long as the offender was a low-level, nonviolent participant with no prior criminal record who has cooperated fully with the government

Five conditions of the safety valve

Charles Doyle 2018 (Senior Specialist in American Public Law with the Congressional Research Service) “Mandatory Minimum Sentencing of Federal Drug Offenses” 11 January 2018 <https://fas.org/sgp/crs/misc/R45074.pdf> (accessed July 26, 2021)

For the convictions to which the safety valve does apply, the defendant must convince the sentencing court by a preponderance of the evidence that he satisfies each of the safety valve’s five requirements. He may not have more than one criminal history point. He may not have used violence or a dangerous weapon in connection with the offense. He may not have been an organizer or leader of the drug enterprise. He must have provided the government with all the information and evidence at his disposal. Finally, the offense may not have resulted in serious injury or death.

3. Quantification of results of Safety Valve + 5K1.1

Mandatory minimums are flexible + only 50% of eligible offenders receive one

Sen. Chuck Grassley 2013 (Ranking Member, Senate Judiciary Committee) “The Enforcement Of Mandatory Minimums” 17 September 2013 <https://www.grassley.senate.gov/news/news-releases/enforcement-mandatory-minimums> (accessed July 26, 2021)

Mandatory minimum sentences are not new.  The first Congress enacted mandatory minimum sentences in 1790.  Nor are they as inflexible as they are often characterized.  According to the Sentencing Commission, almost half of all offenders convicted of an offense carrying a mandatory minimum sentence are not given such a sentence.  We hear over and over that mandatory minimum sentences are one size fits all.  We hear that low level and first time offenders always receive harsh sentences.  Not so.  The safety valve provision requires judges not to impose mandatory minimum sentences for first time, low-level, nonviolent drug offenders, who have provided all information to the authorities.  Mandatory minimum sentences are not imposed on many other offenders because they provide substantial assistance to the government in prosecuting more serious criminals.

In 2017, it’s still below 50% getting the mandatory minimum

Prof. David Bjerk 2017 (Russell S. Bock Chair of Public Economics and Taxation at Claremont McKenna College.) “Mandatory Minimums and the Sentencing of Federal Drug Crimes” January 2017 <https://www.journals.uchicago.edu/doi/10.1086/690205> (accessed July 27, 2021)

The primary findings of this paper are the following. First, despite the far lower quantity thresholds for mandatory minimum eligibility for crack offenders relative to those convicted of powder cocaine offenses (even post-FSA), fewer crack offenders are eligible for mandatory minimums than those convicted of powder cocaine offenses. Second, mandatory minimums appear to be far from mandatory, with less than half of those who are eligible receiving a sentence consistent with the ostensible mandatory minimum. First-time mandatory-minimum-eligible offenders are particularly likely to avoid sentences consistent with the mandatory minimums, primarily because the most common way that eligible offenders avoid mandatory minimums is through federal “safety-valve” relief, for which a minimal criminal history is necessary. Partially because crack offenders are less likely than those convicted of other drug offenses to be determined to have the requisite minimal criminal history (which is partially based on the sentence length associated with previous convictions), a much smaller fraction of mandatory-minimum-eligible crack offenders receive sentences short of the mandatory minimum than eligible offenders convicted for other drugs.

Large fraction of criminals avoid mandatory minimums

Prof. David Bjerk 2017 (He is the Russell S. Bock Chair of Public Economics and Taxation at Claremont McKenna College.) “Mandatory Minimums and the Sentencing of Federal Drug Crimes” January 2017 <https://www.journals.uchicago.edu/doi/10.1086/690205> (accessed July 27, 2021)

The US federal mandatory minimum sentences are controversial not only because of the length of the mandatory sentences for even first-time offenders but also because eligibility quantities for crack cocaine crimes are small compared with those for other drug offenses. This paper shows that the impact of these mandatory minimums on sentencing is quite nuanced. A large fraction of mandatory-minimum-eligible offenders, particularly first timers, are able to avoid these mandatory minimums. Moreover, despite lower eligibility thresholds for crack-related offenses, a smaller fraction of those convicted of crack-related offenses are eligible for mandatory minimums relative to those convicted of other drug offenses. Furthermore, while being just eligible for a mandatory minimum increases sentence length on average, the impact is not uniform across drug offenses. Notably, sentences for crack offenders are generally sufficiently long such that, on average, sentences for crack offenders are not impacted by eligibility for a mandatory minimum.

Crack cocaine offenders wouldn’t see any real change – they’d get similar sentences as they do today

Prof. David Bjerk 2017 (Russell S. Bock Chair of Public Economics and Taxation at Claremont McKenna College.) “Mandatory Minimums and the Sentencing of Federal Drug Crimes” January 2017 <https://www.journals.uchicago.edu/doi/10.1086/690205> (accessed July 27, 2021)

The primary findings of this paper are the following. First, despite the far lower quantity thresholds for mandatory minimum eligibility for crack offenders relative to those convicted of powder cocaine offenses (even post-FSA), fewer crack offenders are eligible for mandatory minimums than those convicted of powder cocaine offenses. Second, mandatory minimums appear to be far from mandatory, with less than half of those who are eligible receiving a sentence consistent with the ostensible mandatory minimum. First-time mandatory-minimum-eligible offenders are particularly likely to avoid sentences consistent with the mandatory minimums, primarily because the most common way that eligible offenders avoid mandatory minimums is through federal “safety-valve” relief, for which a minimal criminal history is necessary. Partially because crack offenders are less likely than those convicted of other drug offenses to be determined to have the requisite minimal criminal history (which is partially based on the sentence length associated with previous convictions), a much smaller fraction of mandatory-minimum-eligible crack offenders receive sentences short of the mandatory minimum than eligible offenders convicted for other drugs. However, the third and arguably most surprising finding in this paper is that while being convicted of trafficking a drug quantity just in excess of a mandatory-minimum-eligibility threshold is associated with a significant increase in expected sentence length for powder cocaine, methamphetamine, marijuana, and heroin offenders, this is not the case for crack offenders. Rather, regardless of mandatory minimum eligibility, it appears that crack offenders generally receive sufficiently long sentences (often because of how their criminal histories are counted) that being convicted of trafficking a quantity just in excess of a mandatory-minimum-eligibility threshold does not impact sentence length. To put this another way, how crack cocaine offenders are treated in the overall federal sentencing structure means that most crack offenders would receive similar sentences even in the absence of the mandatory minimums.

4. A/T “The Sessions memo requires harsh sentences”

DOJ repealed the Sessions memo

C.J. Ciaramella 2021 (He is a reporter at Reason. He was previously a politics editor at BuzzFeed, and a reporter for the Washington Free Beacon.) “Justice Department Rescinds Trump-Era Memo Ordering Prosecutors To Seek Harshest Sentences” 29 January 2021 <https://reason.com/2021/01/29/justice-department-rescinds-trump-era-memo-ordering-prosecutors-to-seek-harshest-sentences/>

The Justice Department has rolled back a Trump-era memo that directed federal prosecutors to seek the harshest charges and sentences available to them. In a memorandum released today, [reported](https://www.huffpost.com/entry/doj-biden-sentencing-charging-policy_n_601441aac5b63b0fb2808ce7?3dl)by HuffPost, acting Attorney General Monty Wilkinson rescinded a 2017 memo that ordered federal prosecutors to seek the toughest charges and maximum possible sentences on the books.

MINOR REPAIR

The problem is length, not mandatory sentencing

*Robert VerBruggen 2013 (editor of RealClearPolicy; BA in journalism and political science) “In Defense of Mandatory Minimums” 10 November 2013* <https://www.realclearpolicy.com/blog/2013/11/11/in_defense_of_mandatory_minimums_725.html>(accessed July 27, 2021)

It seems to me that we can keep the benefits of these reforms while backing off from their more draconian aspects. The problem with a 55-year mandatory sentence for a pot dealer isn't that it's mandatory. It's that it's a 55-year sentence for a pot dealer -- which shouldn't be possible, much less mandated. (Such ridiculous sentences often serve as a threat prosecutors can use to extract plea deals on lesser charges rather than going to trial, as they tried to do in this case.) If a mandatory sentence is too high, it should be reduced, and if a single mandatory sentence applies to many different offenses -- some trivial, some severe -- the law should be broken up into the appropriate number of pieces.

Only end mandatory minimums for some

THE EDITORIAL PAGE STAFF OF THE FREE LANCE-STAR 2021 (The Free Lance–Star is the principal daily newspaper distributed throughout Fredericksburg, Virginia, United States) “EDITORIAL: Middle ground on mandatory minimums” 13 January 2021 <https://fredericksburg.com/opinion/editorial-middle-ground-on-mandatory-minimums/article_703064d3-c92f-518b-8778-d824775ccfc9.html> (accessed July 27, 2021)

Repealing one-size-fits-all mandatory minimum sentences for lesser crimes or first offenses, but keeping them in place for career criminals and violent felons, is not only possible, it is the best way to reduce unnecessarily long incarcerations while still protecting the public from the worst of the predators.

HARMS / SIGNIFICANCE

1. Plea bargaining – not a problem

Mandatory minimums don’t increase plea deals – they reduce them

Kevin Emas 2014 (Judge in the Third District Court of Appeal of Florida, presentation to the American Judges Association Annual Educational Conference) “Mandatory Minimum Sentences: Handcuffing the Prisoner or the Judge?” 7 October 2014 <http://amjudges.org/conferences/2014Annual/ConferenceMaterials/ZC-Emas-Mandatory-Minimum-Sentences-Written-Materials-8-14.pdf> (accessed July 26, 2021)

The contention that mandatory minimum sentences result in a lower percentage of trials and higher percentage of guilty pleas appears to be unsupported. In fact, there is evidence that charging a crime carrying a mandatory minimum actually increases the likelihood of a trial. According to a report of the United States Sentencing Commission, covering sentences imposed in the year 2010, 94.1% of those convicted of an offense carrying a mandatory minimum pled guilty, while 97.5% of the offenders not facing a mandatory minimum pled guilty. The Commission also found that “the longer the mandatory minimum penalty an offender faces, the less likely he or she is to plead guilty.”

2. Racial disparities

Link: The *Booker* decision (2005) and the Fair Sentencing Act (2010). Supreme Court’s 2005 *US v. Booker* decision said Sentencing Guidelines can’t be made mandatory

Charles Doyle 2018 (Senior Specialist in American Public Law with the Congressional Research Service) “Mandatory Minimum Sentencing of Federal Drug Offenses” 11 January 2018 <https://fas.org/sgp/crs/misc/R45074.pdf> (accessed July 26, 2021)

The hate crime legislation enacted in 2009 directed the U.S. Sentencing Commission to submit a second report on federal mandatory minimums. The Commission presented its second report in October 2011. A number of things had changed between the first and second Commission reports. Sentencing under the Guidelines had been in place for only a relatively short period of time when the first report was written. By the time of the second report, the number of defendants sentenced by federal courts had grown to almost three times the number sentenced under the Guidelines when the Commission wrote its first report. The judicial landscape has changed as well. When the Commission issued its first report, the Guidelines were considered binding upon sentencing judges. After the Supreme Court’s *Booker* decision and its progeny, the Guidelines became but the first step in the sentencing process. In addition, the Fair Sentencing Act, passed in 2010, reduced the powder cocaine-crack cocaine ratio from 100 to 10 to roughly 18 to 1.

Reason for racial disparities: Biased judges. After the *Booker* decision, with having more leeway, judges issue racially biased sentences. It’s NOT due to mandatory minimums

Sen. Chuck Grassley 2013 (Ranking Member, Senate Judiciary Committee) “The Enforcement Of Mandatory Minimums” 17 September 2013 <https://www.grassley.senate.gov/news/news-releases/enforcement-mandatory-minimums> (accessed July 26, 2021)

The Attorney General correctly notes that “unwarranted disparities are far too common.”  He cited one report that shows that “black male offenders have received sentences nearly 20 percent longer than those imposed on white males convicted of similar crimes,” and that this is “shameful.” But he overlooks the reason for those disparities.  They exist not so much due to mandatory minimum sentences, which existed both before Booker and after.  In fact, Congress has reduced mandatory minimum sentences since *Booker*.  Rather, the disparities are due primarily to the Supreme Court’s Booker decision that made the sentencing guidelines advisory, rather than to mandatory minimums. Since that 2005 ruling, the guidelines have been applied in fewer and fewer cases every year.  Sentences imposed now turn on which judge the offender appears before.  And more than before, the quality of the lawyer and the other factors that produced disparity before the Sentencing Reform Act are now creeping back into sentencing.

Sentencing Commission study found Blacks get longer sentences without mandatory sentencing than with it

Sen. Chuck Grassley 2013 (Ranking Member, Senate Judiciary Committee) “The Enforcement Of Mandatory Minimums” 17 September 2013 <https://www.grassley.senate.gov/news/news-releases/enforcement-mandatory-minimums> (accessed July 26, 2021)

The Sentencing Commission, in that report that the Attorney General referred to, tracked racial disparities in sentencing. It compared sentences of African-American and White males at the time the guidelines were still mandatory compared to today, when they are advisory only. For cases overall, when the guidelines were mandatory, African-American males served 11.5 percent longer sentences than white males. Now that the guidelines are advisory, African-American men serve 19.5 percent longer sentences than white males. That is a significant difference. There are various categories of crimes in which the rendering of the sentencing guidelines as advisory has increased disparity. For instance, in firearms case, African-American men received sentences that were 6 percent longer than white men when the guidelines were mandatory. Today, African-American men receive sentences 10 percent longer than whites for these crimes. For drug trafficking, African-American men received sentences that were 9 percent longer than white men in 2005, but since the guidelines were made advisory, they now receive sentences that are 13 percent longer.

Big disparities exist where mandatory minimums don’t apply

Sen. Chuck Grassley 2013 (Ranking Member, Senate Judiciary Committee) “The Enforcement Of Mandatory Minimums” 17 September 2013 <https://www.grassley.senate.gov/news/news-releases/enforcement-mandatory-minimums> (accessed July 26, 2021)

Two areas that the Attorney General has said are criminal enforcement priorities also exhibit disparities. These are financial crimes and child pornography possession. As I have said many times before, I wish the Department would prosecute even one of the executives of the major financial firms whose criminal conduct contributed to the financial crisis. These two criminal fields both tend to involve white male defendants. Too often, the sentences imposed are too lenient. In addition, these crimes do not carry mandatory minimum sentences. We should consider imposing mandatory minimum sentences for these offenses, both to reduce racial disparities and to give prosecutors additional tools to combat these serious crimes.

DISADVANTAGES

1. Lost crime deterrent

Link: Mandatory minimums are a successful deterrent

John Perritano 2017 (award-winning journalist and author.) “Why Are Mandatory Minimum Sentences Popular Again?” 19 May 2017 <https://people.howstuffworks.com/why-are-mandatory-minimum-sentencing-popular-again.htm> *(accessed July 26, 2021) [first bracket added]*

[Maxwell Jackson, police chief of Harrisville, Utah] Jackson knows the issue well. He [testified](http://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20100527/Testimony_Jackson.pdf) before the [United States Sentencing Commission](http://www.ussc.gov/) in 2010 telling the bipartisan group that "minimum mandatory sentences removes [the] most extreme offenders from society for long periods of time." Plus, the chief said, mandatory minimums are an important crime-fighting tool.

Link: Without mandatory minimums, we couldn’t catch the “big fish”

Sen. Chuck Grassley 2013 (Ranking Member, Senate Judiciary Committee) “The Enforcement Of Mandatory Minimums” 17 September 2013 <https://www.grassley.senate.gov/news/news-releases/enforcement-mandatory-minimums> (accessed July 26, 2021)

The combination of mandatory minimum sentences and a reduction for substantial assistance provides investigative leads against bigger fish. It is a benefit of mandatory minimum sentences that is not always appreciated. Were we to meaningfully cut back on mandatory minimums, we would lose the ability to bring prosecutions against a large number of major criminals.

Application + impact: Weak on crime

Sen. Chuck Grassley 2013 (Ranking Member, Senate Judiciary Committee) “The Enforcement Of Mandatory Minimums” 17 September 2013 <https://www.grassley.senate.gov/news/news-releases/enforcement-mandatory-minimums> (accessed July 26, 2021)

Since Booker, there have been press reports of people who have been convicted of financial fraud who have received very lenient sentences, far below the guidelines. That is leading to disparity. One report showed that there have been so many financial fraudsters in New York who have been sentenced merely to probation that lawyers for newly convicted fraudsters have argued that to avoid disparities, their clients must also receive probation.

Impact: Massive economic cost

Recovery Centers of America 2016 (addiction recovery program) “Economic Cost of Substance Abuse in the United States, 2016” 2016 <https://recoverycentersofamerica.com/economic-cost-substance-abuse/> (accessed July 26, 2021)

Drug and alcohol use in the United States costs $1.45 trillion in economic loss and societal harm annually.  This includes $578 billion in economic loss and $874 billion dollars in societal harm through quality of life adjustment and premature loss of life.

Impact: More crime, more death

Drug Enforcement Administration 2021 (federal agency enforcing US drug laws) “DEA 2020 Year in Review: Combatting Serious Drug-Related Threats During the Pandemic” 14 January 2021 <https://www.dea.gov/press-releases/2021/01/14/dea-2020-year-review-combatting-serious-drug-related-threats-during> (accessed July 26, 2021)

While synthetic opioids, such as illicit fentanyl, continue to be the primary cause of these deaths, there has also been an alarming increase in the number of deaths involving illicit stimulants, particularly methamphetamine. Overdose deaths connected to meth increased almost 35 percent in 2020, exceeding the number of cocaine-related deaths. Simultaneously, violent crime rates showed a disturbing increase, with murder, aggravated assault, and other violent crimes on the rise. Drug trafficking is a known contributor to violent crimes in America.

Application: Pre-1970s

*Robert VerBruggen 2013 (He is editor of RealClearPolicy) “In Defense of Mandatory Minimums” 10 November 2013* <https://www.realclearpolicy.com/blog/2013/11/11/in_defense_of_mandatory_minimums_725.html>(accessed July 27, 2021)

As I [warned in August](https://www.realclearpolicy.com/blog/2013/08/14/are_americans_still_tough_on_crime_612.html), prison reformers must not forget why we created mandatory sentences to begin with. Back in the late 1970s and early 1980s, Americans were pretty close to unanimous -- about 90 percent -- in the belief that courts were going too easy on criminals. Part of the problem was that the laws weren't strict enough, and part of the problem was that bleeding-heart judges abused their discretion to let off hardened criminals. Campaigns against "revolving door" prison policies resonated deeply with the public (see [Dukakis, Michael](http://en.wikipedia.org/wiki/Revolving_Door_%28advertisement%29)).

A/T “Low-level offense” -- vague term

Prof. Bill Otis 2017 (Georgetown law professor and former federal prosecutor) “Former Prosecutor On Why He Supports Mandatory Minimums” 31 May 2017 <https://www.npr.org/2017/05/31/530843623/former-prosecutor-on-why-he-supports-mandatory-minimums> (accessed July 24, 2021)

OTIS: Low-level offenders seems to me to be an undefined phrase. You don't know exactly what low level means. Often it's used to mean a courier in a drug business. What people don't realize as much as they should is that a courier in the drug business is just as essential as a car is in a pizza delivery business. The business - unless you can deliver your inventory, the business is going to fall apart. And just saying that they're low level is too general and too undefined to make for good criminal justice policy.

2. Biased judges

Mandatory minimums ensure the rule of law

*Robert VerBruggen 2013 (editor of RealClearPolicy; BA in journalism and political science) “In Defense of Mandatory Minimums” 10 Nov 2013* <https://www.realclearpolicy.com/blog/2013/11/11/in_defense_of_mandatory_minimums_725.html>(accessed July 27, 2021)

There were liberal reasons to support this kind of reform, too. Even *with* mandatory minimums, liberal and conservative judges manage to [give different sentences](http://www.northwestern.edu/newscenter/stories/2006/03/tiller_mobile.html) for similar crimes. And of course, when judges have wide discretion, all sorts of illegitimate factors -- including race, class, sex, and physical attractiveness -- can subtly (or not-so-subtly) bias them toward giving longer or shorter sentences for a given crime. If we want all people to be equal before the law, the law -- not the particular judge who happens to be assigned to the case -- needs to determine how people are treated

Link + application: Judges became more biased after the *Booker* decision

Prof. Alma Cohen and Prof. Crystal Yang 2018 (Cohen is a Professor of Empirical Practice at Harvard Law School, Associate Professor at the Eitan Berglas School of Economics Tel-Aviv University, and a Faculty Fellow at the National Bureau of Economic Research. Yang is Professor of Law at Harvard Law School and a Research Associate at the National Bureau of Economic Research) “Judicial Politics and Sentencing Decisions” 7 May 2018 <https://scholar.harvard.edu/files/cyang/files/cohen_yang_march2018.pdf?m=1525793200> (accessed July 26, 2021)

We next analyze whether differences in disparities by political affiliation are driven by individual judge preferences. Specifically, we test whether sentencing differences by political affiliation expand when judges are granted more discretion, and thus when they are freer to exhibit their preferences. We exploit plausibly exogenous variation in the timing of the Supreme Court’s decision in United States v. Booker, which greatly increased judicial discretion by making the prior mandatory Federal Sentencing Guidelines advisory. We find that in the first few years after Booker, racial and gender disparities by judge political affiliation expand. Specifically, we find that the racial gap in sentence length by judge political affiliation doubles in magnitude post-Booker, with Republican-appointed judges sentencing blacks to 4.7 months longer in prison compared to similar non-black defendants, relative to their Democratic-appointed colleagues, a statistically significant increase from the pre-Booker period. Importantly, however, the increase in the racial gap by political affiliation is due to Democratic-appointed judges reducing their sentencing of black versus non-black offenders in the immediate aftermath of Booker, rather than Republican-appointed judges increasing their sentencing of black versus non-black offenders post-Booker. While less statistically significant, we also find suggestive evidence that gender disparities by political affiliation are larger after Booker, with Republican-appointed judges sentencing females to 1.8 fewer months than males compared to Democratic-appointed judges, a more than doubling of the gender gap prior to Booker. Yet, we also find that sentence gaps by political affiliation, in particular increases in gaps post-Booker, cannot be solely explained by differences in the willingness of Republican-appointed and Democratic-appointed judges to adhere to the Guidelines, suggesting that gaps by political affiliation exist for reasons other than simply compliance with the Guidelines.

Application: Short sentences for heinous crimes

Louise Gaille 2018 (B.A. in Economics from Univ. of Washington;has almost a decade of experience in Banking and Finance.) “11 Mandatory Minimum Sentences Pros and Cons” 27 February 2018 <https://vittana.org/11-mandatory-minimum-sentences-pros-and-cons> *(accessed July 26, 2021)*

Many judges apply the law to the best of their ability in a professional manner. Then there are some judges that do not. One recent case in Montana involved a teacher who received a 30-day prison sentence for raping a 14-year-old student of his. Installing mandatory minimum sentences can reduce issues where a personal bias comes into play. The judge in Montana stated that the victim “looked older than her age” and that is why he issued such a light sentence.

Link: Before mandatory minimums, judges were unpredictable

Sen. Chuck Grassley 2013 (Ranking Member, Senate Judiciary Committee) “The Enforcement Of Mandatory Minimums” 17 September 2013 <https://www.grassley.senate.gov/news/news-releases/enforcement-mandatory-minimums> (accessed July 26, 2021)

Judges had almost limitless discretion in sentencing within a broad range.  Sentences imposed depended much more on which judge was giving the sentence than the nature of the offense or the criminal history of the offender. The guidelines eliminated other disparities as well. Judges could not consider factors that often led to wealthier defendants receiving shorter sentences for similar crimes than less wealthy defendants. Racial bias in sentencing, conscious or unconscious, also was addressed through mandatory guidelines.

Link: Empowers politicized judges

Prof. Alma Cohen and Prof. Crystal Yang 2018 (Cohen is a Professor of Empirical Practice at Harvard Law School, Associate Professor at the Eitan Berglas School of Economics Tel-Aviv University, and a Faculty Fellow at the National Bureau of Economic Research. Yang is Professor of Law at Harvard Law School and a Research Associate at the National Bureau of Economic Research) “Judicial Politics and Sentencing Decisions” 7 May 2018 <https://scholar.harvard.edu/files/cyang/files/cohen_yang_march2018.pdf?m=1525793200> (accessed July 26, 2021)

Overall, our findings suggest that judicial politics may be a source of the persistent racial and gender disparities in the federal criminal justice system, and that politics may play an even larger role today under the current state of increased sentencing discretion. These results indicate that the appointment of federal judges can have profound distributional effects on the criminal justice system, in particular because the federal criminal justice system is the source of the largest and fastest growing prison population (Congressional Research Service 2013), with federal judges making tens of thousands of sentencing decisions a year. Our estimates suggest that a ten-percentage point increase in the share of Republican-appointed judges in each court would increase the racial sentencing gap by approximately five percent and the gender sentencing gap by roughly two percent. During an average four-year term, a Republican president has the potential to alter the partisan composition of the district courts by over 15 percentage points, potentially increasing the racial and gender sentencing gap by 7.5 and 3 percent, respectively

Link: prosecutors push for harsher sentences when judges have more discretion

Crystal Yang 2013 (Olin Fellow and Instructor in Law, University of Chicago Law School) “Free at Last? Judicial Discretion and Racial Disparities in Federal Sentencing” October 2013 <https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=1663&context=law_and_economics> (accessed July 26, 2021)

While the disparities estimated in this paper do not capture the compounded disparities that can result at each stage of the criminal process, I conclude by exploring the impact of increased judicial discretion on changes in prosecutorial decisions to charge mandatory minimums. Given that Booker left Congressionally-enacted statutory minimums intact, one would not necessarily expect judicial treatment of mandatory minimums to change in the aftermath of Booker. However, prosecutors may strategically respond to increased judicial discretion post Booker if they want to bind judges from departing downwards. After Booker, prosecutors have commented that they are far less willing to forego charging mandatory minimums because judges ultimately sentence defendants below the Guidelines minimum.

Link: African Americans receive harsher sentences post-*Booker*

Crystal Yang 2013 (Olin Fellow and Instructor in Law, University of Chicago Law School) “Free at Last? Judicial Discretion and Racial Disparities in Federal Sentencing” October 2013 <https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=1663&context=law_and_economics> (accessed July 26, 2021)

Using comprehensive data on federal defendants sentenced from 1994-2009, I find evidence that increased judicial discretion via Booker has led to large and robust increases in racial disparities in sentencing, particularly after periods of reduced appellate scrutiny. By four years after Booker, the racial sentencing gap increases to 4.4 months, almost a 10% increase in the average sentence length. I also find that recent increases in racial disparities in sentencing appear to be larger among judges appointed post Booker, consistent with a story in which judges experienced with sentencing under rule-based sentencing continue to follow the Guidelines even when given more discretion. These findings should, however, be interpreted cautiously as they only apply to new George W. Bush appointees. Barack Obama appointed judges may exhibit different sentencing patterns. Finally, my results suggest that prosecutors charge black defendants with higher rates of binding mandatory minimums compared to white defendants after Booker, consistent with prosecutors attempting to bind judges to prevent them from departing downwards from the Guidelines in response to increased judicial discretion

Impact: Racially biased sentencing harms earning capability

Tara O'Neill Hayes 2020 (Director of Human Welfare Policy at the American Action Forum.) “THE ECONOMIC COSTS OF THE U.S. CRIMINAL JUSTICE SYSTEM” 16 July 2020 <https://www.americanactionforum.org/research/the-economic-costs-of-the-u-s-criminal-justice-system/> (accessed July 26, 2021)

Incarceration is also correlated with large discrepancies in wealth accumulation: Among people aged 29-37 in 2000, personal wealth averaged over $80,000 for those never incarcerated, but less than $10,000 for those who were. Here, the racial disparity is so severe that formerly incarcerated Whites still accumulated more wealth than never incarcerated Blacks. Ultimately, imprisonment leads to reduced lifetime earnings of up to 40 percent.

Impact: More crime

Tara O'Neill Hayes 2020 (Director of Human Welfare Policy at the American Action Forum.) “THE ECONOMIC COSTS OF THE U.S. CRIMINAL JUSTICE SYSTEM” 16 July 2020 <https://www.americanactionforum.org/research/the-economic-costs-of-the-u-s-criminal-justice-system/> (accessed July 26, 2021)

The high incarceration rates and long sentences that characterize the U.S. criminal justice system also do not yield the low rates of recidivism that are desired. The criminogenic nature of prison—its tendency to cause or reinforce criminal behavior—may lead to increased crime. Evidence shows that one-third of people released from prison will return at some point. A study from the U.S. Sentencing Commission found that nearly half of federal prisoners were rearrested within 8 years of their release, and one-third were reconvicted and one-fourth were reincarcerated. Other studies have found re-arrest and reincarceration rates as high as 77 and 55 percent, respectively, for state prisoners. A study of convicted individuals in Texas, whose average age was 30, found that each additional year sentenced increased the likelihood of post-release criminal activity by 4 to 7 percentage points per quarter. In Chicago, individuals detained as juveniles were 22 to 26 percent more likely than their peers to re-offend and 13 percent less likely to graduate from high school.