EXECUTIVE SUMMARY

RACIAL DISPARITY IN WAKE OF THE *BOOKER/FANFAN* DECISION

Overview of: "Racial disparity in the wake of the *Booker/Fanfan* decision

An alternative analysis to the USSC's 2010 report"

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Research Summary

The U.S. Sentencing Commission (USSC) released a report in March 2010 concluding that disparity in federal sentencing has increased in the wake of the U.S. Supreme Court decisions in United States v. Booker *(2005) and* Gall v. United States *(2007). In light of this USSC report, we provide an alternative set of analyses that we believe provides a more complete and informative picture of racial, ethnic, and gender disparity in federal sentencing outcomes post-*Booker *and* Gall. *We attempt first to replicate the USSC's models. Then, making different modeling assumptions, we present alternative models of sentencing outcomes across four time periods spanning fiscal years (FY) 2000 to 2009. We find that post-*Booker/Gall*:*

1. *Race/ethnic/gender disparity in sentence length decisions is generally comparable with pre-2003 levels;*
2. *African American males' odds of imprisonment have increased significantly post-*Gall*;*
3. *Immigration cases account for a significant proportion of sentence length disparity affecting Black males;*
4. *"Government-sponsored" below* Federal Sentencing Guidelines *sentences are a greater source of racial disparities than judge-initiated deviations.*

   Finally, because much of the debate surrounding the Booker *decision involves questions of whether the guidelines must be mandatory to be effective, we also present analyses of federal sentencing disparities prior to the 1996* Koon v.

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United States *decision, a period when the guidelines were arguably most constraining of judicial decision making. Comparing post-*Booker *and* Gall *to pre-Koon sentencing practices, we find:*

5. *With the exception of incarceration disparities for black males, all race/ethnic/gender groups are sentenced either the same or less harshly (compared to whites) under the new advisory system.*

Policy Implications

One of the chief policy aims of the sentencing guidelines, and the sentencing reform movement more generally, is the reduction of racial, ethnic, and gender disparities in punishment. In the aftermath of the Booker *and* Gall *decisions, which made the* Federal Sentencing Guidelines *effectively advisory, many commentators have feared that federal judges, as a result of their increased discretion, may use offender characteristics at sentencing, and thus disparities based on race, ethnicity, and gender would increase. A recent USSC report, which found that sentencing disparities have increased in the wake of* Booker *and* Gall*, suggests that such fears are warranted and has further strengthened calls for a policy fix to post-*Booker *sentencing. One such proposed policy solution was House bill H.R. 1528 which would have, among other things, transformed the* Sentencing Guidelines *into a complex system of mandatory minimums in order to curb judicial discretion.*

*In response to the USSC report as well as policy solutions to introduce a more rigid sentencing system, we suggest that the federal sentencing data, as yet, provide insufficient evidence of increased post-*Booker *disparity to warrant renewed restrictions on judicial discretion. Our analysis, generally, shows that sentencing disparities post-*Booker *and* Gall *are comparable to those just prior to these decisions, and are actually considerably less than in earlier time periods when the guidelines were more rigid and constraining. This latter finding raises serious questions about whether the guidelines must be mandatory in order to limit racial/ethnic/gender disparities.*

*However, we do find that disparity in the imprisonment decision for black males increased post-*Gall*, which is ground for concern. Yet our results do not lend support to policy solutions that would seek to simply "re-mandatorize" the guidelines. Because our analysis shows that the bulk of extralegal disparities are observed in the incarceration decision and not the sentence-length decision (a distinction that is not made in the USSC report), reintroducing a rigid sentencing scheme may actually exacerbate incarceration disparities while having limited impact on sentence length disparities. Overall, rather than "blanket" solutions such as broad reductions in judicial discretion, we think that any policy changes to the* Sentencing Guidelines *should be focused on areas that are shown to be associated with sentencing disparities. According to our results,*

such areas include incarceration decisions, immigration offenses, and government-sponsored downward departures. Ultimately, we think careful consideration of the most problematic areas of sentencing, including those decisions made by prosecutors as well as judges, will be most effective at curbing extralegal disparities and increasing fairness at sentencing, both of which were original goals of the sentencing reform movement.

Keywords

sentencing disparity, *judicial discretion*, *federal courts*, *United States v. Booker decision*