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**Just Deserts**
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# RACIAL DISPARITY UNDER THE FEDERAL SENTENCING GUIDELINES

**WESTLAW LAWPRAC INDEX**

**JUD -- Judicial Management, Process & Selection**

Every fall I teach constitutional law to high school students from the Chicago Public Schools. The students are mostly African-American and Hispanic. When I ask them whether they believe the criminal justice system is fair to people of color, they mostly say no. My clients, also mostly African-American and Hispanic, say the same thing.

Where did these perceptions come from? Are they true? *Is* federal sentencing law unfair to people of color?

The answer is, regrettably, yes.

Fortunately, there has never been a better time to address this problem.

The U.S. Supreme Court's decisions regarding the Federal Sentencing Guidelines after *United States v. Booker*, 543 U.S. 220 (2005), give courts both the power and the obligation to more deeply scrutinize the reasoning underlying the guidelines and to reject those guidelines that create disparity without furthering any purpose of sentencing. Now, criminal defense lawyers must arm the courts with the information they need to begin to remedy the inequities created by the guidelines. And federal prosecutors, in their dual role as advocates for the government and administrators of justice, are uniquely situated to act aggressively to detect and eliminate these disparities.

Twenty years after the advent of the guidelines, the Open Society Institute reports that "a defining characteristic of America's criminal justice system is its disproportionate impact on the poor and people of color, particularly young men of color." Catherine V. Beane, "Moving Toward a More Integrative Approach to Justice Reform: Policy Report," (Feb. 2008) at 2, available at www.soros.org/initiatives/washington/articles_publications/publications/moving_ 20080228.

How disproportionate? In federal prison, people of color make up almost 75 percent of the prison population, although they constitute only 25 percent of the U.S. population. Worse, African-Americans alone make up almost 40 percent of the federal prison population, although they constitute only 13 percent of our country's population. Put another way, the federal rate of incarceration for whites is 412 per 100,000 residents, for Hispanics it is 742 per 100,000 residents, and for African-Americans it is a stunning 2,290 per 100,000 residents, according to statistics from the Bureau of Justice in 2006 and the 2002 U.S. Census.

How about the length of their sentences? As noted by District Judge Lynn Adelman and his law clerk Jon Dietrich in "Rita, District Court Discretion, and Fairness in Federal Sentencing," 85 *Denv. U. L. Rev.* 1, 57 (2007), the average sentence for an African-American offender is about 25 percent longer than for a white offender.

Scholars disagree on the reasons for this disparity, but everyone agrees that "the disproportionate number of racial minorities confined in our nation's jails and prisons cannot be attributed solely to racially neutral efforts to control crime and protect

society." Cassia C. Spohn, "Thirty Years of Sentencing Reform: The Quest for a Racially Neutral Sentencing Process," in 3 *Criminal Justice* (2000) at 481.

The Sentencing Commission could not be clearer: The primary goal--the "first and foremost" goal--of the Federal Sentencing Guidelines is to avoid unwarranted disparity. U.S. Sentencing Commission, "Fifteen Years of Guidelines Sentencing" (Nov. 2004) at 11 (hereafter USSC Report). Despite the commission's good intentions, however, there can be no doubt that the sentencing guidelines have contributed to racial disparity in sentencing, as the commission itself has acknowledged. Before the guidelines, the sentencing gap between white and minority offenders was relatively small. Immediately after their implementation, the gap began to widen and has never significantly decreased. USSC Report at 115.

***16** Reviewing its own findings, the commission concluded:

> Today's sentencing policies, crystalized into the sentencing guidelines and mandatory minimum statutes, have a greater adverse impact on Black offenders than did the factors taken into account by judges in the discretionary system in place immediately prior to guidelines implementation. Attention might fruitfully be turned to asking whether these new policies are necessary to achieve any legitimate purpose of sentencing.

USSC Report at 135.

By pinpointing areas in the guidelines that we now know adversely affect African-Americans, researchers give us a way to turn our attention to this critical undertaking.

Let's start with criminal history. For those who have not had the dubious pleasure of practicing under the guidelines, some explanation would be helpful. Guideline sentencing is conducted using a 258-box grid called the "Sentencing Table." The vertical axis of the grid ranks the severity of the offense from Level 1 to Level 43. The horizontal axis ranks the severity of the offender's criminal history from the lowest category, Category 1, to the highest, Category VI. Criminal history is calculated by adding the points allotted for each prior offense--the higher the number, the longer the sentence.

Research demonstrates that this reliance on criminal history virtually ensures a racially disparate impact. The question becomes whether that impact and the costs associated with it are justifiable. Increasingly, practitioners and researchers alike believe that they are not.

In its Fifteen Year Report, the Sentencing Commission evaluated the racial impact of the "career offender" guideline, a special provision that catapults an offender's criminal history to the highest category if the offender has two prior drug-trafficking convictions. The commission found that although only 26 percent of offenders sentenced under the guidelines in the year 2000 were African-American, African-Americans constituted 58 percent of those subject to the career offender provision. USSC Report at 133. Not surprisingly, studies show that African-Americans have a higher risk of conviction for drug trafficking than other racial groups based on factors like the ease of detecting drug dealing in the open-air markets often found in poor, urban neighborhoods. As numerous studies point out, this disparity holds true even though African-Americans constitute only 14 percent of monthly drug users, a percentage consistent with findings that drug use rates in the United States generally reflect the racial distribution of the population. *See* Marc Mauer and Ryan S. King, "A 25-Year Quagmire: The War on Drugs and Its Impact on American Society" (The Sentencing Project, Washington, D.C., 2007) at 19.

More surprisingly, studies also show that recidivism rates are much lower for persons whose criminal history is based on drug trafficking than for persons whose criminal history is based on even one violent crime. After reviewing this information, the commission concluded that the use of drug trafficking convictions to increase criminal history under the career offender guideline disproportionately affects African-Americans "without clearly advancing a purpose of sentencing." *Id*. at 134.

Other criminal history rules, such as the use of traffic offenses to increase an offender's criminal history score, also may adversely affect people of color. *Id*. The truth of this observation is well-documented in *United States v. Leviner*, 31 F. Supp. 2d 23 (D. Mass. 1998). Writing about her decision in *Leviner* in the spring 2002 issue of the ABA's *Human Rights* magazine, District Judge Nancy Gertner remarked:

  

> The guidelines's emphasis on criminal history enhances whatever inequities were embodied in past sentences. I sentenced a man for the crime of "felon in possession of a firearm," whose criminal record scored high on the guidelines. When I looked closely, I noticed that all the scored offenses were nonviolent, traffic offenses--for instance, driving after his license was suspended. And then I wondered: Since no other traffic offense accompanied the license charges, how did the man get stopped? I strongly suspected "Driving While Black." I departed downward, refusing to give literal credit to the record. ["Federal Sentencing Guidelines: A View from the Bench."]

Guideline departures also may create racial disparity. The guidelines permit departures when a party can show that there is an extraordinary reason to sentence above or below the suggested guideline range. After *Booker*, some courts rejected the departure analysis. *See, e.g., United States v. Arnaout*, 431 F.3d 994, 1003 (7th Cir. 2005). Yet, many courts still use the analysis at sentencing. *See, e.g., United States v. Langford*, 516 F.3d 205 (3d Cir. 2008); *United States v. O'Non*, 2008 U.S. App. LEXIS 5550 (6th Cir. Mar. 12, 2008) (unpublished).

The U.S. Supreme Court seems to agree that departures remain viable after *Booker*. *Irizarry v. United States*, 128 S. Ct. 2198 (2008). Yet, as the Court pointed out, departures are no longer the only permissible way for courts to impose non-guideline sentences. Rejecting the argument that the Due Process Clause requires a court to give notice of its intent to sentence outside the guideline range as it does when it intends to depart from that range, the Court said "'Departure' is a term of art under the Guidelines and refers only to non-Guidelines sentences imposed under the framework set out in the Guidelines." *Id*. at 2202. Thus, there is no limit on the number or kind of variances a court may now impose pursuant to Section 3553(a). *Id*. at 2203. As Professors Douglas Berman and Peter Rutledge explained in their amicus brief, "departures" have always been creatures of the guidelines, available only in atypical cases; whereas after *Booker*, "variances" from guideline sentences are available in any case where sufficient facts are presented under the sentencing statute. *See* brief at 22, available at Professor Berman's Blog, *Sentencing Law and Policy*, http://sentencing.typepad.com (March 25, 2008).

The continued use of departure analysis is unfortunate because, here, too, there appears to be a disparate impact on African-Americans. Although research on this issue remains sparse, one recent study found that African-Americans were less likely than persons of other races to receive a departure ***17** below the guidelines. USSC Report at 129. This result is in accord with the findings documented in David Mustard's comprehensive guidelines study, "Racial, Ethnic, and Gender Disparities in Sentencing: Evidence from the U.S. Federal Courts," 44 *J. L. & Econ*. 285 (2001). Mustard discovered that "blacks, males, Hispanics, and those with low levels of education and income are less likely to receive downward departures and more likely to receive upward adjustments compared to their counterparts." *Id*. at 308. Moreover, Mustard determined that the sentence reduction given to nonwhite offenders was smaller than the reduction given to white offenders. *Id*. at 311.

These findings also agree with research regarding mandatory minimum sentences, which shows that both the probability of receiving a mandatory minimum sentence and the likelihood of being offered a plea bargain below the mandatory minimum are lower for African-Americans than for persons of other races. Barbara Meierhoefer, *The General Effect of Mandatory Minimum Prison Terms* (Federal Judicial Center, Washington, D.C., 1992) at 20.

Researchers report even more dramatic disparities in the number of departures requested by the government for cooperators. Under the guidelines, downward departures based on an offender's cooperation with the government may be given only if the government makes what is called a "substantial assistance" motion. As reported by the commission, these departures are given less often to persons of color than to white persons. Specifically, the commission found that Hispanics are seven percentage points less likely to receive a substantial assistance departure, and African-Americans are four percentage points less likely. Linda Drazga Maxfield and John H. Kramer, *Substantial Assistance: An Empirical Yardstick Gauging Equity in Current Federal Policy and Practice* (USSC Jan. 1998) at 14, 31.

Reviewing these findings, Professor Albert Alschuler notes that the racial gap cannot be explained away by legally relevant factors such as mandatory minimum sentences, which were factored out of the study. Alschuler also points out that even when African-Americans and Hispanics receive departures, the departures are smaller than those received by whites. Albert Alschuler, "Disparity: The Normative and Empirical Failure of the Federal Guidelines," 58 *Stan. L. Rev*. 85, 105 (2005); *see also* USSC Report at 130.

  

A similar result was reported by Celesta Albonetti in "Sentencing Under the Federal Sentencing Guidelines: Effects of Defendant Characteristics, Guilty Pleas, and Departures on Sentence Outcomes for Drug Offenses, 1991-1992," 31 *Law & Soc'y Rev*. 789 (1997). Albonetti found that whites who provided substantial assistance in drug cases received a 36 percent reduction in the likelihood of incarceration, while similarly situated African-Americans received a 28 percent reduction.

Although few studies have examined the question of whether the guidelines create racial disparity in white-collar crime cases, those that do exist support that conclusion. For example, Max Schanzenbach and Michael L. Yaeger, in "Prison Time, Fines, and Federal White-Collar Criminals: The Anatomy of a Racial Disparity," 96 *J. Crim. L. & Criminology* 757, 792 (2006), conclude: "[U]nexplained racial and ethnic differentials persist even for non-violent, white-collar crimes." After attempting to separate out all legally relevant factors in white-collar cases, the authors still found a persistent disparity of 10 percent longer prison sentences for African-Americans over whites. Concerned with the existence of this disparity under the guidelines, the authors noted that the magnitude of the disparity mirrors that found for other crimes, such as drug crimes. *Id*. at 781.

The structure of the guidelines themselves also contributes to the racially disparate results. The guidelines give federal prosecutors enormous discretion to shape sentences by what and how they charge. As Professor Sandra Guerra Thompson observes, "By allowing prosecutors to decide the sentence ranges through the charging power and, to some extent, through control of what sentencing facts were brought to the court's attention, prosecutors could effectively decide the guideline range that would be applied in a particular case." "The *Booker* Project: The Future of Federal Sentencing: Introduction," 43 *Hous. L. Rev*. 269, 272 (2006).

Discretion, of course, is critical to the functioning of our criminal justice system. Nonetheless, as a number of former federal prosecutors recognize, discretion can lead to racially disparate results for any number of reasons. The disparity may result from race-neutral criteria that create racially disparate results, with or without conscious animus, or from unconscious racial stereotyping. *See generally* Lynn D. Lu, "Prosecutorial Discretion and Racial Disparities in Federal Sentencing: Some Views of Former U.S. Attorneys," 3 *Fed. Sent. Rep*. 151 (Feb. 2007).

Concerns about the effect of prosecutorial discretion under the sentencing guidelines were raised more than a decade ago by Ilene Nagel, an original sentencing commissioner and coauthor of a 1994 commission report on guideline plea negotiations. Discussing the findings of the commission report in a *Washington Post* series on the federal guidelines, Professor Nagel admitted "There appeared to be disturbing hints of social class, race and gender distinctions." Mary Pat Flaherty and Joan Biskupic, "Justice by the Numbers: Rules Often Impose Toughest Penalties on Poor, Minorities: Justice Dept. Says the System Is Free of Bias," *Washington Post* (Oct. 9, 1996) at A1.

***18** One example of how this discretion creates disparity can be seen in the commission's own studies reporting on when firearm enhancements are charged. Researchers found that, although African-Americans constitute 48 percent of the offenders who qualify for the enhancement in drug cases, they constitute 56 percent of those charged with the enhancement and 64 percent of the total number convicted of it. USSC Report at 90; Alschuler at 104-05.

Another aspect of the guidelines that surely has a negative impact on people of color is Section 5H1.10, which unequivocally states: "[Race is] not relevant in the determination of sentence." In promulgating this rule, the commission fundamentally misinterpreted the statutory directive upon which it was based, with regrettable consequences. Significantly, in choosing to make race "irrelevant," the commission inserted itself into what might be the most divisive racial issue facing our country today--that of affirmative action.

The enabling legislation required the commission to "assure that the guidelines and policy statements are entirely neutral as to the race, sex, national origin, creed, and socioeconomic status of offenders." 28 U.S.C. § 994 (d). The accompanying legislative history explains that the purpose of this directive was to clarify that no preferential treatment was to be given "to defendants of a particular race ... or to relegate to prisons defendants who are poor, uneducated, and in need of education and vocational training." S. Rep. No. 98-225, *reprinted in* 1984 U.S.C.C.A.N. 3182, 3354.

Importantly, the legislative history goes on to say "The requirement of neutrality with regard to such factors *is not a requirement of blindness*." U.S.C.C.A.N. at 3354, n.409 (emphasis added). This caveat was ignored by the commission. As a result, for 20 years, defense lawyers have struggled with how to give judges a complete picture of their clients as required by statute without running afoul of the guidelines.

  

It appears, however, that our time has come. In eliminating mandatory sentencing guidelines, the U.S. Supreme Court made clear that the guidelines are now only one of the factors courts must consider when imposing sentence. *See Rita v. United States*, 127 S. Ct. 2456 (2007); *Gall v. United States*, 128 S. Ct. 586 (2007); *Kimbrough v. United States*, 128 S. Ct. 558 (2007). Instead of rigid adherence to the guidelines, the Court commanded the lower courts to follow the language of 18 U.S.C. § 3553(a) and impose sentences "sufficient but not greater than necessary" to meet the statutory purposes of sentencing, regardless of the advisory sentencing guideline range. Every sentence must now comport with all seven of the directives in Section 3553(a), only one of which directs courts to consider the sentencing guidelines.

True, the guidelines must be considered first, but they may be rejected based on other factors, such as the need for the specific sentence to fulfill the statutory purposes of sentencing, the history and characteristics of the offender, or the nature and circumstances of the offense. No longer are "extraordinary circumstances" required--or even allowed--to justify sentences outside the guidelines. No longer are proportional mathematical formulas required--or even allowed--to justify departures. These approaches, the Court said, "come too close to creating an impermissible presumption of unreasonableness for sentences outside the Guidelines range." *Gall* at 595.

As the Court explained in *Kimbrough*, while a court must continue to respectfully consider the guidelines, "*Booker* 'permits the court to tailor the sentence in light of other statutory concerns as well ....'" *Kimbrough* at 494. Particularly significant for our purposes, courts may now impose sentences that vary from the guidelines based on policy considerations, which may include disagreements with the guidelines. *Id*. at 495. This is so, even though these variances may decrease sentencing uniformity. The Court approved that result as "a necessary cost of the remedy" it had created. *Id*. at 574.

But has the Court gone far enough? Can the lower courts resist the lure of the guidelines? Will they? Will prosecutors use the new openness to seek ways to decrease racial disparity? Will defense lawyers provide judges with the encouragement they need to vary from the guidelines? Or after the initial excitement dies down, will we be left with the same old status quo--which, for our purposes, means the same old racial disparity?

The Court seems somewhat conflicted. While on the one hand preaching sentencing revolution, the Court still requires every sentencing to begin with a proper calculation of the applicable guideline sentence. The guideline sentence is "the starting point and the initial benchmark." *Gall* at 457.

In addition, the Court has put a heavy thumb on the scale by requiring appellate courts to review guideline sentences for "reasonableness" and then allowing them to presume that sentences within the guidelines are reasonable. *Rita* at 2465. Recent indications are that even those courts that have not adopted the presumption are likely to abide by it. *See, e.g., United States v. Carty*, 520 F.3d 984 (9th Cir. 2008).

The Court's explanation for the presumption increases the imbalance. "The Guidelines as written reflect the fact that the Sentencing Commission examined tens of thousands of sentences and worked with the help of many others in the law enforcement community ...." The Court added: "[I]t is fair to assume that the Guidelines, insofar as practicable, reflect a rough approximation of sentences that might achieve § 3553(a)'s objectives." *Rita* at 2464-65.

Although many disagree with the Court's assertion that the guidelines actually do reflect an approximation of Section 3553(a)'s objectives (*see*, for example, Carissa Byrne Hessick and Andrew Hessick, "Rita, Claiborne, and the Courts of Appeals' Attachment to the Sentencing Guidelines," *19 Fed. Sent. Rep*. 171, 171-72 (Feb. 2007) and Alschuler, *supra*, at 86 and n.1), the "gravitational pull" of the guidelines remains strong. As Justice David Souter warned in his dissent in *Rita*, the pull exerted by the presumption of reasonableness may cause courts to impose guideline sentences almost as often under advisory guidelines as they did under mandatory guidelines.

> What works on appeal determines what works at trial, and if the Sentencing Commission's views are as weighty as the Court says they are ... a trial judge will find it far easier to make the appropriate findings and sentence ***19** within the appropriate Guidelines, than to go through the unorthodox factfinding necessary to justify a sentence outside the Guidelines range ....

*Rita* at 2488, Souter, J., dissenting.

  

Judge Gertner suggests that the guidelines' gravitational pull is even more deeply entrenched. In "*Rita* Needs *Gall*--How to Make the Guidelines Advisory," 85 *Denv. U.L. Rev*. 63 (2007), she posits five reasons for the courts' continued attraction to the guidelines: First, the idea that the guidelines were created by a group of experts; second, the pervasive anti-judge climate of the past 20 years; third, the fact that many judges today only have experience sentencing under the guidelines; fourth, the comfort offered by "anchoring" or linking the philosophy of the guidelines to numerical ranges; and fifth, the lack of an opposing sentencing philosophy upon which judges could rely.

But *Gall* and *Kimbrough* give us, if not exactly an opposing sentencing philosophy, certainly a new philosophy that allows us to push farther away from the guidelines on two different grounds. First, the entire universe of sentencing factors now can be raised and must be considered. Second, where it can be shown that a guideline is not based on sound empirical evidence or national experience, the guideline need not be followed at all.

In *Kimbrough*, the Court accepted the argument that the crack cocaine guideline need not be applied because the commission failed to consider empirical data in formulating the guideline. The Court's reasoning followed directly from its earlier-stated belief that the guidelines should serve as benchmarks in large part because of the commission's ability to "base its determinations on empirical data and national experience, guided by a professional staff with appropriate expertise." *Id*. at 575, *citing* *United States v. Pruitt*, 502 F.3d 1154, 1171 (10th Cir. 2007) (McConnell, J., concurring). Where either empirical data or national experience is lacking, the guideline itself is open to challenge.

That is our situation here. Noempirical studies were conducted by the commission on the question of whether the guidelines, in general or in particular, created racial disparity. Moreover, later studies empirically demonstrate that many individual guidelines and the guidelines as a whole actually do create racial disparity. Applying these studies to the facts of an individual case makes it possible to show that the use of a particular guideline or guidelines actually circumvents rather than advances the purposes of Section 3553(a), resulting in an advisory guideline sentence that perpetuates unwarranted racial disparity. This mode of analysis is exactly what the court suggested in *United States v. Rodriguez*, 527 F.3d 221, 231 (1st Cir. 2008), where it reversed the district court's refusal to independently determine whether the existence of fast-track early disposition programs for immigration cases in some districts and not in others created a disparity requiring a variance from the guideline sentence.

The significance of this conclusion and the need to respond to it may seem self-evident. After all, it was more than a century ago that the U.S. Supreme Court recognized that equal justice requires courts to carefully scrutinize laws that disparately affect minority groups. *See* *Yick Wo v. Hopkins*, 118 U.S. 356 (1886). And in *Batson v. Kentucky*, 476 U.S. 79, 92 (1986), the Court overruled the "crippling burden of proof" that courts had erected in cases where the defendant raised an equal protection challenge to the prosecution's striking of African-American jurors.

Nonetheless, the courts are not always receptive to arguments concerning unconscious or de facto discrimination. *See, e.g.*, *United States v. Armstrong*, 517 U.S. 456 (1996) (defendant's study did not meet strict requirements necessary to obtain pretrial discovery on issue of discriminatory prosecution of crack cocaine offenders); *McCleskey v. Kemp*, 481 U.S. 279 (1987) (in capital case, statistical study showing correlation between race and capital sentencing determinations did not require reversal of petitioner's conviction). It is, therefore, worth reiterating the reasons why the elimination of unwarranted racial disparity in federal sentencing is so important, regardless of whether the disparity is deliberate.

Discrimination within the judicial system has been described as the "most pernicious" form of discrimination. *Batson* at 87-88. In *Kimbrough*, the Court recognized that just the perception of unwarranted racial sentencing disparity "fosters disrespect for and lack of confidence in the criminal justice system ...." *Id*. at 492-93, *quoting* The Sentencing Commission's May 2002 "Report to Congress: Cocaine and Federal Sentencing Policy" at 103. We have shown here that under the guidelines, there is not just the perception of unwarranted racial disparity but also actual disparity.

Others report that sentencing policies that contribute to unwarranted racial disparity are less effective in ensuring that the goal of public safety is met. Marc Mauer, "Racial Impact Statements as a Means of Reducing Unwarranted Sentencing Disparities," 5 *Ohio St. J. Crim. L*. 19, 33 (2007).

And we know that continuing current federal sentencing practice will perpetuate racial disparity and negatively affect not just the African-American community, but our country as a whole. Our current practice leaves wives without husbands, children without fathers, and often pushes those children to commit crimes of their own. Mauer notes that it seriously affects "life

  

prospects for the generation of black children growing up today." *Id*. at 46. Numerous studies document the correlation between incarceration and unemployment, low wages, and family instability. In addition, those who leave prison may be denied the right to vote, prohibited from receiving federal financial aid, including food stamps and other welfare assistance, and permanently banned from entering public-housing programs.

Our criminal justice system rests on the sometimes elusive promise of equal justice for all. Despite some ambivalence, the U.S. Supreme Court has opened up the world of sentencing and given back to each of us a way to make good on that promise. It is an opportunity we can't afford to miss.

## Footnotes

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