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Ryan W. Scott

Indiana University Maurer School of Law, ryanscot@indiana.edu

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POLICY ESSAY

RACIAL DISPARITY IN WAKE OF THE BOOKER/FANFAN DECISION

Race disparity under advisory guidelines

Dueling assessments and potential responses

Ryan W. Scott

Indiana University

Dueling studies of race disparity, one by the U.S. Sentencing Commission (USSC, 2010) and an alternative analysis published in this issue by Ulmer, Light, and Kramer (2011), diverge sharply in their methodological choices and in their characterization of trends in federal sentencing. The Commission's study suggests a marked increase in race disparity, differences in sentencing outcomes between racial groups that cannot be explained by controlling for relevant nonrace factors, after the Supreme Court's decisions in *United States v. Booker* (2005) and *Gall v. United States* (2007). Those decisions rendered the federal Sentencing Guidelines advisory and set a highly deferential standard of appellate review. The alternative analysis finds more modest changes, which are largely confined to immigration offenses and to the decision whether to impose a sentence of prison or probation.

Yet, in several of their key findings, the Commission's research and the new analysis by Ulmer et al. (2011) reach similar conclusions. Both agree that for Black male offenders compared with White male offenders, the "in/out" decision—whether to impose a sentence of imprisonment or probation—is a source of persistent and increasing disparity. Both suggest that evidence of race disparity under the mandatory Guidelines, before 2003, was unstable and inconclusive. And surprisingly, both also indicate that race disparity affecting Black male offenders reached its lowest levels ever under the PROTECT Act in 2003 and 2004, when the Guidelines were at their most mandatory and inflexible and departures were closely policed through *de novo* appellate review.

Although narrow, those areas of agreement have potentially important implications for sentencing law. This policy essay evaluates the support that the new research lends

Direct correspondence to Ryan W. Scott, Maurer School of Law, Indiana University, Law Building 247, 211 South Indiana Avenue, Bloomington, IN 47405 (e-mail: ryanscot@indiana.edu).

to several paths forward for federal sentencing. It focuses on three possibilities: a system of “dispositional departures” to regulate the prison/probation decision; a rollback of the *Booker* remedial opinion that would restore the PROTECT Act regime, augmented by jury fact finding; and a new proposal to simplify the Guidelines championed by Judge William Sessions, the former Chair of the Sentencing Commission (the “Sessions proposal”). It concludes that the best approach, based on the current body of research, may be “none of the above.” As a postscript, however, it urges that the new studies of race disparity be evaluated in the context of related research on interjudge sentencing disparity.

Dueling Studies, Common Ground

The Commission’s 2010 report and the alternative analysis by Ulmer et al. (2011) diverge sharply in their characterization of recent trends in race disparity at the federal level. Reversing its previous conclusions about post-*Booker* race disparity (USSC, 2006), the Commission found that after controlling for legally relevant factors for which data are available, Black male offenders consistently have received longer sentences than White male offenders, and the degree of disparity has “increased steadily since *Booker*” (USSC, 2010).¹ That kind of trend, if borne out by the data, is deeply worrisome in light of already staggering incarceration rates among Black men in America. Disparate levels of imprisonment for Black male offenders have resulted principally from facially race-neutral sentencing rules, such as mandatory minimum sentences for drug offenses and the now-repealed 100-to-1 crack/powder cocaine ratio (Tonry 2010). But a growing gap between Black and White offenders in sentencing decisions would exacerbate the problem and would deserve attention because the Sentencing Reform Act of 1984 was designed in part to counteract race disparity (Breyer, 1988).

The study by Ulmer et al. (2011), in contrast, finds more modest effects, which are largely confined to the prison/probation decision and to immigration offenses. Sentence-length disparity between Black male and White male offenders has indeed increased since *Booker*, the study concluded, but the effect was approximately 40% smaller than estimated by the Commission, and there is no significant difference between levels of disparity in the pre-PROTECT Act period (2002–2003) and the most recent post-*Gall* period. In other words, for sentence length, “Black male disparity returned to the pre-PROTECT state in the wake of *Gall*” (Ulmer et al.). Sentence-length effects for Black male offenders also shrink considerably in models that exclude immigration offenses. Yet the alternative analysis finds that some forms of disparity in imprisonment decisions have increased since *Booker* and *Gall*. For Black male offenders, regardless of whether immigration offenses are excluded,

1. The Commission’s “refined” models found that during the PROTECT Act period, Black male offenders received sentences 5.5% longer than those for White male offenders. The gap grew to 15.2% in the post-*Booker* period and to 23.3% in the most recent post-*Gall* period.

unexplained disparity in the prison/probation decision is significantly higher under the advisory Guidelines post-*Gall* than under the PROTECT Act.²

The authors of the alternative analysis attribute the studies' divergent results to different methodological choices. Their analysis models the prison/probation decision separately, disentangling race disparity in the "in/out" decision from disparity in sentence length among offenders who receive a prison sentence. It also controls for criminal history using both the criminal history score and the guideline minimum sentence, which is determined in part by reference to criminal history. In some models, the alternative analysis by Ulmer et al. also excludes immigration offenses because of concerns raised by fast-track programs and noncitizen offenders.

Points of Agreement

Rather than attempt to referee the methodological sparring, this essay focuses on the substantial areas of overlap between the two studies. Despite their differences, the Commission's research and the analysis by Ulmer et al. (2011) reach similar conclusions in several key respects.

First, both the Commission's research and the analysis by Ulmer et al. (2011) seem to agree that the choice between prison and probation is a source of persistent and increasing race disparity. Ulmer et al.'s analysis found "an unexplained increase in Black males' odds of imprisonment post-*Gall*," which is statistically significant compared with the PROTECT Act period, both for federal offenses as a whole and for the subset of nonimmigration offenses. Although the Commission's most recent study did not analyze the "in/out" decision separately, its previous research found that, despite year-to-year fluctuations, for fiscal years 1998 to 2002 overall, the odds of imprisonment were 20% higher for Black males than for White males (USSC, 2004: Figure 4.4). Notably, neither study was able to control for the full range of considerations that a judge might consider in selecting a prison sentence, including the offender's employment record and the degree of violence in the offender's criminal history.³ Yet within the limits of the available data, the studies seem to agree that for Black male offenders, significant and increasing unexplained race disparity exists in federal imprisonment decisions.

Second, both the Commission study and the analysis by Ulmer et al. (2011) seem to agree that the evidence of race disparity under the mandatory Guidelines, prior to the PROTECT Act in 2003, was volatile and inconclusive. For example, the Commission's earlier "unrefined" models found that Black offenders received longer prison terms than

2. Logistic regression models calculate a coefficient for Black males of 0.209 in the post-*Gall* period, which is significantly greater than the PROTECT Act period ($b = 0.046$) and post-*Booker* periods ($b = 0.084$), but not significantly greater than the pre-*Booker* period ($b = 0.101$).

3. Both studies control for the guideline minimum sentence, which reflects hundreds of non-race factors related to the nature of the offense and the history and characteristics of the offender, as detailed in chapters two, three, and four of the Guidelines Manual.

White offenders by as much as 14.2% in fiscal year 1999, but by a more modest 8.2% in fiscal year 2001, and by a statistically insignificant amount in fiscal year 2002 (USSC, 2006: Figure 13). Those results echoed the Commission's previous research, which reported that race disparity for Black men fluctuated considerably between 1998 and 2002, with no statistically significant race disparity for some sentencing outcomes in some years (USSC, 2004: Figures 4.7 and 4.8). That instability makes it difficult to draw reliable comparisons between the current advisory guidelines and the pre-PROTECT Act mandatory Guidelines.

Third, and most surprisingly, both the Commission's models and the analysis by Ulmer et al. (2011) seem to agree that race disparity for Black men reached its lowest levels under the PROTECT Act in 2003 and 2004. The Commission's "refined" models for Black male offenders, as replicated by Ulmer et al., found significantly lower levels of race disparity in sentence length under the PROTECT Act than under the advisory Guidelines after *Booker* and *Gall*.⁴ The Ulmer et al. alternative analysis reached the same conclusion. Its models of sentence length for Black male offenders receiving a prison sentence found significantly lower levels of unexplained race disparity under the PROTECT Act than in the pre-PROTECT Act and post-*Gall* periods (Ulmer et al., 2011: Table 2).⁵ Likewise, models of the incarceration decision for Black males found no statistically significant Black-male effect during the PROTECT Act period and found a race effect significantly smaller than under the advisory Guidelines post-*Gall* (Ulmer et al., 2011: Figure 4).⁶ According to Ulmer et al., "the post-*Booker* era has brought greater sentence length racial disparity disadvantaging Black males," but "only when one's basis of comparison is the PROTECT era." That finding is important and entirely consistent with the Commission report.

Possible Paths Forward

Although narrow, those apparent points of agreement in the race disparity research have potentially important implications for sentencing law and policy. Consider several possible paths forward: (a) Create a system of "dispositional departures" by tweaking the Guidelines to regulate explicitly the choice between prison and probation; (b) restore the PROTECT Act, with its strict controls over judicial discretion, augmented by jury fact finding; (c) Adopt Judge Sessions's proposal, which would simplify the Guidelines while making

4. The linear regression models of sentence length for Black males calculated a coefficient of 0.089 during the PROTECT Act period, which is significantly lower than the post-*Booker* period ($b = 0.164$), and the post-*Gall* period ($b = 0.217$), but not significantly different from the pre-PROTECT Act period ($b = 0.130$).

5. The linear models of sentence length for Black men receiving a prison sentence produced a coefficient of 0.045 in the PROTECT Act period, which is significantly lower than the pre-PROTECT Act period ($b = 0.066$) and the post-*Gall* period ($b = 0.077$) but not significantly different from the post-*Booker* period ($b = 0.053$).

6. The logistic models of the incarceration decision for Black males calculated a nonsignificant coefficient of 0.046 for the PROTECT Act period, which is significantly lower than the post-*Gall* period ($b = 0.209$) but not significantly different from the pre-PROTECT Act period ($b = 0.101$) or the post-*Booker* period ($b = 0.084$).

them “presumptive” and widening guideline imprisonment ranges; or (d) None of the above.

Dispositional Departures

Ulmer et al. (2011) suggest that because their analysis provides clear evidence of increasing race disparity in the prison/probation decision, policy makers should consider changes “specifically targeted” at that stage of sentencing. Currently, federal sentencing rules leave the initial choice between prison and probation almost entirely unregulated. For cases in zone A of the sentencing grid (0–6 months of imprisonment), a sentence of probation is clearly permitted. Likewise, under U.S.S.G. § 5B1.1(a), for cases in zone B of the sentencing grid, a sentence of probation is “authorized” in combination with other conditions, subject to a few restrictions. But in neither case is a sentence of probation required, or even presumed; the decision rests entirely with the sentencing judge. Stronger guidance from the Commission might help counteract the emergence of unexplained race disparity in choosing from among available sanctions.

One option for addressing race disparity in the prison/probation decision is to create a presumption of prison or probation for different cells of the sentencing grid, coupled with a system of appellate review for “dispositional departures” that deviate from that presumption. Several state sentencing guidelines systems operate in that manner, including Minnesota and Kansas (Frase, 2006). And there is reason to believe the dispositional-departure model can succeed. Frase (2009) uncovered little evidence of race disparity in Minnesota sentencing decisions, although unexplained disparity was found in other parts of the state’s criminal justice system. Of particular relevance, after other legal and extralegal factors were taken into account, race has not been a significant predictor of an executed (rather than a stayed) prison sentence in Minnesota for the last 15 years (Frase, 2009).

Given the complexity of the federal Guidelines, there cannot be much appetite among judges and lawyers for yet another layer of presumptions, departures, and appellate review standards. In addition, to avoid constitutional problems, a system of dispositional departures would be required either to afford offenders a right to a jury trial with respect to facts that rebut a presumption of probation, or to specify that the presumption is merely advisory. Nonetheless, because the latest research on race disparity suggests that prison/probation decisions are an area of special concern, explicit regulation of the choice among sanctions deserves a look.

Restore the PROTECT Act, with Jury Fact Finding

A much more drastic option is to roll back the *Booker* remedial opinion and restore federal law as it stood under the PROTECT Act in 2003 and 2004, augmented by the right of the accused to have a jury find any facts required by the Sixth Amendment. That was precisely the remedy proposed by Justice Stevens in dissent in *Booker*, and some members of Congress introduced legislation to the same effect in the immediate aftermath of the

decision (Bowman, 2005). The theory is that tight constraints on judicial discretion, of the kind that prevailed under the PROTECT Act, can minimize the chances that implicit race bias on the part of judges will taint sentencing outcomes.

Ulmer et al. (2011) find no reason, in light of their research, to “globally constrain federal judges’ sentencing discretion as a remedy for disparity.” They suggest that the PROTECT period was an “anomaly” because “racial and gender sentence length disparities are less today, under advisory Guidelines, than they were [in the pre-*Koon* period in 1994 and 1995; see *Koon v. United States*, 1996] when the Guidelines were arguably their most rigid and constraining.” It is a mistake, however, to equate the pre-*Koon* and PROTECT Act periods. The PROTECT Act ushered in the “most rigid and constraining” period in federal sentencing history, and by a country mile. Whereas the pre-*Koon* standard of appellate review was unsettled, with most circuits adopting a three-tier approach with a mixture of “reasonableness” and *de novo* review (Lee, 1997), the PROTECT Act rendered the Guidelines more inflexible and unyielding than ever. The Act not only repudiated the abuse-of-discretion standard of review announced in *Koon* but also specified that an appellate review of sentences would be *de novo*, directed the Commission to reduce the incidence of downward departures, saddled judges with new reporting requirements for non-guideline sentences, and directed prosecutors to resist downward departures (Scott, 2010). The rate of judge-initiated, below-Guidelines sentences plunged to an estimated 5% after the PROTECT Act, lower than during the run-up to *Koon* (Stith, 2008: Figure 2; USSC, 2003: Figure 16; USSC, 2006).⁷ The Act was widely described as the most fundamental power shift in federal sentencing since the inauguration of the Guidelines (Barkow, 2005; Stith, 2008; Tiede, 2009). To test the effectiveness of “rigid and constraining” sentencing guidelines, one cannot do better than the PROTECT Act, and at least with respect to unexplained race disparity, the results are surprisingly encouraging.

I harbor no affection for PROTECT Act, which I have criticized previously for its hasty enactment, its reliance on flawed departure data, and its myriad intrusions into the province of judges, the Commission, and even prosecutors (Scott, 2010). The primary objective was not to rectify racial injustice but simply to decrease downward departures. Moreover, like other proposals laser-focused on judicial discretion, restoring the PROTECT Act regime would do nothing to alleviate race disparity in the decisions of police and prosecutors, or in the content of the Guidelines and statutory sentencing ranges. Still, the favorable marks that the new studies give to the PROTECT Act, which Ulmer et al. (2011) describe as a “truly unusual period in the history of the Guidelines,” provide at least modest support for the premise that mandatory guidelines with robust appellate review can reduce unexplained race disparity in sentencing decisions.

7. The Commission’s reported downward departure rates throughout these years are misleading because of the misclassification of fast-track sentences in border districts throughout the 1990s. Stith (2008) estimated revised rates for 2001–2007 based on the Commission’s research.

The Sessions Proposal

In a widely discussed new article, Judge William K. Sessions III (in press), a Clinton appointee and President Obama's choice to chair the Sentencing Commission, proposed a dramatic restructuring and simplification of the federal Sentencing Guidelines. Among other changes, Judge Sessions recommended streamlining individual guidelines, simplifying the sentencing table, widening punishment ranges to afford judges greater flexibility, and abrogating mandatory minimum sentences. Most important, for the current purposes, he proposed to replace the current advisory system with "presumptive" guidelines, subject to meaningful appellate review. That change is necessary, he argued, to accomplish Congress's goal of eliminating unwarranted sentencing disparity, including demographic disparity. Indeed, Judge Sessions cited the Commission's research as evidence of increasing race disparity in the wake of *Booker* and, thus, as support for his revisions (Sessions, in press).

The proposal by Sessions (in press) does not, however, call for a system of unyielding Guidelines with *de novo* appellate review, as under the PROTECT Act. To the contrary, Judge Sessions is critical of the Act and especially its directives to the Commission. Instead, he proposes to "resurrect" presumptive Guidelines and to install a new form of appellate review in which within-range sentences are essentially unreviewable, while review of departures would involve "relatively strict scrutiny." At the same time, the proposal by Sessions would widen sentencing ranges significantly to make the Guidelines simpler and more flexible. Thus, on a continuum between today's advisory Guidelines, on the one hand, and the strict and inflexible system of the PROTECT Act, on the other hand, the proposal by Sessions falls somewhere in between.

The Commission study and the alternative analysis by Ulmer et al. (2011) provide only mixed support for such a middle-ground proposal. The closest real-world analog to the system Judge Sessions (in press) envisions is the system of "presumptive" guidelines he seeks to partially resurrect, which prevailed from 1996 to the PROTECT Act in 2003. At best, however, that regime performed erratically. The Commission's research indicates that the levels of race disparity for Black and Hispanic men fluctuated considerably throughout that period, without apparent explanation (USSC, 2004, 2006). The best support for a Sessions-style proposal comes from the Commission's "refined" models, which report that levels of race disparity for Black male offenders were significantly lower in the immediate pre-PROTECT Act period than under the advisory Guidelines in the *Booker* and *Gall* periods (Ulmer et al., 2011: Figure 2). But Ulmer et al.'s analysis, both for incarceration decisions and sentence length, finds no significant difference between the pre-PROTECT and post-*Gall* periods for Black men. Indeed, setting aside immigration offenses, Ulmer et al. conclude that significantly *less* race disparity exists in the post-*Gall* period than in the pre-PROTECT period. Because much depends on the researchers' methodological choices, we have only mixed evidence that the proposal would reduce unexplained race disparity.

None of the Above

In the end, however, the best approach may be “none of the above.” The studies by USSC (2010) and Ulmer et al. (2011) underscore some fundamental challenges in identifying trends in race disparity in federal sentencing. First, as McDonald and Carlson (1993: 106) observed, “[a]ny findings that are sensitive to minor changes in model specifications such as these must be interpreted with caution.” Here, basic choices about how to model the sentencing decision, how to control for criminal history, and how to disentangle noncitizen effects from race effects seem to have serious consequences. Signs of increasing race disparity deserve continuing vigilance, but the competing analyses in these studies suggest that no robust trend has yet emerged under the advisory Guidelines.

Second, the Commission’s previous research suggests that considerable “noise” exists in race disparity trends. Between 1998 and 2002, for example, levels of unexplained race disparity in sentencing outcomes for Black and Hispanic men swung wildly from year to year, with no obvious explanation. Nonrace factors could be to blame for those “unstable” results, including omitted variable problems and changes in multicollinearity between race and other independent variables (USSC, 2004). It is encouraging that, according to both studies, the short-lived experiment with the PROTECT Act produced historically low levels of unexplained race disparity at sentencing for Black male offenders. Yet the Supreme Court brought the PROTECT Act era to an abrupt end after just 15 months, and we have no way of knowing whether the results would have persisted.

I do not mean to suggest that research into unexplained race disparity at sentencing is hopeless. Both the results and the methodological discussion in these studies make valuable contributions to debates over the future of federal sentencing. To move policy makers, however, evidence of a trend in race disparity will have to be robust and sustained. So far, the race disparity research, standing alone, is insufficient to justify sweeping changes.

Race Disparity and Interjudge Disparity

Of course, research on race disparity does not stand alone. Another primary objective of the Sentencing Reform Act was to curtail *interjudge* disparity, driven not by legitimate differences between offenses and offenders but by the preferences, punishment philosophies, and idiosyncrasies of individual judges (Breyer, 1988). Studies in the late 1990s found that the Guidelines had in fact succeeded in decreasing that form of unwarranted disparity (Anderson, Kling, and Stith, 1999; Hofer, Blackwell, and Ruback, 1999). But preliminary empirical work focused on one district court suggests a sharp increase in interjudge disparity in the wake of *Booker* and *Gall* (Scott, 2010).

If subsequent research on interjudge disparity were to detect the same trend nationwide, policy makers might consider the same options implicated by research on race disparity: the Sessions proposal, a modified PROTECT Act system, or more targeted changes. Today, evidence of a surge in unexplained race disparity is too equivocal to justify sweeping changes

in sentencing law. But as our understanding of post-*Booker* sentencing improves, it could form a crucial part of a broader case for changes to the advisory Guidelines system.

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Ryan W. Scott is an Associate Professor at Indiana University Maurer School of Law in Bloomington, Indiana.