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Do Mandatory Minimums Increase Racial Disparities in Federal Criminal Sentencing?

Abstract

Black males received sentences about twenty percent longer than similarly situated white males from 2012 to 2016. Some of this inequality may be introduced by mandatory minimum sentences. Charges carrying a mandatory minimum sentence are brought against Black defendants at higher rates than white defendants. It has been argued that these sentences introduce bias in two ways: legislatively (the types of crimes that carry a mandatory minimum) and in the way these sentences are put into practice (increasing prosecutorial discretion). This brief explores whether mandatory minimum sentences increase racial inequality in criminal sentencing.

Keywords

Mandatory minimums, race, racial disparity, criminal sentencing, prosecutorial discretion

Cover Page Footnote

I would like to thank Professor Geoffrey Sanzenbacher for his guidance and comments.

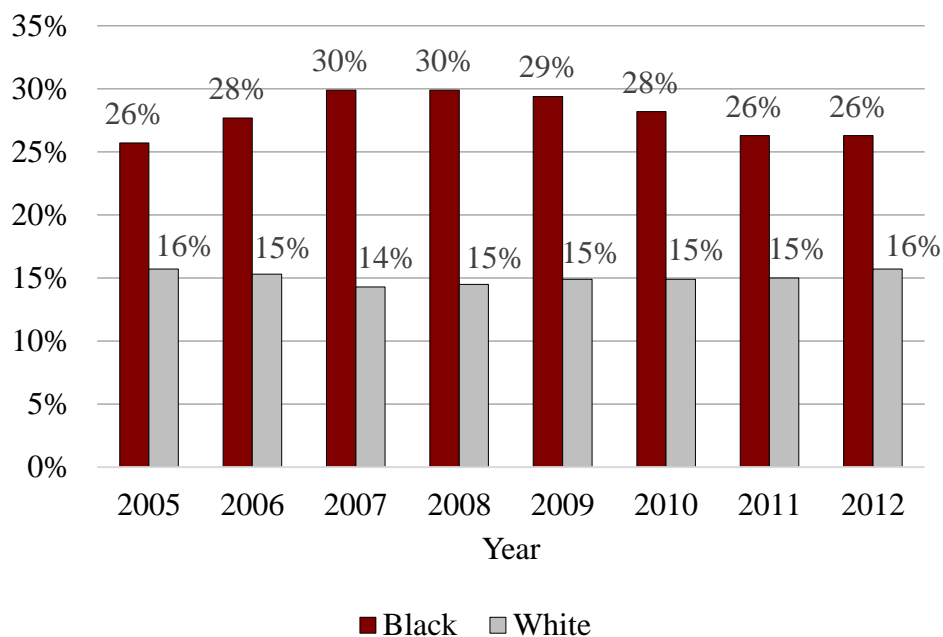
Introduction

The United States legal system seeks equal outcomes for equal offenses. If there are either unequal outcomes for equal offenses or equal outcomes for unequal offenses, justice has not been achieved. Especially problematic is if either of these scenarios arises because of the race of the defendant, a category against which it is constitutionally prohibited to discriminate. The justice system is not meeting its goals if a Black person is likely to serve a longer sentence for the same criminal conduct as a white person, all other factors equal. Yet, studies have demonstrated that this disparity is, in fact, present. According to the United States Sentencing Commission (USSC), Black males received sentences about twenty percent longer than similarly situated white males from 2012 to 2016.¹ Beyond violating lofty ideals of justice, this disparity concretely contributes to the mass incarceration of American men of color, which in turn reinforces racial economic inequality in the United States by “remov[ing] through incarceration of a large segment of earners.”²

It is unclear exactly where in the judicial process this inequality is introduced. The conscious and unconscious biases of judges, prosecutors, and juries are all possibilities, and are all likely culpable to some degree. Recent literature, however, has pointed a particular finger at mandatory minimum sentences. As illustrated in Figure 1, charges carrying a mandatory minimum sentence are brought against Black defendants at higher rates than white defendants. It has been argued that these sentences introduce bias in two ways. First, legislatively – the types of crimes that carry a mandatory minimum are disproportionately committed by Black people. Second, in the way these sentences are put into practice – giving biased prosecutors the flexibility to disproportionately choose these sentences for Black people. This paper will explore whether mandatory minimum sentences increase racial inequality in criminal sentencing.

¹ USSC, 2017. “Demographic Differences in Sentencing: An Update to the 2012 *Booker* Report.”

² Pettit and Gutierrez, 2018. “Mass Incarceration and Racial Inequality.”

Figure 1 *Imposition of a Mandatory Minimum 2005-2012*

Source: *Bureau of Justice Statistics, 2015*

The discussion proceeds as follows. The first section will provide background on how mandatory minimum sentences figure into the judicial process, including relevant legislation and legal precedent. The second section presents empirical evidence for the two ways that mandatory minimum sentencing increases racial disparity in federal sentencing. Part A of the second section will present evidence that the types of charges that tend to carry a minimum sentence are more commonly brought against racial minorities. Part B of this section will consider the literature exploring how prosecutors use mandatory minimums in a way that tends to increase racial disparity. The third section concludes that racial inequality in federal sentencing is affected by mandatory minimums in two ways – legislatively and in the way they are used in practice.

I. Background

United States Judicial System

The range of sentence lengths for a given crime are laid out in the United States Criminal Code. The range is often very broad (for example, zero to thirty years). Many crimes have ranges that start with zero, but some do not.³ Crimes with no

³ There has not been a federal parole system since 1987 (See the Sentencing Reform Act of 1984 Pub. L. No. 98-473, 98 Stat. 2019 (1987))

possibility for a zero sentence are said to carry a mandatory minimum sentence.⁴ People convicted of a charge that carries a mandatory minimum tend to serve longer sentences than of those who were not—an average of 110 versus 28 months.⁵ However, there is a lot of overlap in the Criminal Code, meaning that the same criminal behavior could be pursued as various charges. Prosecutors decide what charge to bring. Sometimes they get to decide between one that carries a mandatory minimum and one that does not. For example, a prosecutor might have the discretion to decide whether to pursue a mandatory minimum triggered by a firearms violation if there was a gun in the car of, but not on the person of, the defendant during a crime. Sometimes prosecutors have no choice in bringing a charge that carries a mandatory minimum sentence.

War on Drugs

A wide variety of serious charges have long carried statutory mandatory minimums, such as child pornography, murder, and kidnapping.⁶ However, when crime rates in the eighties rose and several high-profile drug overdoses made the news in quick succession, Congress was motivated to pass sweeping crime reform legislation that focused especially on drug trafficking. The Anti-Drug Abuse Act of 1986 established mandatory minimum sentences for a slew of federal drug charges, often very long sentences for relatively low levels of possession. Table 1 shows some of the sentences required by that act for possession of various amounts of various drugs.

⁴ Relief from a mandatory minimum can be obtained two ways: the safety valve, which allows judges to sentence guilty defendants with a low criminal record to a term beneath the minimum, and “substantial assistance”---information that helps them prosecute someone else. See 18 USC §3553 (f)

⁵ USSC, 2017. “Overview of Mandatory Minimum Penalties in the Federal Criminal Justice System.”

⁶ Azhari, 2018. “Mandatory Minimums: What Are They and Which Federal Crimes Have Them?”

Table 1 *Mandatory Sentences for Federal Drug Charges*

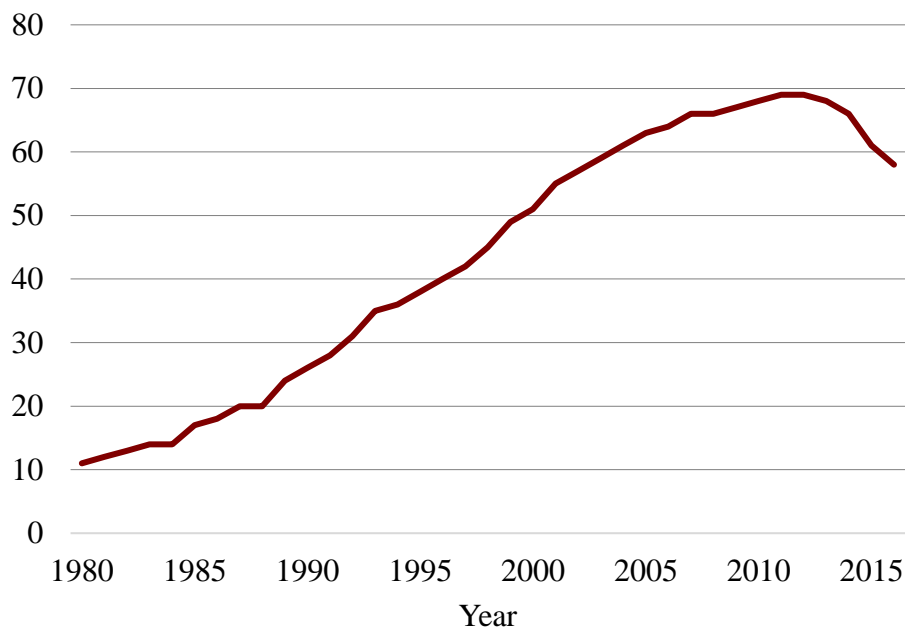
| Drug Type | Amount | Min. Sentence |
|-----------------------|---------|---------------|
| Crack cocaine | 5 g | 5 years |
| | 50 g | 10 years |
| Powder cocaine | 500 g | 5 years |
| | 5 kg | 10 years |
| Heroin | 1 kg | 10 years |
| Fentanyl ⁷ | 40 g | 5 years |
| | 400 g | 10 years |
| Methamphetamine | 5 g | 5 years |
| | 50 g | 10 years |
| Marijuana | 100 kg | 5 years |
| | 1000 kg | 10 years |

Source: 21 U.S. Code § 841 A

Many states followed with stricter drug crime enforcement legislation of their own, many including long mandatory minimums. The result was a sharp increase in incarceration rates. Since 1987, the number of Americans incarcerated in federal prisons has gone from 20 per 100,000 people to 58 in 2016, as illustrated in Figure 2. The growth rate was already positive, but its slope increased during this period before dropping off more recently.

⁷ Amount here refers to the amount of any substance than contains trace amounts of fentanyl, not total amount of fentanyl

Figure 2 U.S. Federal Prison Population per 100,000, 1980-2016



Source: Bureau of Justice Statistics

United States Sentencing Guidelines

Like prosecutors, judges have some discretion, although the United States Sentencing Guidelines (USSG) advise judges where a sentence should fall within the statutory range, based on the fact pattern of the crime and background information, like the criminal record of the defendant.⁸ When the guidelines were enacted in 1987, the intent was to limit judicial discretion, hopefully making sentences more unbiased and uniform. In most cases, judges were required to adhere to the sentence calculated using the guidelines formula.

United States v. Booker

However, in the 2005 case *Booker v. United States*, following the precedent of *Blakely v. Washington* of the previous year, the Supreme Court found that using criteria which was neither admitted by the defendant nor proved before a jury to determine length of sentence violated his or her sixth amendment right to due process. Faced with the options of 1) making every factor considered by the USSG

⁸ This fact pattern is subject to judicial ruling, but judges usually defer to what prosecutors bring them.

subject to proof before a jury, 2) striking large portions of the guidelines, or 3) making the guidelines entirely advisory, the majority opinion decided on the last option.⁹ A succession of cases quickly followed that confirmed judges could award sentences inside and outside the guideline range, provided relevant factors were considered.^{10 11 12} This decision did not, however, make statutory minimums non-binding.

II. Empirical

This section look at the existing empirical evidence that mandatory minimum sentences increase racial inequality in criminal sentencing via the two aforementioned mechanisms: type of offense and prosecutorial discretion.

IIA. Type of Offense

The breakdown of the demographics of the national prison populations illustrate that this explosion in numbers has been driven by the war on drugs. About half of current federal inmates were convicted of a drug charge, and three quarters of those were subject to a mandatory minimum sentence.¹³ Much of the debate surrounding the effect of minimum sentences on inequality is about these types of charges. Racial minorities are disproportionately likely to be arrested on a drug-related charge compared to their white counterparts. In 2016, 41 percent of drug offenders in federal prison were Hispanic, followed by Black offenders at 35 percent. White offenders, meanwhile, made up only 21 percent.¹⁴ Figure 3 breaks down drug trafficking offenders for various substances by race. Bear in mind that non-Hispanic whites make up about 60% of the U.S. population, compared to 13% Black and 18% Hispanic or Latino.¹⁵

⁹ *United States v. Booker*, 543 U.S. 220 (2005).

¹⁰ *Kimbrough v. United States*, 552 U.S. 85 (2007).

¹¹ *Gall v. United States*, 552 U.S. 38 (2007).

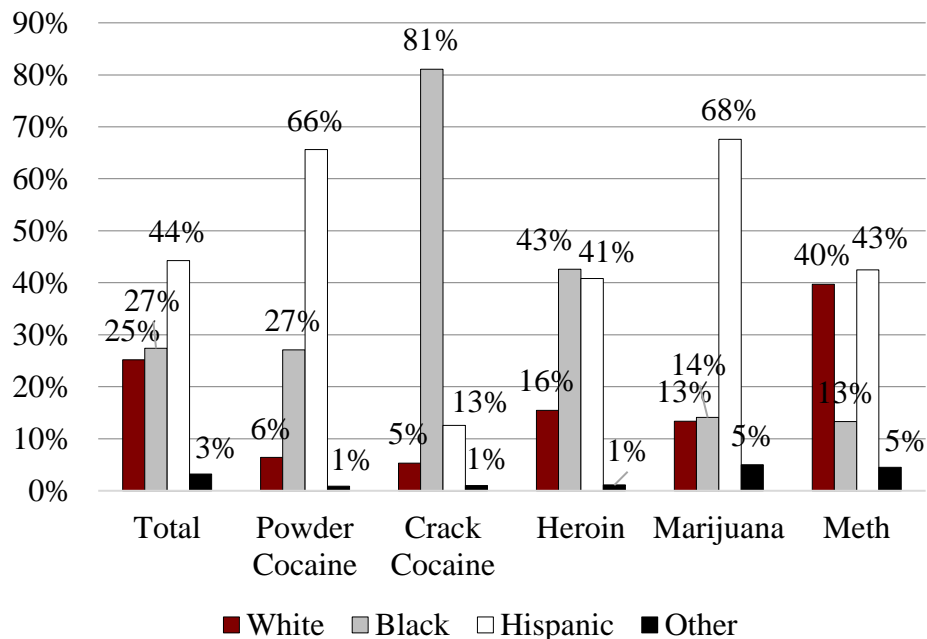
¹² *Rita v. United States*, 551 U.S. 338 (2007).

¹³ USSC, 2017. "Mandatory Minimum Penalties for Drug Offenses in the Federal System"

¹⁴ *Ibid.*

¹⁵ U.S. Census, 2019. "Quick Facts."

Figure 3 Rate of Drug Trafficking Offenders by Drug Type and Race, FY 2019



Source: U.S. Sentencing Commission, 2019 Datafile, USSCFY19.

A minimum sentence is also often statutorily mandatory for repeat offenders.¹⁶ This disproportionately affects people of color because rates of recidivism are higher among racial minorities. According to a study by the Bureau of Justice Statistics, “During the first year after release, 40% of white prisoners were arrested for the first time, compared to 47% of Hispanic and 46% of Black prisoners.”¹⁷ Being more likely to have a criminal record means racial minorities are more likely to have this type of minimum sentence triggered.

IIB. Prosecutorial Discretion

Moreover, within years of these policies being put in effect, concerns were being raised about their disproportionate effect on minorities, even if one controls for the type of offense. As early as 1991, the USSC testified before congress that:

“[t]he disparate application of mandatory minimum sentences in cases in which available data strongly suggest that a mandatory minimum is

¹⁶ This type of law gained attention for its effect on racial disparity in prison populations at the state level, too, after several states passed a so-called “three strikes” law, wherein a mandatory minimum is triggered after a third offense.

¹⁷ Alper, Durose, and Markman, 2018. “Update on Prisoner Recidivism: A 9-Year Follow-up Period (2005-2014).”

applicable appears to be related to the race of the defendant, where whites are more likely than non-whites to be sentenced below the applicable mandatory minimum.”¹⁸

This disparity has not gone away. The same commission claimed that “[i]n fiscal year 2016, Black and White offenders convicted of a drug offense carrying a mandatory minimum remained subject to the mandatory minimum at different rates (64.6% vs. 50.8%).”¹⁹

The USSC attributes this increase in racial sentencing disparity to the increased discretion afforded to judges under *Booker*. They believe that the guidelines need to be binding in order to sufficiently do their job of making federal sentences proportional and uniform. In 2012 they released an exhaustive report on the effect of *Booker* and other such cases, and found that increased judicial discretion was associated with increased racial sentencing inequality.

Other research, however, has suggested that judicial discretion is not the root of the problem. A 2012 study compared cases where the fact pattern suggested a mandatory minimum would be binding (involving a firearm and/or a defendant with a high-scoring criminal record) with those where it was avoidable. Looking only at offenders who were already eligible for a mandatory sentence controls for the fact that mandatory minimums target crimes associated with minorities. They found that the racial gap in sentence length was greater where the minimum was binding. Thus, the authors concluded that racial disparities in sentencing were either diminished or unaffected by judicial discretion. Where judges had more range in decision-making, race was a worse predictor of a defendant’s fate (Fischman and Schanzenbach, 2007).

They considered instead that judges were actually a mitigating factor on racial disparity coming from another source, prosecutors, which other research corroborates. Before *Booker*, prosecutors were able to exercise considerable control over the length of a sentence. Presenting a certain fact pattern, which the judge was likely to defer to, would yield a specific result out of the guideline’s formula. After *Booker*, judicial discretion increased at the expense of prosecutorial power and, accordingly, their leverage in eliciting pleas. Many academics have hypothesized that this motivated prosecutors to lean more heavily on one of their remaining tools: mandatory minimums. By bringing a charge that carries a minimum sentence over one that does not---where they have both options---prosecutors regain some of their bargaining power.

If prosecutors use this tactic in a racially different way, bias could be introduced before a judge is involved. Ulmer, Kurlychek, and Kramer (2007) used multilevel analysis of Pennsylvania criminal cases to examine the factors that figure

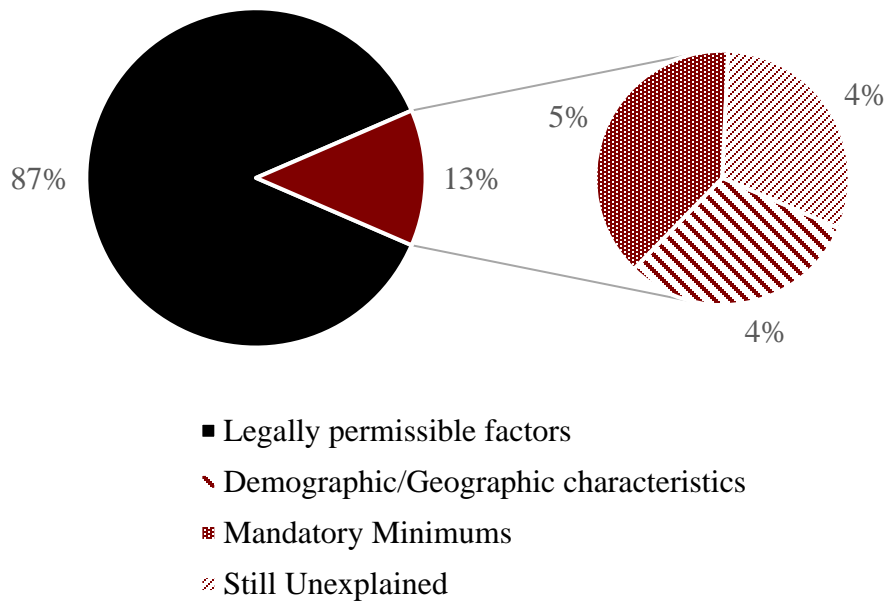
¹⁸ USSC, 1991. “Mandatory Minimum Penalties in the Federal Criminal Justice System.”

¹⁹ USSC, 2017. “Federal Drug Mandatory Minimum Penalties.”

into prosecutorial decision of bringing a minimum-carrying charge. Pennsylvania is a uniquely good case study because mandatory minimums are not automatically invoked; prosecutors choose whether to move for their application, an act which binds the judge (if the defendant is convicted) to a sentence that is usually higher than she otherwise would have handed down. The authors found that, with similar case facts, Hispanic males were more likely to receive a mandatory minimum, and that the larger the percent of a county's population was Black, the greater the white-Black disparity in likelihood of receiving a mandatory minimum (Ulmer et al., 2007).

Another paper found stronger results at the federal level. The authors used arrest data from the US Marshals Service as a proxy for criminal conduct rather than initial charging data in order to better isolate the role of prosecutors, since an initial charge might already contain bias. As illustrated in Figure 4, they found that about half of the unexplained racial sentencing disparity can be accounted for by the prosecutor's decision to bring a charge that carries a mandatory minimum, *ceteris paribus* (Starr and Rehavi, 2014). The authors of the *Booker* Report, however, countered that Starr and Rehavi underestimated the role that judges play in this process. Among other things, they point out that judges are required to consider relevant conduct in addition to presumptive charges, to account for the possibility of prosecutors not including potentially mitigating factors. Judges have nominal say in almost every step of the process (Schmitt et al., 2013).

Figure 4 *Explanations for Racial Disparity in Federal Sentencing*



Source: Starr and Rehavi 2014

Reimer and Wayne (2011) provide more specific insight into how prosecutors' use of this mechanism actually works and why it tends to exacerbate racial disparities. Charging many loosely affiliated defendants as co-conspirators opens a variety of ways prosecutors can use mandatory minimums to pile onto a charge or solicit a plea. For a street-level drug dealer, they can calculate the amount of drugs as the total amount found on all persons involved in the same network, regardless of how much an individual defendant held. Mandatory minimums triggered by firearms and gang affiliation also extend to all parties. Someone who has already pled and served their time at the state level can be recharged for the same crime at the federal level if prosecutors allege they are part of a ring. The authors are most concerned, however, by the 'substantial assistance' exception to mandatory minimums. Since it is only possible where offered by prosecution, the authors claim it incentivizes defense counsel to encourage pleading as early as possible, before all available plea deals are gone, with no time to consider building a strong case. This incentive remains even for the counsel of innocent parties, because they cannot risk exposing their client to the substantial mandatory time in prison they would face if convicted (Reimer and Wayne 2011).

III. Conclusion

As the United States Sentencing Commission testified before Congress in 1991,

“Under the guidelines, offenders classified as similar receive similar sentences; under mandatory minimums, offenders seemingly not similar nonetheless receive similar sentences. It thus appears that an unintended effect of mandatory minimums is unwarranted sentencing uniformity.”²⁰

To be sure, judges are not immune from bias. Reducing drug trafficking is important. Prior records are a relevant factor to consider in sentencing. But the evidence seems to indicate that allowing judges the option to sometimes conclude that no time or a brief time in jail is the just outcome will decrease undue racial inequality in prisons. If mandatory minimum sentences are to be legislated, their applicability should be narrowly defined, and their effect carefully monitored, to ensure that they are not arming the justice system with more weapons against some racial groups than others.

References

Alper, Mariel, Matthew R. Durose, and Joshua Markman. 2018. Bureau of Justice Statistics. “Update on Prisoner Recidivism: A 9-Year Follow-up Period (2005-2014).” Washington, DC.

²⁰ USSC, 1991. “Mandatory Minimum Penalties in the Federal Criminal Justice System.”

- Azhari, Sami. "Mandatory Minimums: What Are They and What Federal Crimes Have Them?" *Azhari LLC Blog*. 27 September 2018. Web.
- Carson, E. Ann and Joseph Mulako-Wangota. Bureau of Justice Statistics. "Imprisonment rates of total jurisdiction population." Generated using the Corrections Statistical Analysis Tool (CSAT) – Prisoners at www.bjs.gov. 8 May 2020.
- Fischman, Joshua B. and Max M. Schanzenbach. "Racial Disparities under the Federal Sentencing Guidelines: The Role of Judicial Discretion and Mandatory Minimums." *Journal of Empirical Legal Studies*, no. 4 (2012): 764.
- Gall v. United States, 552 U.S. 38 (2007)
- Kimbrough v. United States, 552 U.S. 85 (2007)
- Pettit, Becky and Carmen Gutierrez. "Mass Incarceration and Racial Inequality." *American Journal of Economics and Sociology*, 77: 1153-1182. (2018) <https://doi.org/10.1111/ajes.12241>
- Schmitt, Glenn R., Louis Reedt, and Kevin Blackwell. "Why Judges Matter at Sentencing: A Reply to Starr and Rehavi." 123 *Yale L.J. Online* 251 (2013), <http://yalelawjournal.org/forum/why-judges-matter-at-sentencing-a-reply-to-starr-and-rehavi>.
- Starr, Sonja B., and M. Marit Rehavi. "Mandatory Sentencing and Racial Disparity: Assessing the Role of Prosecutors and the Effects of Booker." *The Yale Law Journal* 123, no. 1 (2013): 2-80.
- Rehavi, M. Marit, and Sonja B. Starr. "Racial Disparity in Federal Criminal Sentences." *Journal of Political Economy* 122, no. 6 (2014): 1320-354.
- Reimer, Norman L. and Lisa M. Wayne, "From the Practitioners' Perch: How Mandatory Minimum Sentences and the Prosecution's Unfettered Control over Sentence Reductions for Cooperation Subvert Justice and Exacerbate Racial Disparity," *University of Pennsylvania Law Review PENNumbra* 160 (2011): 159-178
- Rhodes, William, Ryan Kling, Jeremy Luallen, and Christina Dyou, *Abt Associates*. Bureau of Justice Statistics. "Federal Sentencing Disparity: 2005-2012." Report No. WP-2015:01. Washington, DC.
- Rita v. United States, 551 U.S. 338 (2007)
- Ulmer, Jeffery T, Megan C Kurlychek, and John H. Kramer. "Prosecutorial Discretion and the Imposition of Mandatory Minimum Sentences." *Journal of Research in Crime and Delinquency* 44, no. 4 (2007): 427-58.

United States Census, 2019. *Quick Facts*. Washington, DC.

United States Sentencing Commission. 1991. *Report to the Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System*. Washington, DC.

_____. 2017. *Overview of Mandatory Minimum Penalties in the Federal Criminal Justice System*. Washington, DC.

_____. 2017. *Demographic Differences in Sentencing: An Update to the 2012 Booker Report*. Washington, DC.

_____. 2017. *Mandatory Minimum Penalties for Drug Offenses in the Federal System*. Washington, DC.

United States v. Booker, 543 U.S. 220 (2005)