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Douglas Smith

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NARROWING RACIAL DISPARITIES IN SENTENCING THROUGH A SYSTEM OF MANDATORY DOWNWARD DEPARTURES

*By Douglas Smith**

I met Allen in Danville, Virginia in the spring of 1993 when I was the Safety and Security Manager for the Danville Redevelopment and Housing Authority. Allen was 16 and lived in a public housing development with his mother and sister. A model teenager in many respects and an anomaly among those I often encountered in public housing. Allen was highly motivated, attended school regularly, and had aspirations of attending college. Most importantly, he avoided all of the pitfalls that doomed many of his friends: drug and alcohol use, premature parenthood, and contact with the criminal justice system. Then on October 16, 1994, after succumbing to peer pressure and in a semi-drunken haze, Allen participated in the armed robbery of a Pizza Hut. The police caught up with him after the robbery at the local hospital, where he was being treated for a gunshot wound to his leg, which he sustained accidentally after abandoning the robbery.[1] He initially lied to the police about the circumstances of injury. However, the next day, he voluntarily admitted being involved in the robbery. After taking his statement, the police arrested and charged him with armed robbery and use of a firearm in the commission of a felony.

Allen decided to plead guilty to the charges. He had many mitigating factors in his favor including his regular high school attendance, his cooperation with the police in identifying his accomplices, the fact that no one was injured during the robbery, his clean adult record, and testimony received by the court from family members, one of his high school teachers, and myself. Yet, the judge sentenced Allen to 40 years for armed robbery with ten years suspended, and three years for the use of a firearm in the commission of a felony, all to be served consecutively. His sentence was nearly *four and one half times* the national average maximum state court sentence for robbery and virtually *double* the national average maximum state court sentence for murder.[2] The only "positive" was that Allen was eligible for parole, having committed his offense less than two months before Virginia abolished parole.

As of March 2, 2005, Allen had served ten years in prison, more than double the average time served by individuals with a prior felony record who committed robbery before Virginia's abolition of parole,[3] and nearly three years more than the average number of years served by those without a prior felony record who committed robbery after the abolition of parole.[4] If Allen remained imprisoned until his mandatory release date of 2012, he will have served 17 years, a sentence virtually identical to the average post-abolition robbery sentence for those with the most serious felony records.[5]

The shocking reality is that Allen's sentence was well within the range of punishment available for his crimes.[6] Most state courts hold that prison sentences within the legislatively prescribed range of a valid statute do not constitute cruel and unusual punishment under the Eighth Amendment.[7] Moreover, in Virginia, a sentence that does not exceed the maximum sentencing guidelines prescribed by statute is not reversible on grounds of abuse of discretion.[8] Thus, the validity of Allen's sentence seemed indisputable, albeit harsh for a first-time offender with such strong mitigating factors. Indeed, it is difficult to imagine the sentence Allen would have received if he had a prior felony record. The court reporter's notes suggest that the judge weighed societal intolerance of robbery, the need to protect victims, the fact that Allen was armed and masked, and the fact that shots were fired during the robbery in determining a sentence. While these are legitimate and reasonable concerns, news reports on arguably more heinous crimes[9] coupled with my own observations of the racial dynamic in Danville, suggested that race may have affected the judge's decision.

Without assuming conscious or unconscious racial bias, this essay examines racial sentencing disparities between African-American and White-American offenders at the state and federal levels,[10] and advocates a legislative solution to ensure that mitigating factors are not arbitrarily disregarded by judges. This proposal will address the U.S. Supreme Court's assertion that "[a]pparent disparities in sentencing are an inevitable part of our criminal justice system."[11] Removing judicial discretion in downward departures may promote racial parity in criminal sentencing.

This article first provides a brief historical overview of racial sentencing disparities, discussing indeterminate and determinate sentencing. It then briefly discusses the futility of pursuing a judicial solution, focusing on key decisions by the Supreme Court in *Washington v. Davis*, *McCleskey v. Kemp*, and *United States v. Armstrong*, and will analyze two radical and unrealistic proposals for reducing racial sentencing disparities. The article then proposes mandatory downward departures, considering standardized offender characteristics and mitigating factors, including the pros and cons of the proposal. Finally, it concludes that society should use non-race based solutions such as mandatory downward departures in sentencing to create parity in sentencing between White Americans and African Americans and restore confidence and fairness to the criminal justice system.

RADICAL DISPARITIES IN THE CRIMINAL JUSTICE SYSTEM

As a historical matter, African Americans have routinely been singled out for harsher punishment than White Americans. During slavery, states enacted separate statutes known as "Slave Codes" to punish slaves who committed specified offenses.[12] Punishment under the Slave Codes for even minor transgressions

was often brutal and inhumane.[13] Meanwhile, these same codes completely exonerated slave masters who killed slaves in the course of punishing them for "resisting."[14]

African Americans fared little better under the Black Codes of 1865, which controlled the movement and activities of newly freed slaves.[15] The Black Codes penalized African Americans for "offenses" similar to those for which they faced punishment under slavery.[16] While the Black Codes were eventually struck down by Congress after the Fourteenth and Fifteenth Amendments were passed,[17] and African Americans gained certain rights and freedoms during Reconstruction, these victories were eventually whittled away by Jim Crow laws in the wake of *Plessy v. Ferguson*.[18] Under Jim Crow laws, African Americans continued to face differential treatment and punishment under state laws.[19]

Above and beyond Jim Crow laws, African-American offenders were subject to the vagaries of indeterminate sentencing, a punishment philosophy which emerged during Reconstruction, eventually becoming the predominant method until the 1960s.[20] Under indeterminate sentencing schemes, punishment is individually tailored to an offender's unique situation or circumstances. The trial judge has complete discretion to determine a sentence that falls within legislatively-determined minimum and maximum terms applicable to each offense.[21] The driving philosophical force of indeterminate sentencing is based on the theory that crime is a "moral disease" and punishment's goal is "reformation of criminals...not the infliction of vindictive suffering."[22] The ultimate length of an offender's sentence is determined by a parole board based on its view of whether or not the offender has been rehabilitated after a period of incarceration.[23]

His sentence was nearly four and one half times the national average for robbery and virtually double the national average maximum state court sentence for murder.

While indeterminate sentencing schemes enjoyed early support[24] and appeared arguably beneficial to offenders in theory, history suggests that, in practice, due to their highly discretionary nature, African-American offenders were often victims of racial bias under such schemes. Indeed, as early as 1933, researchers noted "striking differences and wide disparity in sentence type and length" under indeterminate sentencing schemes and suggested that "racial discrimination [manifested] itself in the form of more severe sentences for minority defendants than for equally situated white offenders."[25] The futility of addressing these disparities was increased by the fact that such sentences were generally not reviewable and judges were not required to explain their rationale.[26] As parole was used to alleviate prison overcrowding rather than for rehabilitation,[27] doubts about the ad hoc nature of parole board decisions, the potential for misleading victims, and high recidivism rates prompted concerns about discrimination in the parole process.[28] By the early 1970s, mounting research suggested rehabilitation had failed,[29] and growing concerns about sentencing disparities, prison overcrowding, and the perception that criminals were being coddled signaled the demise of indeterminate sentencing.[30]

In the mid-1970s, as support for indeterminate sentencing declined, scholars and researchers advocated a less discretionary form of sentencing known as determinate or presumptive sentencing, in which similarly situated offenders receive similar sentences.[31] At the heart of the proposal was a mandate to create a set of guidelines to establish specified periods of incarceration for corresponding levels of seriousness.[32] Judges would then have limited discretion to consider aggravating or mitigating circumstances which would raise or lower the presumptive sentence respectively.[33] Under the proposal, parole would be phased out.[34] While early determinate sentencing proposals did not completely rule out rehabilitation as a goal, determinate sentencing has often been characterized as eschewing the rehabilitation of offenders in favor of pursuing retribution or "just desserts" as its main goal.[35]

In 1984 Congress established the U.S. Sentencing Commission to develop sentencing guidelines similar to those originally proposed by advocates of reduced judicial discretion.[36] The Commission was authorized to consider the relevance of "an offender's age, education, vocational skills, mental and emotional condition, physical condition (including drug dependence, previous employment record, family and community ties, role in the offense, criminal history, and dependence on criminal activity for a livelihood."[37] The final draft guidelines retained some original features but fell short in other respects in that these guidelines for criminal offense levels failed to account for the full panoply of potentially relevant offender characteristics originally suggested by Congress in the enabling legislation.[38] Also absent was a clear purpose for the sanctions, despite the clear legislative history in which Congress sought to "require the judge to consider the four purposes of sentencing [rehabilitation, retribution, incapacitation, and restitution] before imposing a particular sentence."[39]

State reforms of earlier indeterminate sentencing schemes preceded federal reforms, albeit for many of the same reasons which drove federal reforms.[40] Today, approximately 25 states have some form of either guideline-based sentencing, presumptive sentencing, or a hybrid of the two.[41] Many states also established mandatory minimum penalties for certain offenses that a judge was required to impose upon conviction.[42]

However, the statistics gathered after most federal and state sentencing reforms were implemented are startling.[43] A Bureau of Justice Statistics study on trends in discretionary and mandatory parole reported that, on average, African Americans remain incarcerated three months longer than White Americans in discretionary parole systems and seven months longer than White Americans in mandatory state parole systems. In studying the issue, several states invariably agreed that racial bias has at least

some influence on the decision-making process in state criminal justice systems.[44]

Though much of the literature acknowledges the presence of at least some racial bias at all levels of the criminal justice system,[45] from arrest to incarceration, many other factors are cited for their "superior explanatory power" - in particular, African-American patterns of offending and prior criminal records of African-American offenders.[46] Furthermore, some scholars assert that society need not be concerned about racial disparities in the criminal justice system if the system appears, for the most part, objective and unbiased.[47] Despite these arguments, there are a number of valid reasons why racial sentencing disparities warrant concern, chief of which is that most researchers even those that conclude that legally relevant sentencing factors are the chief reason for racial sentencing disparities, refuse to dismiss the possibility that racial discrimination does play a role in sentencing.[48]

Why "Possible" Solutions Are Not "Probable" Solutions

Pursuing a constitutional remedy for racial sentencing disparities, specifically an Equal Protection challenge, would be an exercise in futility because the court has typically upheld government action with a racially disparate impact.[49] *McCleskey* and *Armstrong* demonstrate that, notwithstanding clear evidence of racial bias, claims that reach the threshold for an equal protection violation based on disparate impacts are "available in theory, but unattainable in practice."[50]

Additionally, two methods proposed to cope with racial sentencing disparities are affirmative action and racially-based jury nullification. Both remedies are targeted primarily at non-violent drug offenders engaged in "victimless crimes," which seek to ameliorate concerns about releasing violent minority offenders into the community and providing the same opportunities for community-based treatment, in lieu of incarceration, as are afforded White drug offenders.[51] Butler justifies affirmative action using a modified version of the "diversity" rationale he calls "parity diversity,"[52] which presumes that disproportionate African-American criminality results from "the distorting influence of [W]hite supremacy on the political and legal processes by which 'criminals' are named and selected for punishment"[53] In order to combat this influence, the criminal justice system must artificially limit the number of non-violent African-American drug offenders that come within its purview, regardless of their guilt or innocence, to achieve the parity that would be had in a truly color-blind system.

Butler's racially-based jury nullification thesis rests on a similar rationale. To combat the influence of White supremacy in the criminal justice system, African-Americans may be morally obligated to engage in jury nullification (i.e. the acquittal of some non-violent African-American drug offenders without regard to their culpability).[54] Butler seeks "subversion of American criminal justice" by using jury nullification by African Americans "to cause retrial after retrial, until, finally, the United States 'retries' its idea of justice."[55]

Butler's arguments are persuasive but idealistic at best.[56] Even if the U.S. Supreme Court's position changes on affirmative action, Butler's proposal would be limited if Justice O'Connor's proposed 25 year sunset on affirmative action prevails.[57] Butler attempts to skirt the substantive infirmities of his proposal by couching his requirement for proportionality of arrest and imprisonment of African Americans in terms that suggest "goals," not quotas. Even if the proposal were to survive the political process, it would not likely survive strict scrutiny.[58] Butler's racially-based jury nullification proposal suffers on two accounts. The proposal is intentionally radical and subversive[59] and its implementation strategy might give prosecutors a sufficiently race-neutral reason to use preemptory strikes against African-American jurors.[60]

The Case For Mandatory Downward Departures In Sentencing

A standardized system of mandatory downward departures in sentencing synthesizes two seeming incompatible ideas - namely, reduced judicial discretion and the consideration of offender characteristics and mitigating factors. Under this proposal, relevant mitigating factors and offender characteristics would be numerically standardized for judicial consultation, based on their empirical relevance in explaining criminal behavior and how often they are cited by judges in downward departures from sentencing.[61] Judges would consult the standardized form at sentencing to assess the factors and characteristics in a particular case. If the factors were present, the judge would be required to reduce the sentence, according to the applicable sentencing guidelines, by the factors' weight. Judges would retain minimal discretion to depart further downward based on factors not enumerated in the form, but would be required to provide a written explanation for this departure. Judges would be prevented from considering the race of the offender.

"A mandatory downward departure system reflects a modest attempt to preserve certain elements of both determinate and indeterminate schemes in an objective package."

This proposal would have several benefits. First, by defining mandatory factors for consideration and virtually eliminating judicial discretion, a mandatory downward departure system might significantly reduce the effect of racial bias at sentencing[62] and ease the concern that judges will "use departures to impose sentences according to their own ideals."[63] By the same token, using those mitigating factors most often cited by judges to justify downward departures ensures that a mandatory departure system reflects sentencing considerations judges deem most per-

tinent.

Second, to the extent that the selected mitigating factors are disproportionately present in cases involving African-American offenders, mandatory departures based on these factors may close the racial disparity gap between African Americans and White Americans without relying on race. Downward departures as a means of closing this racial gap would be far less vulnerable to a constitutional challenge, would potentially reduce sentencing disparities with respect to other minorities, and could foster increased confidence in the criminal justice system among African Americans.

Third, a mandatory downward departure system comports well with the rough consensus among legislators and commentators that mitigating factors and offender characteristics should be considered at sentencing.[64] Thus, the proposal would ensure the consistency which indeterminate sentencing schemes lack. Lastly, to the extent that sentences are ultimately reduced across the board, a mandatory downward departure system might help to reduce prison overcrowding and correctional costs, a growing concern in many states with determinate sentencing.[65] Moreover, the system continues to stress deterrence and incapacitation as society's preferred goals of punishment in order to equalize the system. Criminals are not "coddled" by this system, but merely treated as equally and fairly as possible.

"A Bureau of Justice Statistics study on trends in discretionary and mandatory parole reported that, on average, African Americans remain incarcerated three months longer than White Americans in discretionary and seven months longer than White Americans in mandatory state parole systems."

Objections to indeterminate sentencing schemes recognize that the system's discretionary nature invites the influence of racial bias at sentencing, invariably leading to disproportionately severe sentencing outcomes for African Americans. By the same token, determinate sentencing schemes either do not give judges adequate leeway to individualize sentences, or are voluntary in nature and therefore susceptible to the same infirmities found in indeterminate sentencing schemes. Inadequate consideration of mitigating factors and circumstances disproportionately impact African Americans.

This proposal is vulnerable to several criticisms. First, a mandatory downward departure system may only increase the influence of prosecutorial discretion in charging decisions, which greatly influences sentencing.[66] Prosecutors may begin to "charge strategically to gain the upper hand in plea negotiations or introduce evidence of prior criminal activity or aggravating circumstances at trial."[67] Because of the courts' extreme deference to prosecutors, resulting sentencing disparities would likely continue. However, this proposal presumes that sentencing reform will not occur in a vacuum. Concomitant reforms in other areas of the criminal justice system, like prosecutorial discretion, may help manage this problem.[68]

Second, this proposal would be vulnerable to an equal protection challenge despite being race neutral.[69] Since strict scrutiny is "strict in theory, but fatal in fact,"[70] a race-neutral mandatory downward departure system ostensibly aimed at reducing racial sentencing disparities, particularly for African-American offenders, might be seen as presumptively invalid even if it simultaneously helps White Americans. Nevertheless, the Supreme Court will tolerate remedies addressing the underrepresentation of racial minorities which define in a race neutral manner "the disadvantages... that racial minorities disproportionately face."[71]

A third objection might lie in the U.S. Supreme Court's recent decisions in *Blakely v. Washington*[73] and *United States v. Booker*,[74] which rendered both state and federal sentencing guideline essentially advisory. The concern of the U.S. Supreme Court in those cases, however, was the judicial enhancement of sentences above the maximum dictated by statute based on facts not decided by the jury,[75] which violated the Sixth Amendment right to jury trial.[76] A mandatory downward departure system presents the converse situation and, therefore, would not implicate the Sixth Amendment but instead pursues the permissible goal of sentencing parity.[77]

Perhaps the strongest objections to this proposal are the further reductions of judicial discretion and its low political viability. Determinate schemes have been criticized for being rigid and difficult to apply.[78] The Supreme Court clearly prefers maintaining as much judicial sentencing discretion as possible.[79] Furthermore, this proposal appears to coddle criminals, particularly violent criminals, at a time when citizens are siding with politicians who adhere to tough crime policies. But most of the criticism has been directed towards the lack of judicial discretion to consider offender characteristics in order to adjust sentences downward. This proposal for mandatory downward departures would squarely address that issue. While warehousing criminals for long periods of time may help reduce crime to a minor extent in the short term, it hardly constitutes a long term solution.[80]

A mandatory downward departure system reflects a modest attempt to preserve certain elements of both determinate and indeterminate sentencing schemes in an objective package. It is by no means a panacea for racial disparities in sentencing or for all of the ills afflicting the criminal justice system. Rather, it is an additional tool that can be used to achieve the ultimate goals of racial parity and fairness in sentencing. Perhaps, if such a system had been in place in Virginia a decade ago, Allen would have received a fair and just sentence for his misdeeds; one that would have allowed him to return to society two years ago instead of seven years from now.[81]

ENDNOTES

[*] Douglas Smith earned his JD from University of Virginia School of Law. He earned his B.A. from University of Virginia and earned a M.S. in Administration of Justice/Forensic Science from Virginia Commonwealth University.

[1] Allen indicated in his statement to police that he did not enter the restaurant with his accomplices. Rather, he entered through the back door of the restaurant, at which point one of his accomplices handed him a gun. He stated that he became scared and immediately ran out of the restaurant with the gun in his pocket, leaving his accomplices behind in the restaurant. The gun discharged in his pocket as he was running away. Witness statements taken from some of the victims in the restaurant offer some corroboration of Allen's story. They were either unaware of a third robbery participant or caught a fleeting glimpse of a third robber. No witness definitively identified Allen.

[2] *See* Jodi M. Brown and Patrick A. Langan, *State Court Sentecning of Convicted Felons, 1994*, BUREAU OF JUSTICE STATISTICS, U.S. DEPT. OF JUSTICE (1998), http://www.ojp.usdoj.gov/bjs/pub/pdf/scscf94.pdf.

[3] *See* VIRGINIA CRIMINAL SENTENCING COMMISSION 2004 ANNUAL REPORT, A DECADE OF TRUTH IN-SENTENCING IN VIRGINIA 2 (2005).

[4] *Id.*

[5] *Id.*

[6] VA. CODE ANN. § 18.2-58 (2006) (indicates that the punishment for armed robbery may be anywhere from 5 years to life in prison); VA. CODE ANN. § 18.2-53.1 (2006) (requires a mandatory minimum sentence of 3 years for the use of a firearm in the commission of a felony).

[7] *See generally* Howard J. Alperin, Comment Note, *Length of Sentence as Violation of Constitutional Provisions Prohibiting Cruel and Unusual Punishment*, 33 A.L.R.3d 335 (2005).

[8] *See Perry v. Commonwealth*, 208 Va. 283, 156 S.E.2d 566, 571 (1967); *Satterwhite v. Commonwealth*, 201 Va. 478, 111 S.E.2d 820, 824 (1960).

[9] *See* Erin Moriarty, *Queens of Armed Robbery*, http://www.cbsnews.com/stories/2004/03/30/48hours/main609390.shtml.

[10] While fully acknowledging that sentencing disparities exist within the criminal justice with respect to other racial/groups—particularly Latinos, *see generally* Tushar Kansal and Marc Mauer, *RACIAL DISPARITY IN SENTENCING: A REVIEW OF THE LITERATURE,THE SENTENCING PROJECT* (2005), http://www.sentencingproject.org/pdfs/disparity.pdf (hereinafter "SENTENCING PROJECT II"),—for the purposes of the this paper I focus exclusively on African-Americans, mainly because of their overrepresentation in the criminal justice system by almost every standard of measure. *See generally* Wade Henderson, *JUSTICE ON TRIAL: RACIAL DISPARITIES IN THE AMERICAN CRIMINAL JUSTICE SYSTEM 25,* LEADERSHIP CONFERENCE EDUCATION FUND - LEADERSHIP CONFERENCE ON CIVIL RIGHTS (2000) (hereinafter "JUSTICE ON TRIAL").

[11] *McKleskey v. Kemp*, 481 U.S. 279, 312 (1987).

[12] Because of their status as property under the Constitution, African Americans were ineligible for punishment under the system applicable to whites accused of crimes. *See* Paula C. Johnson, *At the Intersection of Injustice: Experiences of African-American Women in Crime and Sentencing*, 4 AM. U. J. GENDER SOC. POL'Y & L. 1, 16 (1995).

[13] For example, under the Virginia slave codes, slaves guilty of rape or murder would be hanged; those guilty of robbery would have their ears cut off, be placed in stocks, and be whipped 60 times; and those guilty of associating with whites would be whipped or mutilated through branding or maiming. *See* Africans In America: The Terrible Transformation, Part 1: 1450-1750, *at* http://www.pbs.org/wgbh/aia/part1/1p268.html.

[14] *See* J. THORSTEN SELLIN, SLAVERY AND THE PENAL SYSTEM 135 (1976).

[15] *See* DERRICK BELL, RACE, RACISM AND AMERICAN LAW 273, 516 (2000). It is widely acknowledged that Black Codes were enacted primarily to maintain white Southerners access to a ready pool of cheap labor. *See id.* at 273.

[16] Punishments included public whippings for carrying a weapon of any kind, imprisonment for failing to obtain special advance permission to come within the town limits of a particular town, and forced indentured servitude to the highest bidder for failing to provide oneself "a comfortable home and visible means of support." *See Black Codes in the former Confederate States*, Shotgun's Home of the American Civil War, http://www.civilwarhome.com/blackcodes.htm (last visited Apr. 14, 2005); *see also* SELLIN, *supra* note 14, at 137–38.

[17] *See* BELL, *supra* note 15, at 273.

[18] 163 U.S. 537 (1896) (upholding the constitutionality of "separate but equal" segregation to be constitutional).

[19] *See* BELL, *supra* note 15, at 273.

[20] *See* Ilene H. Nagel, *Structuring Sentencing Discretion: the New Federal Sentencing Guidelines*, 80 J. CRIM. L. CRIMINOLOGY 883, 895 (1990); SANDRA SHANE-DUBOW ET AL., U.S. DEP'T OF JUSTICE, SENTENCING REFORM IN THE UNITED STATES; HISTORY, CONTENT, AND EFFECT 4 (1985) (stating that by 1922, forty-four states had adopted some form of parole practice).

[21] The trial judge examines a number of individual offender characteristics, including the existence of a prior record, education level, employment history, evidence of drug or alcohol abuse, and other information considered germane to sentencing. *See Developments in the Law: Race and the Criminal Process IX. Race and Noncapital Sentencing*, 101 HARV. L. REV. 1626, 1627 (1988) (hereinafter "*Developments*").

[22] *See* Nagel, *supra* note 20, at 893.

[23] *See Developments*, *supra* note 21, at 1627.

[24] *See Williams v. New York*, 337 U.S. 241, 248 (1949) (noting early Supreme Court support for indeterminate sentencing because "[r]etribution is no longer the dominant objective of the criminal law. Reformation and rehabilitation of offenders have become important goals of criminal jurisprudence."); *See also* SHANE SANDRA SHANE-DUBOW ET AL., U.S. DEP'T OF JUSTICE, SENTENCING REFORM IN THE UNITED STATES; HISTORY, CONTENT, AND EFFECT 4, 4–6 (1985) (acknowledging early support for indeterminate sentencing from state governments and Congress).

[25] Jane A. Dall, Note, *A Question for Another Day: The Constitutionality of The U.S. Sentencing Guidelines Under* Apprendi v. New Jersey, 78 NOTRE DAME L. REV. 1617, 1620 (2003); *See also* SHANE-DUBOW, *supra* note 25, at 8.

[26] *See* Dall, *supra* note 25, at 1620–21.

[27] *Developments*, *supra* note 21, at 1637–38. Indeed, many critics bemoaned the absence of any treatment or rehabilitation programs in prisons purporting to carry through the philosophy behind indeterminate sentencing. *See* Frankel, *infra* note 31, at 93 (stating that "[t]he sentence purportedly tailored to the cherished needs of the individual turns out to be a crude order for simple warehousing. The prison characteristically has no treatment facilities of any substantial nature. The means for rehabilitation, undefined and probably unknown, are not at hand.").

[28] MICHAEL H. TONRY, U.S. DEP'T OF JUSTICE, SENTENCING REFORM IMPACTS 7 (1987) (hereinafter "SENTENCING REFORM").

[29] *See* Nagel, *supra* note 20, at 896–97.

[30] *See* SHANE-DUBOW, *supra* note 20, at 6–8; *See also* Nagel, *supra* note 20, at 895.

[31] Former Federal District Court Judge Marvin E. Frankel, often cited as being the catalyst for change in sentencing at the federal level, expressed the concern of many at the time, noting that "the almost wholly unchecked and sweeping powers [given] to judges in the fashioning of sentences are terrifying and intolerable for a society that professes devotion to the rule of law." MARVIN E. FRANKEL, CRIMINAL SENTENCES: LAW WITHOUT ORDER 5 (1973). Other early proponents of indeterminate sentencing included Harvard Law Professor Alan Dershowitz and Andrew von Hirsch; *see* SHANE-DUBOW, *supra* note 20, at 8; *see also* Johnson, *supra* note 12, at 36 (1995).

[32] *See* Charles J. Olgetree, Jr., *The Death of Discretion? Reflections on the Federal Sentencing Guidelines*, 101 HARV. L. REV. 1938, 1944-46 (1988); *see also* Johnson, *supra* note 12, at 38.

[33] *See* Johnson, *supra* note 12, at 38; *see also* SHANE-DUBOW, *supra* note 16, at 8; *Developments*, *supra* note 22, at 1639.

[34] *Developments*, *supra* note 21, at 1639.

[35] *Id.* at 37.

[36] The guidelines became federal law on November 1, 1987. *See* Ogletree, *supra* note 32, at 1945.

[37] Congress also required the Commission to remain neutral with respect to the "race, sex, national origin, creed, and socio-economic status of offenders." *Id.*; *See also* Nagel, *supra* note 20, at 904.

[38] Instead, the Commission highlighted only the characteristics of a prior criminal record, the offender's dependence on crime for a livelihood, and the offender's acceptance of responsibility. *See* SHANE-DUBOW, *supra* note 20, at 18.

[39] *See* Ogletree, *supra* note 32, at 1952 (quoting S. REP. NO. 225, at 75 (1984), *reprinted in* 1984 U.S.C.C.A.N. 3220, 3221); *see generally* Aaron J. Rappaport, *Unprincipled Punishment: The U.S. Sentencing Commission's Troubling Silence about the Purposes of Punishment*, 6 BUFF. CRIM. L. REV. 1043 (2003). It should also be noted that deterrence is recognized as a major purpose of sentencing.

[40] *See generally* BUREAU OF JUSTICE STATISTICS, OFFICE OF JUSTICE PROGRAMS, U.S. DEPT. OF JUSTICE, TRUTH IN SENTENCING IN STATE PRISONS (1999) (hereinafter "TRUTH IN SENTENCING REPORT"); *see also infra* note 32 and accompanying text.

[41] *See generally* JON WOOL & DON STEMEN, VERA INSTITUTE OF JUSTICE, AGGRAVATED SENTENCING: BLAKELY V. WASHINGTON: PRACTICE IMPLICATIONS FOR STATE SENTENCING SYSTEMS (2004), http://www.vera.org/publication_pdf/242_456.pdf (hereinafter "VERA REPORT").

[42] *See* JUSTICE ON TRIAL, *supra* note 11, at 21; Johnson, *supra* note 13, at 39–40. In Virginia, sentencing reform moved at much more deliberate pace. While Virginia courts had adopted a set of voluntary sentencing guidelines several years prior, wholesale sentencing reform did not begin until 1994 when former Governor (now U.S. Senator) George Allen took office. *See* VIRGINIA CRIMINAL SENTENCING COMMISSION, 2004 ANNUAL REPORT 24, 43 (2004) (hereinafter "VIRGINIA REPORT").

[43] The percentage of African-Americans admitted to state and federal prisons between 1979 and 1992 increased from 39% to 54%. Nationwide, twenty-three percent of African-American males between the ages of 20 and 29 were under control of the criminal justice system in 1990, a number that rose to 42% the next year in Washington, D.C. and 56% in Baltimore. *See* MICHAEL TONRY, MALIGN NEGLECT: RACE, CRIME AND PUNISHMENT IN AMERICA 37, (1995).

[44] *See, e.g.*, TONRY, *supra* note 28, at 49 (stating that "[a] conclusion that black overrepresentation among prisoners is not primarily the result of racial bias does not mean that there is no racism in the system."); Alfred Blumstein, *Racial Disproportionality Of U.S. Prison Populations Revisited*, 64 U. COLO. L. REV. 743, 759 (1993) (stating that, while the bulk of racial disproportionality is explained by other factors, "[t]here are too many anecdotal incidents and analysis of particular jurisdictions reflecting blatant discrimination to reach [the] naive conclusion [that there is no racial discrimination in the criminal justice system].").

[45] *Id.*

[46] *See* Patrick A. Langan, *Racism on Trial: New Evidence to Explain the Racial Composition of Prisons in the United States*, 76 J. CRIM. L. & CRIMINOLOGY 666, 683 (1985) (concluding that his test results supported the proposition that differential involvement in imprisonable crimes were the primary cause of the disproparity).

[47] *See* UNITED STATES SENTENCING COMMISSION, FIFTEEN YEARS OF GUIDELINES SENTENCING: AN ASSESSMENT OF HOW WELL THE FEDERAL CRIMINAL JUSTICE SYSTEM IS ACHIEVING THE GOALS OF SENTENCING REFORM 131–32, 113 (2004) (hereinafter

"FIFTEEN YEAR REPORT") ("As long as the individuals in each group are treated fairly, average group differences simply reflect differences in the characteristics of the individuals who comprise each group. Group disparity is not necessarily unwarranted disparity."); *see also Developments*, *supra* note 21, at 1639–40 (noting that "although sentencing guidelines may help to eliminate racial discrimination in the correctional system, they will not eliminate all racial disparities, because some relevant offense-related characteristics correlate significantly with race."); Randall Kennedy, *The State, Criminal Law, and Race Discrimination: A Comment*, 107 HARV. L. REV. 1255, 1260 (1994); TONRY, *supra* note 28, at 80–81; Ernest van den Haag, *Refuting Reiman and Nathanson*, *in* PHILOSOPHY OF PUNISHMENT 148 (Robert M. Baird & Stuart E. Rosenbaum eds., 1988).

[48] *See* THE SENTENCING PROJECT, REDUCING RACIAL DISPARITY IN THE CRIMINAL JUSTICE SYSTEM: A MANUAL FOR PRACTITIONERS AND POLICYMAKERS (2000) (hereinafter "SENTENCING PROJECT"); Cassia Spohn, NATIONAL INSTITUTE OF JUSTICE, THIRTY YEARS OF SENTENCING REFORM: THE QUEST FOR A RACIALLY NEUTRAL SENTENCING PROCESS 474–75 (2000). *See also* FINAL REPORT OF THE CALIFORNIA JUDICIAL COUNCIL ADVISORY COMMITTEE ON RACIAL AND ETHNIC BIAS IN THE COURTS 184-5 (1997) (hereinafter "CALIFORNIA REPORT"); FINAL REPORT OF THE PENNSYLVANIA SUPREME COURT COMMITTEE ON RACIAL AND GENDER BIAS IN THE JUSTICE SYSTEM 150-1 (hereinafter "PENN REPORT"). Angela J. Davis, *Crime and Punishment: Benign Neglect of Racism in the Criminal Justice System*, 94 MICH. L. REV. 1660, 1675-77 (1996); Bell, *supra* note 15, at 518–19; LEADERSHIP CONFERENCE EDUCATION FUND, LEADERSHIP CONFERENCE ON CIVIL RIGHTS, JUSTICE ON TRIAL: RACIAL DISPARITIES IN THE AMERICAN CRIMINAL JUSTICE SYSTEM 4 (2000) (hereinafter "JUSTICE ON TRIAL"); Angela J. Davis, *Prosecution And Race: The Power And Privilege Of Discretion* 67 FORDHAM L. REV. 13, 26–30 (1998) (hereinafter "*Prosecution*").

[49] *See Washington v. Davis*, 426 U.S. 229 (1976). *See also McKleskey v. Kemp*, 481 U.S. 279, 312-3 (1987) (declining to infer discriminatory intent in the administration of Georgia's facially neutral death penalty statute "where the discretion that is fundamental to our criminal justice system is involved"); *United States v. Armstrong*, 517 U.S. 456, 470 (1996) (denying respondent's discovery motion for insufficient evidence of "selective prosecution"). *See generally* Kim Forde-Mazrui, *The Constitutional Implications of Race-Neutral Affirmative Action*, 88 GEO. L.J. 2331 (2000) (quoting *Personal Administrator v. Feeney*, 442 U.S. 256, 279 (1979) (citation omitted)).

[50] *See* JUSTICE ON TRIAL, *supra* note 11, at 32 (citation omitted). Professor Charles Lawrence argues that the Supreme Court's requirement of proof of discriminatory intent in equal protection cases involving racially disparate impacts should be supplanted by what he calls the "cultural meaning" test, which would require the application of heightened scrutiny. Charles R. Lawrence, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 356 (1987). This test would arguably be helpful in cases involving racial sentencing disparities. He acknowledges, however, that he does not "anticipate that either the Supreme Court or the academic establishment will rush to embrace and incorporate [this] approach." *Id.* at 387.

[51] *See* Paul Butler, *Diversity of Opinions: Affirmative Action and the Criminal Law*, 68 U. COLO. L. REV. 841 (1997) (hereinafter "*Affirmative Action*"); Paul Butler, *Racially Based Jury Nullification: Black Power in the Criminal Justice*, 105 YALE L.J. 677 (1995) (hereinafter "*Jury Nullification*").

[52] *See Affirmative Action*, *supra* note 51, at 867–69.

[53] *Id.*

[54] *See Jury Nullification*, *supra* note 51, at 679.

[55] *See Jury Nullification*, *supra* note 51, at 680, 725.

[56] *See Affirmative Action*, *supra* note 51, at 843 n.11 (conceding that "the legal case for many forms of affirmative action is moribund"). *But also see* Margaret E. Montoya, *Of "Subtle Prejudices," White Supremacy, And Affirmative Action: A Reply To Paul Butler*, 68 U. COLO. L. REV. 891, 915 (1997) ("Proposing changes that have no possibility of being implemented under the current political regime diverts us from the more difficult work of designing remedial programs that are palatable to those in power and that stand a chance of improving the material conditions of communities of color.").

[57] *See Grutter v. Bollinger*, 123 S.Ct. 2325 (2003) ("We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest [i.e. diversity] approved today.").

[58] *See* Montoya, supra note 56, at 917-18.

[59] *See Jury Nullification*, *supra* note 51, at 680 ("My goal is the subversion of American criminal justice, at least as it now exists. Through jury nullification, I want to dismantle the master's house with the master's tools.").

[60] For example, Butler suggests that advocates of racially based jury nullification "stand outside a courthouse and distribute flyers explaining the proposal to prospective jurors." *See Jury Nullification*, *supra* note 54, at 724.

[61] *See, e.g.*, UNITED STATES SENTENCING COMMISSION, DOWNWARD DEPARTURES FROM THE FEDERAL SENTENCING GUIDELINES 44–51 (2003).

[62] *See Developments*, *supra* note 21, at 1634.

[63] This creates the disparities which, in part, prompted the implementation of determinate sentencing at the state and federal level. *Cf.* Michael S. Gelacak et. al., *Departures Under the Federal Sentencing Guidelines: An Empirical and Jurisprudential Analysis*, 81 MINN. L. REV. 299, 314 (1996).

[64] *See Tonry supra* note 28; MICHAEL TONRY, MALIGN NEGLECT: RACE, CRIME AND PUNISHMENT IN AMERICA 37, 195 (1995); Gelacak, *supra* note 63, at 311–18; Ogletree, *supra* note 32, at 1957–58; *Cf.* Douglas A. Berman, *Balanced and Purposeful Departures: Fixing a Jurisprudence that Undermines the Federal Sentencing Guidelines*, 76 NOTRE DAME L. REV. 21, 96–104 (2000).

[65] *See, e.g.*, Chris L. Jenkins, *State Is Paying Higher Price for Crime Crackdown*, WASH. POST, Mar. 4, 2004, at B4.

[66] *See* Angela J. Davis, *Prosecution And Race: The Power And Privilege Of Discretion* 67 FORDHAM L. REV. 13, 17-18 (1998) (hereinafter "*Prosecution*").(stating that "[t]hrough the exercise of prosecutorial discretion, prosecutors make decisions that not only often predetermine the outcome of criminal cases, but also contribute to the discriminatory treatment of African Americans as both criminal defendants and victims of crime.").

[67] *Developments*, *supra* note 21, at 1640.

[68] Such reforms have been proposed by a number of commentators. *See generally Prosecution*, *supra* note 66; JUSTICE ON TRIAL, *supra* note 10.

[69] *See* Forde-Mazrui, *supra* note 49, at 2333 (noting the Supreme Court's Equal Protection jurisprudence makes clear that "strict scrutiny under the Equal Protection Clause is triggered by a law motivated by a racially discriminatory purpose, *regardless of whether the law employs an express racial classification or is race-neutral on its face*").

[70] *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 237 (1995) (quoting *Fullilove v. Klutznick*, 448 U.S. 448, 519 (1980) (Marshall, J., concurring)).

[71] *See* Forde-Mazrui, *supra* note 49, at 2334. *Compare Adarand Constructors, Inc.*, 515 U.S. at 2118–19 ("In the eyes of the government, we are just one race here. It is American.") *with Richmond v. J.A. Croson, Co.*, 488 U.S. 469, 528 (1989) ("Any race-neutral remedial program aimed at the disadvantaged as such will have a disproportionately beneficial impact on blacks.").

[72] 124 S.Ct. 2531 (2004).

[73] 125 S.Ct. 738 (2005).

[74] *See* Vera Report, *supra* note 44.

[75] *See Booker*, 125 S.Ct. at 749; *Blakely*, 124 S.Ct. at 2531.

[76] U.S. CONST. amend. VI.

[77] *See Blakely*, 124 S.Ct. at 2540 (stating that its decision in *Blakely* did not "impugn [the] salutary objectives" of achieving parity in sentencing among defendants).

[78] *See* Berman, *supra* note 64.

[79] *See Koon v. United States*, 518 U.S. 81 (1996).

[80] See Alfred Blumstein, *Race and Criminal Justice*, *in* AMERICA BECOMING: RACIAL TRENDS AND THEIR CONSEQUENCES, VOLUME II (2001) ("Disproportionality alone, regardless of its legitimacy, conveys a profound sense of unfairness to the overrepresented groups.").

[81] Allen Farmer was finally granted parole in December of 2005. He was released from prison on March 18, 2006 and currently resides in Chesterfield County, Virginia.

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