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

By Douglas Smith*

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-drunk 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. 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 average maximum state court sentence for murder. 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, 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. 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. The shocking reality is that Allen’s sentence was well within the range of punishment available for his crimes. 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. 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. 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 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, 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.” 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. Punishment under the Slave Codes for even minor transgressions...
was often brutal and inhumane. Meanwhile, these same codes completely exonerated slave masters who killed slaves in the course of punishing them for “resisting.”

African Americans fared little better under the Black Codes of 1865, which controlled the movement and activities of newly freed slaves. The Black Codes penalized African Americans for “offenses” similar to those for which they faced punishment under slavery. While the Black Codes were eventually struck down by Congress after the Fourteenth and Fifteenth Amendments were passed, 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. Under Jim Crow laws, African Americans continued to face differential treatment and punishment under state laws.

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. 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. 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.” 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.

While indeterminate sentencing schemes enjoyed early support 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.” 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. As parole was used to alleviate prison overcrowding rather than for rehabilitation, 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. By the early 1970s, mounting research suggested rehabilitation had failed, and growing concerns about sentencing disparities, prison overcrowding, and the perception that criminals were being coddled signaled the demise of indeterminate sentencing.

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. 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. Judges would then have limited discretion to consider aggravating or mitigating circumstances which would raise or lower the presumptive sentence respectively. Under the proposal, parole would be phased out. 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.

In 1984 Congress established the U.S. Sentencing Commission to develop sentencing guidelines similar to those originally proposed by advocates of reduced judicial discretion. 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)” 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. 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.”

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

However, the statistics gathered after most federal and state sentencing reforms were implemented are startling. 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.\textsuperscript{44}

Though much of the literature acknowledges the presence of at least some racial bias at all levels of the criminal justice system,\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{48}

\textbf{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.\textsuperscript{49} McCleskey and \textit{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.”\textsuperscript{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.\textsuperscript{51} Butler justifies affirmative action using a modified version of the “diversity” rationale he calls “parity diversity,”\textsuperscript{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.”\textsuperscript{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).\textsuperscript{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 ‘tries’ its idea of justice.”\textsuperscript{55}

Butler’s arguments are persuasive but idealistic at best.\textsuperscript{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.\textsuperscript{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.\textsuperscript{58} Butler’s racially-based jury nullification proposal suffers on two accounts. The proposal is intentionally radical and subversive\textsuperscript{59} and its implementation strategy might give prosecutors a sufficiently race-neutral reason to use preemptory strikes against African-American jurors.\textsuperscript{60}

\textbf{THE CASE FOR MANDATORY DOWNWARD DEPARTURES IN SENTENCING}

A standardized system of mandatory downward departures in sentencing synthesizes two seemingly 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.\textsuperscript{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.

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\textsuperscript{62} and ease the concern that judges will “use departures to impose sentences according to their own ideals.”\textsuperscript{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-
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. 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. 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.

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. 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.” 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.

Second, this proposal would be vulnerable to an equal protection challenge despite being race neutral. Since strict scrutiny is “strict in theory, but fatal in fact,” 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 under-representation of racial minorities which define in a race neutral manner “the disadvantages...that racial minorities disproportionately face.”

A third objection might lie in the U.S. Supreme Court’s recent decisions in Blakely v. Washington and United States v. Booker, 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, which violated the Sixth Amendment right to jury trial. 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.

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. The Supreme Court clearly prefers maintaining as much judicial sentencing discretion as possible. 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.

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.
Women in Crime and Sentencing
Paula C. Johnson,
pdfs/disparity.pdf (hereinafter “SENTENCING PROJECT II”),—for the purposes of this Constitutional Provisions Prohibiting Cruel and Unusual Punishment
1994
glimpse of a third robber. No witness definitively identified Allen.
Allen’s story. They were either unaware of a third robbery participant or caught a fleeting
statements taken from some of the victims in the restaurant offer some corroboration of
TENCING PROJECT

See Dall, supra note 25, at 1620–21.
Developments, supra note 21, at 1637–38. Indeed, many critics bemoaned the absence of any treatment or rehabilitation programs in prisons pursuing to carry through to the philosophy of 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 for any substantial nature. The means for rehabilitation, undefined and probably unknowable, are not at hand.”).
See Nagel, supra note 20, at 896–97.
See SHANE-DUBOW, supra note 20, at 6–8; See also Nagel, supra note 20, at 895.
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).
See Johnson, supra note 12, at 38; see also SHANE-DUBOW, supra note 16, at 8; Developments, supra note 22, at 1639.
Developments, supra note 21, at 1639.
Id. at 37.
Conners 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.
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.
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.
1 See also supra note 25, at 8.
1 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 Afri- can-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 H. Tonry, MALIGN NEGLECT: RACE, CRIME AND PUNISHMENT IN AMERICA 37, (1995).
1 See, e.g., Tonry, supra note 28, at 49 (stating that “[a] conclusion that black overrepre- sentation 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].”).
Id.
6 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 indexable crimes were the primary cause of the disproportion).
“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 Pursuit of Philosophy 148 (Robert M. Baird & Stuart E. Rosenbaum eds., 1988).


42 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 End of Race and the Race Equality Redefinition of Unconscious Racial, 39 Stan. L. Rev. 317, 356 (1987). This test would arguably be helpful in cases involving racial sentencing disparities. He acknowledge, 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.


44 See Affirmative Action, supra note 51, at 867–69.

45 Id.

46 See Jury Nullification, supra note 51, at 679.

47 See Jury Nullification, supra note 51, 680. 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 “Sable 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.”).

48 See Gruetter 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.”).

49 See Montoya, supra note 56, at 917-18.

50 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 system’s house with the master’s tools.”).

51 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.


53 See Developments, supra note 21, at 1634.

54 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).