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Reforming Federal Sentencing: A Call for Equality-Infused *Menschlichkeit*

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The federal sentencing guidelines just passed thirty.[1] But they have not been aging well. Even though they were widely heralded at their inception, the problems became obvious early. Some were due to policy decisions made during the drafting process; others stemmed from the U.S. Sentencing Commission's self-definition as the guardian of the guidelines; and others were created by Congress, with its penchant for mandatory minimums.

Truth in sentencing, less judicial discretion, and fewer unwarranted disparities among defendants were among the guidelines' animating principles. The drafters, however, eschewed a guiding punishment philosophy. Instead they promised greater reliance on empirical data, including ongoing review of the guidelines based on collected sentencing data. Over time, those reviews seemed to serve largely the goal of stamping out what the Commission deemed disparities, usually judge-driven departures from the otherwise prescribed grid.[2]

Parallel to the Commission's early work, Congress passed mandatory minimums, especially for drug and gun crimes. Later it added other offenses, including child pornography. The panoply of mandatory minimum sentencing affects much of the federal docket, limits judicial discretion, and continues to drive up the prison population.[3] Frequently the inequities sentences produce are laid at the door of the guidelines. At least initially, the guidelines reinforced those inequities but did not create them.

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1. The federal sentencing guidelines went into effect officially on November 1, 1987. *See* U.S. SENTENCING GUIDELINES MANUAL ch. 1, pt. A (U.S. SENTENCING COMM'N 2018). Still the federal judiciary did not implement them fully until the Supreme Court upheld their constitutionality against a challenge under the Non-Delegation Clause in *Mistretta v. United States*, 488 U.S. 361 (1989).

2. *See, e.g.*, KATE STITH & JOSE A. CABRANES, THE FEAR OF JUDGING (1998).

3. *See, e.g.*, U.S. SENTENCING COMM'N, AN OVERVIEW OF MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM (2017), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2017/20170711_Mand-Min.pdf [perma.cc/9AP7-XMKK].

The Commission pegged guideline grids to such minimums, further lengthening all sentences that fell into these categories. In addition, Congress continued to generously fund the Department of Justice, allowing it to ramp up the number of prosecutions.[4] The result: by 2012 the Bureau of Prisons ran the largest prison system in the country and the largest federal prison system ever.[5] Since then the federal prison system has decreased in size, thanks to the Obama Clemency Initiative, congressional and Commission action on the crack-cocaine sentence differentials, and some other changes.

The federal guidelines are one of about two-dozen sentencing guideline systems around the country.[6] They are by far also the most disliked of all guidelines, with states defending their systems with the chant, "We are not the federal system." Despite the success of the United States in exporting numerous features of its criminal justice system, sentencing guidelines are not among them.

For the guidelines, the most important change came years before the downturn in federal prisoners. In a landmark decision in 2006, the Supreme Court first declared the entire guideline regime unconstitutional before rescuing it by turning it from mandatory to non-binding.[7] Despite greater judicial discretion, initially sentences changed little. Since then, more judges opt for shorter prison turns than suggested by the recommended grids.[8] Differences in the rates by which judges use departures and so-called variances to sentence below the otherwise prescribed guideline grid vary dramatically around

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4. Nora V. Demleitner, *Revisiting the Role of Federal Prosecutors in Times of Mass Imprisonment*, 30 FED. SENT'G REP. 165, 166 (2018).

5. ANN CARSON, BUREAU OF JUSTICE STATISTICS, NCJ NO. 248955, PRISONERS IN 2014, at 2 tbl.1, 3 tbl.2 (2015), https://www.bjs.gov/content/pub/pdf/p14.pdf [perma.cc/T5DG-AF8R].

6. *See* NAT'L CTR. FOR ST. CTS., STATE SENTENCING GUIDELINES: PROFILES AND CONTINUUM (2008), https://www.ncsc.org/~/media/Microsites/Files/CSI/State_Sentencing_Guidelines.ashx [https://perma.cc/6G7J-CHYT].

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

8. *See, e.g.*, U.S. SENTENCING COMM'N, INTERACTIVE SOURCEBOOK OF FEDERAL SENTENCING STATISTICS, SENTENCES RELATIVE TO THE GUIDELINE RANGE OVER TIME (6 Categories), https://isb.ussc.gov/api/repos/:USSC:figure_xx.xcdf/generatedContent?&table_num=Figure_T6 [perma.cc/K7GC-84QZ].

the country, leading the Commission to ring the warning bell about disparities and judicial discretion.[9]

We have now lived with advisory guidelines almost as long as with their mandatory predecessor. After thirty years of federal guideline sentencing and almost half that time with advisory guidelines, the Journal's fall symposium, *Issues in Federal Sentencing: Privilege, Disparity, and a Way Forward*, addressed some of the most challenging problems besetting federal sentencing. The commentators in this volume expand on some of these issues. While some questions may appear technical, broader concerns animate these discussions. The most important issue may be what role the federal criminal justice system, and especially federal sentencing, plays in society and what its function should be. At a time when national values, including the rule of law, have come under pressure and economic analysis appears to dominate consideration of any social problem, the issues our authors raise demand further analysis of values and rights. A sentencing system built on civil and human rights would not look like the one we currently have. The authors here, each in their own way, pave the way for a different, more equitable, and fairer future in sentencing. There could not be a place better than a Journal with a focus on civil rights and social justice for a discussion about these values and the path for their application in federal sentencing.

The Introduction first focuses on the value of a symposium on federal sentencing as a teaching, research, and advocacy tool. The second section centers on questions of equality and equitable treatment in federal sentencing. It details how unfair sentencing has been to minority defendants and then highlights the broader ramifications of those injustices in reinforcing bias and racial stereotyping. The guidelines have both mitigated and reinforced racial disparities. Technology and empirical research may provide the tools to decrease race-based differentials and also to bring about shorter and more rehabilitation-focused sentencing. The third section underscores the need for compassion, mercy, *Menschlichkeit*, in sentencing. All of these

9. *See, e.g.*, U.S. SENTENCING COMM'N, SOURCEBOOK OF FEDERAL SENTENCING STATISTICS tbl.30 (2019), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2019/Table30.pdf [perma.cc/92BF-MU9Q].

are values a good legal education needs to keep in mind lest law become merely an exercise in logic or ideology.

I. Why a Symposium on Federal Sentencing?

As part of higher education, legal education and law schools are regularly under attack. Much of the charge centers on the cost of higher education and insufficient focus on preparing students for the workplace.[10] In light of that discussion, one may ask what a law review symposium that requires resources adds to the educational mission?

In a time of criminal justice reform, federal sentencing remains a center of attention. A symposium underscores the importance of federal sentencing but also highlights the role lawyering plays in bringing about legal change. It raises ethical challenges about social inequality, racism, and the role of technical lawyering at the expense of fairness, justice, and compassion.

For law students, conferences reinforce the importance of lawyering skills and opportunities for policy changes. The federal guidelines would not have become advisory had it not been for lawyers who argued then novel Sixth Amendment claims.[11] They built a set of precedents leading to monumental change in federal guideline sentencing.[12] Today the federal guidelines allow for more creative sentencing arguments than ever before.

In his Article, *Federal Sentencing: A Judge's Personal Sentencing Journey Told Through Voices of Offenders He Sentenced*, Judge Mark Bennett, a recently retired federal district judge in Iowa, laments the quality of much of the criminal representation he encountered as a sentencing judge. Despite some outstanding public defenders, he notes that many

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10. For a thoughtful discussion of professional preparation, see WILLIAM M. SULLIVAN ET AL., EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW (2007), http://archive.carnegiefoundation.org/pdfs/elibrary/elibrary_pdf_632.pdf [perma.cc/46VF-DPM7].

11. *See Booker*, 543 U.S. 220.

12. *See* Apprendi v. New Jersey, 530 U.S. 466 (2000); Blakely v. Washington, 542 U.S. 296 (2004).

defense lawyers fail to explore and brief mitigation arguments. Some judges may be willing to ask mitigation questions themselves. Many, however, will not, and valid arguments will never reach them.

Judge Bennett encourages lawyers to make not only individual mitigation arguments but also pursue broader challenges to specific aspects of guideline sentencing, such as the crack-cocaine sentence differentials.[13] He, for example, began to reject the 100:1 sentencing ratio between crack and powder cocaine baked into the guidelines before Congress legislatively changed it to 18:1.[14] At the time, this was a creative and courageous decision, which was later sanctioned by the Supreme Court.[15] The Supreme Court affirmed the power of district courts to adopt a different sentence regime than the guidelines indicated as long as the Commission's decision was not based on a persuasive empirical approach.

The current 18:1 ratio represents a political compromise rather than a victory of empiricism. As the ratio continues to be based on questionable data, some district court judges, including Judge Bennett, noted again a policy difference with the Commission and adopted lower ratios, including 1:1. The federal government never appealed Judge Bennett's 1:1 ratio. In the meantime, federal appellate courts have expanded the purview of variances that allow judges to impose lower than otherwise prescribed sentences based on policy disagreements.[16]

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13. Important policy disagreements about specific guidelines continue to exist. One example is an intra-district difference between judges in the Western District of Virginia over the methamphetamine guideline. *Compare* United States v. Moreno, No. 5:19CR002, 2019 WL 3557889 (W.D. Va. Aug. 5, 2019), *with* United States v. Farris, 421 F. Supp. 3d 321 (W.D. Va. 2019), *and* United States v. Dennison II, No. 5:18CR00035 (W.D. Va. Nov. 19, 2019).

14. *See Fair Sentencing Act*, AM. CIV. LIBERTIES UNION, https://www.aclu.org/issues/criminal-law-reform/drug-law-reform/fair-sentencing-act (last visited Apr. 24, 2020) [perma.cc/7P94-2CNQ].

15. Kimbrough v. United States, 552 U.S. 85 (2007); Spears v. United States, 555 U.S. 261 (2009) (per curiam). The *Spears* decision arose from Judge Bennett's case.

16. *See* U.S. SENTENCING COMM'N, OFFICE OF GEN. COUNSEL, DEPARTURE AND VARIANCE PRIMER 49–52 (2014), https://www.ussc.gov/sites/default/files

These examples also highlight the need for good empirical data that supports legal arguments and policy changes. There are many open questions in federal sentencing that remain fodder for research. Among them are the length of federal supervision and the success of types of supervision. Federal judges almost automatically impose post-sentence supervision for a three- or five-year timeframe, depending on the offense type, turning permissive language in the guidelines into an apparently binding command.[17] Defense lawyers fail to focus on that issue, as their attention remains on the term of imprisonment. Yet, post-sentence supervision presents a stressful and perhaps unnecessarily lengthy time for (technical) failure. There is immense need for research on this issue that can then be used for legal argument at sentencing.

As the presentations and presenters brought their personal commitment to these issues, this symposium also highlighted that law is not just a logic game. Values matter and, in federal sentencing, compassion and consideration of what a sentence means to an individual, their family, and community impact the outcome. One of the perennial issues in criminal justice is unwarranted racial bias and how to address it at sentencing.

II. Racial Bias in the Federal Criminal Justice System

COVID-19 reveals stark inequalities within our society. Class, race, gender present powerful fault lines. That is also true for the criminal justice system. At every step, pre-existing inequalities become further magnified. Differences remain subject to disagreement over whether they are a function of prior inequalities, whether they are warranted or not. Better data may provide us with greater insight in individual cases. Yet, societally that may not suffice as a racially biased criminal justice system reinforces race bias in society at large.

/pdf/training/primers/2014_Primer_Departure_Variance.pdf [perma.cc/U3GX-N6SS].

17. *See* U.S. SENTENCING COMM'N, FEDERAL OFFENDERS SENTENCED TO SUPERVISED RELEASE (2010), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2010/20100722_Supervised_Release.pdf [perma.cc/5XUE-YTNV].

A. Biases in the Criminal Justice System

Race bias in the federal criminal justice system is not a function of the sentencing guidelines, but long precedes them. It goes back to the founding of the country and since then has been like a cancerous growth. Still as Professor Jelani Jefferson Exum discusses in her Article, *Sentencing Disparities and the Dangerous Perpetuation of Racial Bias*, not all Americans believe the criminal justice system is racially biased. Unsurprisingly, the divides run along racial lines, further reinforcing differences and stereotypes.

1. Unwarranted Racial Disparity: Individual Injustice

Matthew Rowland, in his Article, *Technology's Influence on Sentencing: Past, Present, and Future*, recounts how rehabilitation—the dominant penal philosophy underlying the indeterminate sentencing regime that preceded the guidelines, and broad statutory sentence ranges provided the only limits on federal sentences. Different judges took vastly different approaches, which resulted in substantial disparities between sentences imposed around the country and sometimes even in the same courthouse. Yet, back then, the sentences the judges imposed were not final as they are today under the guidelines. The U.S. Parole Commission could release inmates after they had served at least one third of their sentences.[18] That could lead to further disparities or correct judicial differentials.

One impetus for passage of the federal sentencing guidelines was the obvious and disturbing racial inequality in the system. Individual judges might have been able to explain differences in the sentences they imposed between individual defendants. Yet, systemic data showed racial bias at every stage of the criminal justice system.[19]

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18. The U.S. Parole Commission continues to have jurisdiction over federal inmates (and parolees) sentenced pre-guidelines. *See Frequently Asked Questions,* U.S. DEP'T OF JUST., https://www.justice.gov/uspc/frequently-asked-questions (last visited Apr. 27, 2020) [perma.cc/GS96-4M75].

19. *See, e.g.*, *Report to the United Nations on Racial Disparities in the U.S. Criminal Justice System*, THE SENT'G PROJECT (Apr. 19, 2018), https://

The best-known example of racial disparity built directly into federal criminal legislation is the crack-cocaine sentencing differential.[20] Even when Congress was presented with evidence that the large differential was empirically unfounded and led to unwarranted racial disparities, change came slowly, prodded by the federal judiciary and the Sentencing Commission. Congress ultimately lowered the statutory sentence differentials but did not erase them despite empirical data supporting such a decision.[21] More African Americans continue to go to prison for longer periods of time because of that difference.[22]

Racial disparity may result not only from legislation but also from enforcement. Not all congressional statutes are equally enforced. Some linger in obscurity. It is law enforcement officers and federal prosecutors who decide whether to investigate and commence a criminal action.[23] Law enforcement activities in the federal system are often subject to priorities of the President's Administration. For example, during the Trump Administration, immigration offenders have made up an ever larger percentage of federal inmates.[24]

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www.sentencingproject.org/publications/un-report-on-racial-disparities/ (last visited Apr. 25, 2020) [perma.cc/8SXK-5W8H].

20. For the history and ramifications of crack–cocaine differentials, see U.S. SENTENCING COMM'N, REPORT TO THE CONGRESS: IMPACT OF THE FAIR SENTENCING ACT OF 2010 (2015), https://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/drug-topics/201507_RtC_Fair-Sentencing-Act.pdf#page=8 [perma.cc/WYL9-MTD].

21. *Id.*

22. *Id.*

23. For a discussion of the federal criminal code, see, e.g., Julie R. O'Sullivan, *The Federal Criminal "Code" Is a Disgrace: Obstruction Statutes as Case Study*, 96 J. CRIM. L. & CRIMINOLOGY 643 (2006).

24. *See* U.S. SENTENCING COMM'N, SOURCEBOOK OF FEDERAL SENTENCING STATISTICS fig.I-2 (2019), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2019/FigureI2.pdf [perma.cc/SF48-49AV]. Data on federal prosecutions indicate a substantial increase in immigration cases. *See Immigration Prosecutions for February 2020*, TRAC IMMIGR. (Mar. 31, 2020), https://trac.syr.edu/tracreports/bulletins/immigration/monthlyfeb20/fil/ (last visited Apr. 21, 2020) [perma.cc/K9LQ-TU2J]. On the other hand, white collar prosecutions have declined precipitously compared to five years ago. *See White Collar Crime Prosecutions for February 2020*, TRAC IMMIGR. (Mar. 31, 2020), https://trac.syr.edu

Between 1986 and 2018, the number of federal charges increased by over 75 percent. With almost 98 percent of federal cases ending with a guilty plea in fiscal year 2019,[25] charging and bargaining policies set by the Department of Justice and in local U.S. Attorneys' offices are often determinative. In the end, a prison term seems almost inevitable after a conviction. Because of some fateful policy decisions, since their inception, the guidelines have been almost entirely prison-focused. That means the vast majority of convicted federal defendants enter detention.[26] Since the late 1980s, the average length of time a federal offender serves has doubled.[27]

Sentencing is not only about judges but rather the sentencing outcome mirrors policies of all three branches of government.[28] Still a judge imposes the actual sentence. Even after the sentence is imposed, the involvement of the three branches continues. Prosecutors weigh in on supervision violations and traditionally have a say on presidential clemency decisions. Judges supervise probation and post-prison supervision terms and may oversee occasional sentence modifications. Since most federal defendants are sent to prison, the Bureau of Prisons (BOP) confines inmates and is responsible

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/tracreports/bulletins/white_collar_crime/monthlyfeb20/fil/ (last visited Apr. 21, 2020) [perma.cc/RJ42-BWTN].

25. *See* U.S. SENTENCING COMM'N, SOURCEBOOK OF FEDERAL SENTENCING STATISTICS tbl.11 (2019), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2019/Table11.pdf [perma.cc/3FEZ-E8JF].

26. *See id*. fig.6, https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2019/Figure06.pdf [perma.cc/RZ5B-REMH].

27. *Prison Time Surges for Federal Inmates*, PEW CHARITABLE TRUSTS (Nov. 18, 2015), https://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2015/11/prison-time-surges-for-federal-inmates (last visited Apr. 21, 2020) [perma.cc/79KL-RAYS].

28. On the role of prosecutors, see, e.g., Nora V. Demleitner, *Prosecutors and Sentencing*, *in* THE OXFORD HANDBOOK OF PROSECUTORS AND PROSECUTION (Kay Levine, Russell Gold & Ronald F. Wright eds., forthcoming 2020); Demleitner, *supra* note 4; Andrew D. Leipold, *Criminal Dockets, Sentencing, and the Changing Role of Federal Prosecutors*, 30 FED. SENT'G REP. 177 (2018); Chiraag Bains, *Looking in the Mirror: The Prosecutor's Role in Ending Mass Incarceration*, 30 FED. SENT'G REP. 197 (2018).

for in-prison rehabilitation and training to the extent they are currently offered.[29] At each of the stages of the criminal justice system, racially disparate results are obvious. To what extent they reinforce or counteract each other remains unresolved.

On the positive side, empirical studies, not conclusive but persuasive, indicate that mandatory guidelines decreased unwarranted racial disparities. Sentencing commission studies indicate that with the onset of non-binding guidelines, unwarranted racial disparity has reared back. But many have challenged those findings.[30]

Rowland discusses some of the studies that either show racial bias or refute it. With the data currently available, the debate will remain inconclusive. The challenge is in ascertaining when differences are unwarranted. After all, warranted differences are as significant to fairness as unwarranted differences undermine it. As important as the data discussion is for individual cases, the impact of racial bias in the criminal justice system and sentencing extend far beyond the confines of that system. After all these disparities, as Jefferson Exum notes, "perpetuat[e] the racial bias that increases the daily danger of living as a Black American." The race-based disparity visible in federal sentencing supports societal biases that in turn undergird unwarranted racial differences in our criminal justice and sentencing systems. The regeneration of prejudice is circular with differential outcomes mutually reinforcing each other.

2. Unwarranted Racial Disparities: Societal Impact

As Jefferson Exum explains, our society's race biases infect law enforcement, which in turn reinforces disparate enforcement against African Americans. Sentencing disparities

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29. The First Step Act has substantially expanded the responsibility of the BOP in providing rehabilitation-focused services and training. *See, e.g.*, NATHAN JAMES, CONG. RESEARCH SERV., R4558, THE FIRST STEP ACT OF 2018: AN OVERVIEW (2019), https://crsreports.congress.gov/product/pdf/R/R45558 (last visited Apr. 27, 2020) [perma.cc/CLQ7-WC3Z].

30. *See, e.g.*, Paul J. Hofer, *Federal Sentencing after* Booker, 48 CRIME & JUST. 137 (2019).

are both informed by and contribute further to such biases, which are reflected in the stark racial disproportionality between imprisoned Whites and African Americans.[31]

Originally slavery and its aftermath conditioned White Americans to believe that biological differences accounted for higher criminality of Black citizens. During the Progressive Era, they exchanged biology for culture as the reason why African Americans were allegedly more crime prone. Curiously, today the disparity in the criminal justice system may reinforce the impression that Blacks are more likely to be criminals. A tool designed to shame America into confronting racial bias in the criminal justice system is now a powerful reason, subconsciously, for perpetuating that regime. As the vast majority of White Americans believe in the fairness of the criminal justice system, as Jefferson Exum details, the disproportionate imprisonment of Blacks does not reveal prejudice but instead affirms their belief in the greater criminality of African Americans.

We witness race-informed disparate treatment in all aspects of society, including education and employment. In fact, the well-intentioned "Ban the Box" movement may have fallen victim to racial stereotyping that emerges from criminal justice data. Ban the Box prevents employers from accessing applicants' criminal record unless they have advanced substantially through the hiring regime, in some cases until receipt of an employment offer.[32] The system has overall decreased bias against people with a criminal record—and at

31. Sentencing data for Fiscal Year 2019 indicates that approximately the same number of Black and White offenders were sentenced even though the population breakdown indicates sixty-four percent Whites and twelve percent African Americans in the United States. U.S. SENTENCING COMM'N, SOURCEBOOK OF SENTENCING STATISTICS tbl.5 (2019), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2019/Table05.pdf [perma.cc/GSK8-V2JC]. Bureau of Prison data shows that in March 2020, approximately thirty-eight percent of inmates were Black. *Statistics: Inmate Race,* FED. BUREAU PRISONS (Apr. 11, 2020), https://www.bop.gov/about/statistics/statistics_inmate_race.jsp (last visited Apr. 21, 2020) [perma.cc/3SF2-3GF6].

32. *See Ban the Box*, NAACP, https://www.naacp.org/campaigns/ban-the-box/ (last visited Apr. 25, 2020) [perma.cc/S46N-CQHD].

the same time decreased employment opportunities for young African American men. Apparently, employers, aware of disparate criminal record data, discriminate against all Black applicants, presumably based on statistical crime data, rather than awaiting a later criminal record check.[33]

These biases are so pervasive that de-biasing training cannot be applied across the board, Jefferson Exum concludes, but instead broader solutions as applied in other areas are necessary. Rowland suggests, more optimistically, that Artificial Intelligence (AI) can provide the necessary data to reveal the racial bias present in the criminal justice system and help build processes to shield against it. Addressing racial disparity has to be an explicit goal of the sentencing process to assure individual fairness. Yet, the societal importance may extend far beyond individual fairness, as Jefferson Exum so persuasively argues. Sentence equality, as a function of racial equity throughout the system, is crucial to remove deeply misleading data that immeasurably harms African Americans by further reinforcing existing race bias. Jefferson Exum's analysis propels racial equality from an important measurement to *the* most important dimension of success in sentencing because the stakes for society are the greatest.

Even though the disparities in our criminal justice system manifest most obviously in findings of guilt and the imposition of criminal justice sentences, they are present throughout the system. Judicial attempts at routing out racial disparities at that point are clearly important but not sufficient. Besides sentencing, the judiciary can help build the jurisprudence that provides the tools to enforce greater racial equality. Judges, for example, could help restrain the discretion of prosecutors to achieve greater racial equality.[34] Yet, the impetus for such a novel approach to rethink federal sentencing appears missing.

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33. *See, e.g.*, CHRISTINA PLERHOPLES STACY & MYCHAL COHEN, THE URBAN INST., BAN THE BOX AND RACIAL DISCRIMINATION (2017), https://www.urban.org/sites/default/files/publication/88366/ban_the_box_and_racial_discrimination_4.pdf [perma.cc/W9G4-9C3G].

34. Recent developments in Virginia, however, may point the other way. As progressive prosecutors have attempted to dismiss and not prosecute minor marijuana offenses prior to decriminalization, courts have demanded greater

Racial segregation came to be acknowledged as a national disgrace by the 1950s, but it also presented an international problem for the United States. The Cold War was not only a struggle over weapons systems but also about values and ideologies. For the USSR, segregation served as a tool to demonstrate how miserably the United States failed the values of human rights and equality it espoused abroad. The Supreme Court understood that challenge. Its famous desegregation decisions were a powerful response to the most visible domestic human rights failure.[35]

Today the situation appears reversed. As the United States indicates less interest in the protection of human rights around the globe and gazes largely inward, concerns about U.S. prestige abroad will likely decline, removing an important impetus for internal reform. Broad change, therefore, has to come from other sources. Technology may present us with the tool to ferret out and support charges of unequal treatment based on race and then shame the country into change.

B. Can Technology Save Us?

Technology has changed our lives throughout history, though the still recent developments of the Internet, social media, and big data portend ever more and faster change. These changes have also impacted the criminal justice system. Court filings are accepted electronically, and hearings are possible via video hookup. Female federal inmates are allowed video visits; judges have issued sentences limiting Internet access; police use hotspot data to inform policing; states have adopted risk assessments to make bail and diversion decisions. An early user of data was the federal sentencing commission, which has

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oversight. That development runs counter to the general lack of judicial interference in charging decisions and is disturbing in light of the well-documented racial disparities in low-level marijuana prosecutions. *See* Nora V. Demleitner, *State Prosecutors at the Center of Mass Imprisonment and Criminal Justice Reform*, 32 FED. SENT'G REP. 187 (2020); Peter Vieth, *Arlington Judges Resist Prosecution Policies*, VA. L. WKLY. (Apr. 13, 2020), https://valawyersweekly.com/2020/04/13/arlington-judges-resist-prosecution-policies/ (last visited Apr. 21, 2020) [perma.cc/4KR4-MUBR].

35. *See* MARY L. DUDZIAK, COLD WAR CIVIL RIGHTS: RACE AND THE IMAGE OF AMERICAN DEMOCRACY (2011).

collected and analyzed sentence data since it drafted the first set of guidelines.

Matthew Rowland, the former head of the probation and pretrial services office at the Administrative Office of the U.S. Courts, writes that technological change has been instrumental in changing sentencing. With sentencing theory and the philosophy of punishment largely unchanged for decades, the Sentencing Commission's data collection and research informed the new regime. Still, we seem to be only at the start of understanding crucial elements of sentencing, such as the impact of different types of treatment on recidivism. Rowland deems AI a game-changer, a way to dramatically improve, not displace, human decision-making in sentencing. It would inform programming changes for an offender, for example, aimed at enhancing public safety.

Much of the current focus in the criminal justice system centers on high rates of recidivism. Despite much discussion around the term, its definition varies substantially, as Rowland indicates. Some studies differ in the length of the timeframe used to assess re-offending; others focus on arrest, not conviction data; some look at re-arrests for felonies but not misdemeanors or technical supervision violations; others may consider only convictions of the same or a higher severity-level offense.[36] Because of these reasons, comparable data—nationally and internationally—is hard to come by.

Some use recidivism studies indicating high re-offense rates to show that only incapacitation "works." Rowland, however, notes how little we know about what may dissuade an offender from re-offending. Traditionally recidivism studies focused on easily measurable factors, such as criminal record, age, or type of offense. More recent studies increasingly incorporate attitudinal and cognitive factors. Artificial intelligence, with its ability to aggregate vast amounts of data could, for example, lead to more accurate evidence and better predictions on what

36. For some discussion of the different measures possible, see *Measuring Recidivism*, NAT'L INST. JUST. (Feb. 20, 2008), https://nij.ojp.gov/topics/articles/measuring-recidivism (last visited Apr. 25, 2020) [perma.cc/4GRZ-KSEF]; THE URBAN INST., MEASURING RECIDIVISM AT THE LOCAL LEVEL: A QUICK GUIDE, https://www.urban.org/sites/default/files/recidivism-measures_final-for-website.pdf [perma.cc/8FU7-43Z5].

combination of programs lower the risk depending on the type of offender. AI promises not only more data but also the possibility of greater accuracy, more transparency, and faster results in determining how to protect public safety while maximizing an individual's potential.

Even though Rowland acknowledges concerns about AI reinforcing racial biases, he does not deem those insurmountable. Most important to him is the opportunity for AI to provide substantially better risk prediction tools allowing for sentences that could more effectively target an individual's criminogenic factors.

AI tools hold unprecedented possibilities as they use detailed information about an offender to change otherwise predicted outcomes. Yet, they still require important societal consensus on public safety as the leading goal for sentencing and on investing in those who ran afoul of the criminal justice system. Neither is currently the case as a modified just deserts model governs federal sentencing.[37] A further concern lurks in the background—if criminogenic factors can be modified, why would a public safety focus not emphasize pre-offense prevention? Such an approach would threaten civil liberties as it could entail population-wide assessments of criminogenic factors and broad-based services and programming to change them.

Even without apocalyptic concerns, AI may not remedy but instead reinforce some inequalities. Rowland's commitment to the mitigation of criminogenic risk factors and his belief that such services can be delivered outside of prison undergird his faith in AI. Yet even if AI provided all the benefits he outlines, federal judges would not be bound to follow AI-based recommendations. In some cases, even those who accept the value of such evidence-based sentencing may still resort to a prison sentence precisely so that the offender has any hope to receive necessary services. Defendants from rural areas or from parts of the country that are more impoverished or less invested

37. *See* Paul J. Hofer & Mark H. Allenbaugh, *The Reason Behind the Rules: Finding and Using the Philosophy of the Federal Sentencing Guidelines*, 40 AM. CRIM. L. REV. 19 (2003); Aaron J. Rappaport, *Rationalizing the Commission: The Philosophical Premises of the U.S. Sentencing Guidelines*, 52 EMORY L.J. 557 (2003).

in social services may not have the same options and opportunities to receive appropriate services than those from more urban areas. Socio-economic differences may also become more pronounced. If AI-based sentencing is to cut down on prison numbers, the success may be more mixed than desired.

That would be of substantial concern to Judge Bennett, who suggests slashing guidelines by as much as fifty percent to restore time served and overall sentence lengths closer to pre-guideline sentencing. Despite our focus on imprisonment, on the state level the most frequent sentences are fines and probation. In the federal system, however, imprisonment is the default. Judge Bennett credits the sentencing commission's initial decision not to consider probation sentences when setting up the grid. He wants to see a return to more community-based sentencing.

Certainly, public safety does not require the sentence lengths we currently espouse. Even current evidence-based practices could help set lower sentence lengths and lead to more effective supervision. Federal probation services, under Rowland's leadership, proved that possible after the early release of thousands sentenced under previously higher crack cocaine guidelines and mandatory minimums.[38]

Broad sentence decreases require risk tolerance. Yet, the infamous Willie Horton TV ad that ended both Governor Dukakis's presidential ambitions[39] and the generally highly successful Massachusetts furlough program[40] implied a no-error release policy. Since then, we have operated on the assumption that it is better to incarcerate a person for far longer than public safety predictions support than to accept a reasonable risk inherent in virtually any release.

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38. *See* Matthew G. Rowland, *Projecting Recidivism Rates for Federal Drug Offenders Released Early from Prison*, 28 FED. SENT'G REP. 259 (2016).

39. *See* Peter Baker, *Bush Made Willie Horton an Issue in 1988, and the Racial Scars Are Still Fresh*, N.Y. TIMES (Dec. 3, 2018), https://www.nytimes.com/2018/12/03/us/politics/bush-willie-horton.html?auth=login-email&login=email (last visited Apr. 25, 2020) [perma.cc/WGQ6-7CHW].

40. *See* Robin Toner, *Prison Furloughs in Massachusetts Threaten Dukakis Record on Crime*, N.Y. TIMES (July 5, 1988), https://www.nytimes.com/1988/07/05/us/prison-furloughs-in-massachusetts-threaten-dukakis-record-on-crime.html (last visited Apr. 25, 2020) [perma.cc/RS5D-B2J6].

Evidence-based practices, AI, and the reduction of criminogenic factors do not alter procedural rules and the overall construction of the federal system. Federal judges lack the ability to bind BOP to assign a defendant to a particular prison or allow enrollment in programming. Without BOP's willingness to follow judicial guidance when based on AI information, sentences may turn out to be wrongly calibrated. Alternatively, BOP could use its own predictive instruments, which may lead to a conflict with judicial recommendations. The different branches of government would have to cooperate in unprecedented ways to effectively implement such public safety efforts.

As new insights are reached about best ways to achieve public safety through offender programming, judges would need the ability to undo past sentences. That option currently exists only under the most limited circumstances. In one of his offender vignettes, Judge Bennett admits that even his below-guideline sentence for a defendant now strikes him as too high and as incorrectly allocating prison and supervision time. Yet, there is nothing he can do. His hands are tied, as are those of almost all other actors in the criminal justice system.

As treatment programs impact individuals at different stages, more opportunities to re-assess sentences might also be advisable. Pre-guideline parole, for example, mandated such sentence review, but left it in the hands of the executive branch. Judges could be granted the tools to revisit ongoing sentences. Those exist now only for certain offenders convicted of crack cocaine offenses. The decision whether to release early is heavily based on public safety considerations. [41] A more expanded version of such releases may be the "second-look" provisions included in the American Law Institute's *Model Penal Code:*

41. *See, e.g.*, U.S. SENTENCING COMM'N, FIRST STEP ACT OF 2018 RESENTENCING PROVISIONS RETROACTIVITY DATA REPORT (2020), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/retroactivity-analyses/first-step-act/20200203-First-Step-Act-Retro.pdf [perma.cc/7ERT-2KG3]; Carly Hudson, *Between a Rock and a Hard Place: Ensuring that Defendants Incorrectly Sentenced Between the Fair Sentencing Act of 2010 and* United States v. Dorsey *Achieve Re-Sentencing*, 48 COLUM. J. L. & SOC. PROBS. 141 (2014).

Sentencing.[42] They would provide the judiciary with the ability to review sentences at stated times during the execution of the sentence.

The guidelines, however, were not designed to focus primarily on public safety or rehabilitation. They are a modified just deserts model with largely one tool, incarceration. As federal judges have bemoaned mandatory minimums and guidelines that for long mandated they impose specific and often long sentences, some have argued for more compassion and humanity in the system.[43]

III. Compassion and Menschlichkeit

In the time of COVID-19, prison conditions have become a public talking point.[44] While some state officials have been proactively decreasing jail admission rates and moving toward early releases, the federal system came late to that realization. Some federal prisons may be more conducive to social distancing, but generally these types of confined spaces serve as breeding grounds for contagious diseases, and especially the easily transmitted coronavirus.

Traditionally state and federal inmates differed substantially. Yet, as the number of drug and violent offenders in the federal prison population has increased, that group increasingly resembles state prisoners who lack education, marketable skills, and suffer disproportionately from health

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42. MODEL PENAL CODE: SENTENCING (AM. L. INST., Proposed Final Draft 2017).

43. *See, e.g.*, Matthew Van Meter, *One Judge Makes the Case of Judgment*, THE ATLANTIC (Feb. 25, 2016), https://www.theatlantic.com/politics/archive/2016/02/one-judge-makes-the-case-for-judgment/463380/ (last visited Apr. 27, 2020) [perma.cc/9UH6-9EWW]; Ian Urbina, *New York's Federal Judges Protest Sentencing Procedures*, N.Y. TIMES (Dec. 8, 2003), https://www.nytimes.com/2003/12/08/nyregion/new-york-s-federal-judges-protest-sentencing-procedures.html (last visited Apr. 27, 2003) [perma.cc/U9PA-5SE4].

44. *See Prisons Worldwide Risk Becoming Incubators of Covid-19*, ECONOMIST (Apr. 20, 2020), https://www.economist.com/international/2020/04/20/prisons-worldwide-risk-becoming-incubators-of-covid-19 (last visited Apr. 25, 2020) [perma.cc/LB4H-Y8Q5].

challenges and addiction.[45] In state and federal prisons, inmates are greying. Long sentences have increased the median age of federal inmates.[46] Recidivism rates fall substantially with age, and failing health also translates into a crime-free life.

At a minimum, the Bureau of Prisons should have immediately released older offenders, those with health challenges, and those close to release. Yet the Department of Justice hesitated, with both the Attorney General and U.S. attorneys around the country predicting a crime wave if those convicted were released early or sent to home confinement.

Since the bipartisan passage of the First Step Act, no systemic change has occurred in the federal system. The era of mass imprisonment, including its mandatory minimum sentences, binding guidelines, and tough-on-crime rhetoric and mindset are difficult to surmount, even during an urgent crisis that may cost thousands of men and women in federal custody their lives. Lacking throughout the system is empathy, understanding others, compassion, and humility.

A. Sentencing Is Hard

Federal judges find sentencing to be the hardest aspect of their work.[47] It means to condemn another human being, to face them and their family, to be fair and just and doing right by the victim. With the inception of the federal guidelines, sentencing has morphed from a "lawless" regime into a heavily regulated system that requires judges to be guideline specialists, staying current on the array of federal sentencing decisions issued from

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45. In his Article, Judge Bennett describes the majority of drug defendants who came before him as "[n]on-violent, low-level, long-term and severe drug addicts."

46. *See, e.g.*, Lauren C. Porter et al., *How the U.S. Prison Boom Has Changed the Age Distribution of the Prison Population*, 54 CRIMINOLOGY 30 (2016).

47. In his Article, Bennett states: "I found the collective weight of so many sentencings more emotionally draining and soul robbing than the deaths of my son, all my siblings, and my parents." *See also* Stephen R. Bough, *Getting to Know a Felon: One Judge's Attempt at Imposing Sentences that Are Sufficient, but Not Greater than Necessary*, 87 UMKC L. REV. 25 (2018).

appellate courts and the Supreme Court.[48] The Commission and the Federal Judicial Center offer regular training on sentencing developments.

As many federal judges served as federal prosecutors, they bring with them a strong grounding in sentencing mechanics. Judge Bennett's background prior to ascending to the federal bench was unusual. He had worked as a private criminal defense attorney and litigated civil rights cases, including police brutality cases. The appointments to the federal bench over the last three years make him look ever more like a unicorn.

Before the guidelines became advisory, many federal judges complained about their mandatory nature and the harshness of federal sentences they had to impose. Even though the guidelines now allow for more judicial discretion, perhaps surprisingly many judges do not veer far off their path. Plea bargaining agreements and mandatory sentences continue to limit their discretion. The guideline calculation provides a starting point from which it may be difficult to diverge, especially when the prosecution reinforces the accuracy of the guideline range. That means federal sentences have not suddenly trended substantially lower.[49]

A number of federal judges have lamented that they do not know what happens to people after they sentence them. Some have started reentry courts to facilitate the return of those they sent to prison.[50] Others try to understand what the sentences they impose mean. Judge Bennett discusses his experience visiting with over four hundred of the men and women he sentenced over his almost twenty-five years on the bench. Those are about ten percent of all the people who came before him for sentencing.

As a country, COVID-19 has taught us the importance of closeness, of human contact, and perhaps of human touch. For

48. *See* STITH & CABRANES, *supra* note 2. The U.S. Sentencing Commission annually provides a summary of the Supreme Court cases impacting federal sentencing.

49. *See* Hofer, *supra* note 30.

50. *See, e.g.*, M. Casey Rodgers, *Evidence-Based Supervision in the Northern District of Florida: Risk Assessment, Behavior Modification, and Prosocial Support—Promising Ingredients for Lowering Recidivism of Federal Offenders*, 28 FED. SENT'G REP. 239 (2016).

many federal prisoners, human contact with the outside world is extremely limited. Judge Bennett notes that between eight and ten percent of the inmates he visited never had another visitor. Perhaps those prisoners have no family and friends—a function of their criminal conduct or of their lack of support and social integration prior to offending. The latter will make it harder for them to reintegrate, as family support counts as a powerful element in successful reentry. Alternatively, some inmates refuse visitors, perhaps because they do not want family members to see them imprisoned, or their families do not have the financial resources to visit them in faraway prisons. In the end, prisons are a world of their own, and even the so-called Camp Fed, the Bureau's minimum-security prisons, present challenging experiences. Imprisonment of any length is a substantial sentence. In contrast to the German system, for example, in which deprivation of liberty is the purpose of imprisonment and all conditions have to approximate the outside world, federal prisons often appear designed to add additional deprivations beyond the loss of freedom. Before sentencing an offender to prison, Judge Bennett counsels his colleagues they need to understand what that means.

While the contributors to this Issue explicitly or implicitly argue for less incarceration and shorter sentences, that call may apply particularly to the youngest federal offenders, a group rarely discussed.

B. The Forgotten: Teenage Federal Offenders

Research and scholarship on the federal guidelines abounds. Yet, some areas of federal sentencing remain shrouded in secrecy and are insufficiently researched and understood.

In their Article, Professor Mae Quinn and her student Grace McLaughlin discuss a largely forgotten group of individuals in the federal system, defendants under the age of eighteen. Even the extent of their number is in dispute though it is not as negligible as generally assumed.

During the 1990s and the early 2000s, the image of the juvenile "super predator" governed the public's imagination.[51] States at the time changed their laws so that ever younger teenagers, and in some states preteens, could be transferred from the rehabilitation-oriented juvenile delinquency system into the adult criminal justice system for trial. Since the federal system does not have separate juvenile courts, the issue never arose. Still, for a time, it seemed that the federal criminal justice system might take special aim at juveniles. With youth violence considered a major threat to public safety, the federal government turned some of its resources to fighting it, which led to more trials of juveniles in federal court.

In the last few decades, the U.S. Supreme Court has fielded a set of Eighth Amendment cases that arose in the states and challenged the constitutionality of the death penalty and of life-without-parole sanctions imposed on those who committed these offenses when they were under eighteen. The Court declared unconstitutional the juvenile death penalty, juvenile life-without parole for a non-homicide offense, and mandatory juvenile life-without-parole for homicides.[52] In all of these cases, the Supreme Court found determinative substantial differences between the adult and the juvenile brain. The latter continues to develop, often leaving risk control and other adult brain functions underdeveloped. That implies both greater amenability to change and rehabilitation and lesser culpability.

Still these insights do not appear to inform federal sentencing of those who committed offenses while under eighteen. Quinn and McLaughlin even indicate that some federal prosecutors seem to employ the transfer of juveniles into federal court as an important tool in fighting crime and a continuation of the war on drugs. That approach, however, may thwart counter-developments in the states that have restricted the age of transfer and have begun to recognize that juveniles

51. *See* Clyde Haberman, *When Youth Violence Spurred 'Superpredator' Fear*, N.Y. TIMES (Apr. 6, 2014), https://www.nytimes.com/2014/04/07/us/politics/killing-on-bus-recalls-superpredator-threat-of-90s.html (last visited Apr. 25, 2020) [perma.cc/5C57-VQTV].

52. Roper v. Simmons, 543 U.S. 551 (2005); Graham v. Florida, 560 U.S. 48 (2010); Miller v. Alabama, 567 U.S. 460 (2012).

are different. In light of research that indicates that brain development continues well past the age of eighteen into the mid-twenties, some jurisdictions are experimenting with different ways in how to address offenders between the ages of eighteen and twenty-one.[53] Perhaps it is time to reconsider all sentencing for those whose brain is still developing? After all, another indication of brain development and impulse control fully maturing by the mid-twenties is the declining recidivism rate from that age on. Still that impetus is unlikely to emerge from federal sentencing.

Indeed, federal law enforcement efforts may be targeted at specific groups of young offenders, including non-citizens, Native Americans, and those labeled gang members. For non-citizen youths, federal convictions often lead directly to deportation. Stereotypes of immigrant groups may help federal prosecutors persuade judges that these children deserve to be tried and sentenced as adults.

Perhaps up to half of the youths charged in federal court hail from Native American territory, Quinn and McLaughlin indicate. That is a function of special federal criminal jurisdiction over reservations. Largely Native Americans remain a forgotten part of federal sentencing,[54] and Native American youths are even less visible.

Gang-affiliated youth are of particular interest to federal law enforcement. Courts frequently equate gang affiliation with incorrigibility. To add to that perception, many of these young people are underage and many are non-U.S. citizens. The intersections of age with other characteristics that often lead to

53. *See, e.g.*, John Kelly, *In Another Big Year for "Raise the Age" Laws, One State Now Considers All Teens as Juveniles*, CHRON. SOC. CHANGE (June 25, 2018), https://chronicleofsocialchange.org/youth-services-insider/juvenile-justice-raise-the-age-vermont-missouri-state-legislation/31430 (last visited Apr. 25, 2020) [perma.cc/CM75-Y4ET].

54. *See* U.S. SENTENCING COMM'N, QUICK FACTS—NATIVE AMERICAN OFFENDERS 1 (2020), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Native_American_Offenders_FY19.pdf (stating that Native Americans were about two percent of federal offenders in fiscal year 2019) [perma.cc/8DWJ-PWP8].

harsher sentences may present a new frontier both for federal defenders and children's rights' advocates.

The number of non-citizens in the federal prison population has increased disproportionately to both their representation in the population and their involvement in crime. Persuasive studies indicate that immigrants, both documented and undocumented, are less crime-involved than native-born citizens.[55] The reason for the increase of Hispanic offenders in particular is a function of the Trump Administration's change in enforcement priorities. Rather than releasing illegal border crossers back to Mexico or charging them with a civil violation, they are now being charged criminally, mass processed, and sentenced to short prison terms for crossing the border illegally.[56]

The *Issues in Federal Sentencing: Privilege, Disparity, and a Way Forward* Symposium and the articles printed in this Issue can provide only a glimpse into federal sentencing. Many areas demand further research. Judge Bennett, for example, concludes with his heartfelt gratitude to federal probation officers. They play a crucial role in the federal system, in part as adjuncts to judges. They compile the pre-sentence report, calculate the guideline range, and outline mitigating and aggravating circumstances. In addition, they supervise offenders and bring supervision failings before the judge. Their background and philosophy, therefore, play a crucial role in a system that is otherwise run by lawyers. Still, legal scholarship focuses little on them despite their authority and the important role they play in the sentencing system.

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55. *See, e.g.*, Christopher Ingraham, *Two Charts Demolish the Notion that Immigrants Here Illegally Commit More Crime*, WASH. POST (June 19, 2018, 2:46 PM), https://www.washingtonpost.com/news/wonk/wp/2018/06/19/two-charts-demolish-the-notion-that-immigrants-here-illegally-commit-more-crime/ (last visited Apr. 25, 2020) (summarizing and comparing a number of studies) [perma.cc/6UZU-3NKZ].

56. *See, e.g.*, Richard Marosi, *Feds Plan Mass Prosecution of Illegal Border-Crossing Cases in San Diego, Attorneys Say*, L.A. TIMES (June 6, 2018, 6:50 PM), https://www.latimes.com/local/lanow/la-me-ln-operation-streamline-san-diego-20180606-story.html (last visited Apr. 25, 2020) [perma.cc/TTC6-CVYU].

IV. Conclusion

The crux of the problem with federal sentencing is not that it is failing us but rather that we are unable to grasp fully *how* it is failing us. Ultimately, we do not know what it would mean to have a successful sentencing system. If we prioritized human and civil rights values, equality, safety, and justice, we could build a more equitable and less punitive system.