Risk in Sentencing: Constitutionally-Suspect Variables and Evidence-Based Sentencing

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I: Introduction

It is sometimes said that imposing a criminal sentence is the most difficult thing a judge ever has to do.\(^1\) To get a sentence right, the judge must evaluate a number of competing considerations, weigh the impact of the crime on each involved party, and balance the utilitarian theories of punishment against the deontological ones.\(^2\) Unless the judge is a pure retributivist, considerations about future criminal conduct will almost certainly color his or her decision. But how should the judge assess the risk of recidivism, and how should the judge weigh that risk against other considerations?

That is a difficult question. In some jurisdictions, sentencing guidelines cabin judicial discretion,\(^3\) but recent decisions by the Supreme Court have prohibited certain forms of guideline sentencing.\(^4\) Today, for example, in the federal judiciary, sentencing guidelines are advisory;\(^5\) and any district court judge who treats a guideline sentence as presumptively reasonable can be

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\(^1\) See, e.g., H. Lee Sarokin, Confessions of a Sentencing Judge, HUFFINGTON POST (Mar. 7, 2010) (noting that in his work as a federal judge, “no decision required more thought and agony than a sentence to be imposed”); infra note 41.

\(^2\) See Paul H. Robinson, Punishing Dangerousness: Cloaking Preventive Detention as Criminal Justice, 114 HARV. L. REV. 1429, 1438, 1441 (2001) (“Dangerousness and desert are distinct criteria that commonly diverge... . They inevitably distribute liability and punishment differently. To advance one, the system must sacrifice the other.”).


\(^4\) See Blakely v. Washington, 542 U.S. 296 (2004) (holding that the Sixth Amendment prohibits judges from enhancing sentences based on facts other than those admitted by the defendant or found by a jury beyond a reasonable doubt); United States v. Booker, 543 U.S. 220 (2005) (applying the Blakely holding to the federal sentencing guidelines).

\(^5\) See Booker at 245.
reversed. Accordingly, federal judges must wrestle with all of the sentencing considerations enumerated at 18 U.S.C. § 3553(a), decide which ones are paramount, and attempt to render an appropriate gestalt judgment. Some judges have resorted to consulting ad hoc advisory panels of fellow judges and sentencing experts. And perhaps because there is no consensus about which sentencing objectives take priority over others, it is said that disparity in federal sentencing is increasing. If that is so, the judiciary could see a return to the “bad old days” of indeterminate sentencing, or to the not-so-terrific days of mandatory sentencing guidelines, or to widespread

9 See U.S. SENTENCING COMM’N, DEMOGRAPHIC DIFFERENCES IN FEDERAL SENTENCING PRACTICES: AN UPDATE OF THE BOOKER REPORT’S MULTIVARIATE REGRESSION ANALYSIS 2 (2010) (“Black male offenders received longer sentences than white male offenders. The differences in sentence length have increased steadily since Booker.”).
10 Other researchers looking at post-Booker disparity have reached contradictory conclusions. See Jeffrey T. Ulmer, et al., Does Increased Judicial Discretion Lead to Increased Disparity? The “Liberation” of Judicial Sentencing Discretion in the Wake of the Booker/Fanfan Decision, forthcoming in CRIMINOLOGY.
adoption of mandatory minimum sentences. Fortunately, however, another approach could provide federal judges with much-needed guidance: evidence-based sentencing.

Judges engaging in evidence-based sentencing use data in an actuarial manner instead of applying mere professional judgment. There are good reasons for judges to adopt this approach, as actuarial assessment has been demonstrated to be more effective than clinical judgment in a wide range of fields. Today, there is growing interest in actuarial sentencing in the United States and abroad, and this attraction to the approach will intensify as economic predilections of the sentencing judge could drastically affect the sentence”); Robert J. Anello & Jodi Misher Peikin, *Evolving Roles in Federal Sentencing: The Post-Booker/Fanfan World*, 2009 FED. CTX. L. REV. 301, 303 (2006) (quoting Senator Leahy).

12 See Molly Treadway Johnson & Scott A. Gilbert, *The U.S. Sentencing Guidelines: Results of the Federal Judicial Center’s 1996 Survey* 4 (“I think guidelines which were not mandatory would be helpful for all federal and state judges. It is the mandatory nature which creates the unfairness and the unfairness is outrageously unjust.”) (quoting a federal judge).


15 See infra, Part II (describing evidence-based sentencing).

scarcity forces cash-strapped jurisdictions to sentence “smarter,” reducing the costs associated with corrections while simultaneously safeguarding public safety. Part II of this Article describes evidence-based sentencing.

Determining which characteristics should be considered in actuarial sentencing, however, may prove to be problematic. Although criminologists have identified a number of variables that appear to be robust predictors of recidivism, and although judges have wide discretion at sentencing, several of the factors identified as predictive by criminologists (e.g., race, gender) have been struck down as unconstitutional by some courts. Such problematic items can be eliminated from risk assessment instruments, but as the variables associated with protected

17 The idea of smarter sentencing has already found a toehold in the criminal justice community. See Michael Marcus, Smart Sentencing, at: http://www.smartsentencing.info/whatwrks.html (Mar. 17, 2010). The Constitution Project’s “Smart on Crime” website (http://2009transition.org/criminaljustice/) also includes a number of recommendations to the Administration to improve federal sentencing.

18 See infra note 105.


20 See Williams v. Oklahoma, 358 U.S. 576, 585 (1959) (“In discharging his duty of imposing a proper sentence, the sentencing judge is authorized, if not required, to consider all of the mitigating and aggravating circumstances involved in the crime.”); United States v. Tucker, 404 U.S. 443, 446 (1972) (holding that sentencing judges “may appropriately conduct an inquiry broad in scope, largely unlimited either as to the kind of information he may consider, or the source from which it may come”).

21 See, e.g., United States v. Kaba, 480 F.3d 152, 156 (2d Cir. 2007) (“A defendant’s race or nationality may play no role in the administration of justice, including at sentencing.”).
categories are struck from assessment tools, the predictive power of these instruments wanes.\textsuperscript{22} Should the most robust variables be used or omitted? Some highly-predictive variables are uncontroversial, but others are highly contentious. Part III of this Article briefly surveys the history of recidivism prediction efforts and outlines the criminological evidence for fifteen variables associated with recidivism.

Part IV considers three types of challenges associated with the use of empirical sentencing factors: logistical, legal, and philosophical. First, in terms of logistical challenges, some sentencing factors are easy to observe and measure (e.g., age) but others may be too expensive to assess, requiring significant resources to measure them (e.g., association with criminal peers or clinical assessment of IQ). Second, in terms of legal challenges, some sentencing factors would raise no eyebrows (e.g., criminal record), but explicit consideration of other factors would be controversial (e.g., race). Although courts probably would not uphold defendants’ challenges to evidence-based sentencing based on free speech, double jeopardy, or trial by jury rights,\textsuperscript{23} they may be sympathetic to due process or equal protection claims,\textsuperscript{24} and may bar sentencing judges from considering risk predictors such as race, gender, or age. That said, it is possible that the use of suspect categories at sentencing could survive intermediate—or

\textsuperscript{22} See, e.g., Joan Petersilia & Susan Turner, \textit{Guideline-Based Justice: Prediction and Racial Minorities}, 9 CRIME & JUST. 151, 173 (1987) (noting that omitting factors that are correlated with race from a model to predict recidivism reduced the accuracy of the model by five to twelve percentage points).


\textsuperscript{24} See, e.g., Kaba, at 159; United States v. Leung, 40 F.3d 577, 586-87 (2d Cir. 1994) (reversing sentence and assigning sentencing to new judge for consideration of race or gender); \textit{id}. 6
even strict—scrutiny analysis. While it is implausible that a court would uphold the imposition of a sentence on the basis of race or gender alone, courts might be permitted to assess risk by considering race and gender in combination with other variables. After all, in the context of higher education, the Supreme Court has struck down racial quotas but upheld the consideration of race when considered among other factors. Third, the philosophical challenges associated with evidence-based sentencing are just as thorny as the legal ones. Imposing lengthy sentences on some defendants, simply because they resemble other recalcitrant offenders, may offend some judges’ sense of justice. And to the extent that immutable characteristics are predictive of recidivism (justifying punishment under utilitarian grounds), this may imply that the offenders lack meaningful control over their criminal behavior (making the imposition of punishment problematic on retributivist grounds). Certainly, individual differences play a role in shaping the susceptibility to reoffending, but it may be difficult for many judges to surrender the fictions that all persons are truly equal under the law and that (except in stark cases such as duress or


26 Compare Gratz v. Bollinger, 539 U.S. 244 (2003) (striking down the University of Michigan’s point-based affirmative action admissions policy for undergraduates after characterizing it as a quota system) with Grutter v. Bollinger, 539 U.S. 306 (2003) (upholding the University of Michigan’s affirmative action admissions program at the law school after noting that race was used as a “plus factor” to achieve the compelling state interest of a diverse student body).

diminished capacity) all citizens have more-or-less equal predispositions to obeying or violating the law.28

Ultimately, however, courts must consider these issues.29 When judges impose sentence, they act upon predictions about future criminal conduct, either implicitly or explicitly. They do so every day.30 Unless they are prepared to ignore all utilitarian bases of punishment, judges must assess the risk of future crime. It has long been so. But while the assessment of risk has long been ubiquitous in the criminal justice system,31 the effectiveness of the actuarial approach is transforming the field, thereby creating a “new penology” premised on the management of risk


29 See John Monahan, A Jurisprudence of Risk Assessment: Forecasting Harm Among Prisoners, Predators, and Patients, 92 VA. L. REV. 391, 434-35 (2006) (noting that historically “courts rarely have had to address jurisprudential considerations in making violence risk assessments” but that “[j]urisprudential considerations in premising legal decisions on these specific risk factors can no longer be avoided”).


31 See JAMES Q. WILSON, CRIME AND PUBLIC POLICY (1983)

The entire criminal justice system is shot through at every stage (bail, probation, sentencing, and parole) with efforts at prediction, and necessarily so; if we did not try to predict, we would release on bail or on probation either many more or many fewer persons, and make some sentences either much longer or much shorter.

Id. at 79.
within aggregated groups. \(^{32}\) This new penology may force judges to think differently about 
punishment, and – possibly – to confront difficult jurisprudential truths.

Part V of the Article considers the conundrum of what judges should do with empirical 
assessment tools that rely on suspect variables. On the one hand, evidence-based sentencing 
could provide the guidance that federal district judges so desperately need after the decision in 
United States v. Booker. \(^{33}\) Evidence-based sentencing could help ameliorate the explosive 
growth in the Federal Bureau of Prisons, \(^{34}\) and to mitigate the harm that is currently done to 


\(^{34}\) Like the U.S. prison population generally, the federal prison population has grown at a metastasizing rate since 
1980. See A Brief History of the Bureau of Prisons, at http://www.bop.gov/about/history.jsp (tracing growth of 
federal prison population). While there were only 24,252 inmates in custody in 1980, the population more than 
doubled between 1980 and 1989, and more than doubled again during the 1990s. Id. In fact, the federal prison 
course, state prisons populations are growing dramatically, too. See HEATHER C. WEST & WILLIAM J. SABOL, 
PRISON INMATES AT MIDYEAR 2008 – STATISTICAL TABLES 2 tbl.1, at: 
http://bjs.ojp.usdoj.gov/content/pub/pdf/pim08st.pdf (showing increases in state prison populations that, while not as 
great as the 4.6% annual increases observed among the federal population, still average more than 1% each year). It 
is reasonable to expect that in the hands of state sentencing judges, evidence-based sentencing could also help to 
reduce state prison populations. That is where the real action lies. For although the Federal Bureau of Prisons 
incarcerates more than 200,000 people—more than live in Richmond (VA), Salt Lake City (UT), or Berkeley (CA) 
(see http://quickfacts.census.gov/qfd/states/06/0606000.html)—it represents only 12 percent of those incarcerated in 
the U.S. See WEST & WILLIAM J. SABOL, supra (reporting that federal prisoners constitute 12.5% of all U.S. 
prisoners).
defendants, their families, and their communities (all at tremendous taxpayer expense) by locking federal offenders away for terms that dwarf what comparable offenders receive in state courts. But district judges may very well resent a return to “justice by the numbers,” and may

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35 Evidence-based sentencing might maintain parsimony in punishment, limiting the amount of harm inflicted to the necessary amount. But, by definition, all defendants who are punished are harmed. See generally NILS CHRISTIE, LIMITS TO PAIN (1982); TODD CLEAR, HARM IN AMERICAN PENOLOGY 6-9 (1994); CRAIG HANEY, REFORMING PUNISHMENT: PSYCHOLOGICAL LIMITS TO THE PAINS OF IMPRISONMENT (2006); H.L.A. HART, PUNISHMENT AND RESPONSIBILITY 4-5 (1968); NIGEL WALKER, WHY PUNISH? 1-2 (1991) (all defining punishment as harm or evil intentionally imposed by the state for criminal wrongdoing). This conception of punishment is in no way new. See THOMAS HOBBES, LEVIATHAN 353 (Penguin ed. 1985) (asserting that punishment “is an Evill inflicted by Publique authority” in 1651). The awareness that punishment is a harm, not a boon, prompted one court to state that “this court shares the growing understanding that no one should ever be sent to prison for rehabilitation. That is to say, nobody who would not otherwise be locked up should suffer that fate on the incongruous premise that it will be good for him or her.” United States v. Bergman, 416 F. Supp. 496 (S.D.N.Y. 1976); but see Hegel, infra note 52 (characterizing punishment as the “right” of a criminal).


38 See Matthew Rowland, Cost of Incarceration and Supervision, May 6, 2009 (on file with author) (reporting annual cost of Bureau of Prisons imprisonment in 2008 as $25,894.00).

resist the enhancement of a sentence on the basis of a defendant’s race, sex, age, class, or IQ score. That is understandable. But assessments of risk are part and parcel of sentencing, and if the research showing that actuarial assessment is superior to professional judgment is sound, then judges who eschew risk assessment instruments do so by reducing the efficacy of the sentences they impose. Sentencing blindly, these judges will either over-punish (sending individuals to prison who present little appreciable risk to public safety) or they will under-punish (releasing dangerous criminals into communities to create new victims of crime).

II: The Case for Evidence-Based Sentencing

It is sometimes said that imposing sentence upon a defendant found guilty of a crime is the most difficult obligation that any judge can face, since it requires the deliberate imposition


41 See, e.g., Williams v. New York, 337 U.S. 241, 251 (1949) (describing the responsibility of fixing a sentence as “grave”); Daniel E. Walthen, When the Court Speaks: Effective Communication as a Part of Judging, 57 ME. L. REV. 449, 452 (2005) (“Sentencing decisions are often described as among the most difficult that a judge faces.”),
of harm on another human being.\textsuperscript{42} Imposing punishment, in an evenhanded and dispassionate manner, is an awesome responsibility.\textsuperscript{43} It is also a responsibility for which there is little practical training. Most law schools do not offer courses in penology or sentencing,\textsuperscript{44} and most legal work does not equip the lawyer with directly relevant experience. Yes, both the defense lawyer and the prosecutor are exposed to sentencing, but they participate in that activity as

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\textsuperscript{42} See supra note 35.

\textsuperscript{43} Presumably, the public wants a judge who neither imposes a sentence out of sympathy for the defendant nor out of anger, but from balanced view of the circumstances. See Lawrence B. Solum, \textit{Empirical Measures of Judicial Performance: A Tournament of Virtue}, 32 FLA. ST. U.L. REV. 1365, 1372 (2005) (noting such judicial temperament as one of the largely uncontested judicial virtues).

\textsuperscript{44} See Frankel, supra note 41, at 13 (“Law students learn something about the rules of the criminal law, about the trial of cases, and, increasingly, about the rights of defendants before and during trial. They receive almost no instruction pertinent to sentencing.”). Approximately U.S. thirty law schools offer courses on general sentencing, as compared to 150+ that offer death penalty courses. See Doug Berman, \textit{Questioning Law School Priorities in Instruction and Programming}, at http://sentencing.typepad.com/sentencing_law_and_policy/2008/02/questioning-law.html (Feb. 19, 2008) (providing these estimates). Of course, this is not universally true. In the German legal system, law students first train as judges. See James R. Maxeiner, \textit{Integrating Practical Training and Professional Legal Education}, 14 IUS GENTIUM 37, 43-44 (2008) (noting that German law students apprentice under judicial supervision and thereby learn to craft actual judgments).
parties. Even veteran prosecutors, exhorted to “do justice” instead of to win at any cost, are not required to balance the interests of all involved parties—defendant, victims, and society at large—at least not in the reflective and dispassionate way that a judge must.

Fortunately, a substantial literature on sentencing exists. Judges confronted with the responsibility of imposing sentence may turn to early criminal codes, to seminal works by early and contemporary philosophers, and to the jurisprudential work of professional societies. In

45 See, e.g., Berger v. United States, 295 U.S. 78, 88 (1935) (“The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done….”). The Court’s exhortation has been echoed by Attorney General Eric Holder, who told assistant U.S. attorneys that “[y]our job is not to win cases. Your job is to do justice. Your job is in every case, every decision that you make, to do the right thing.” Nedra Pickler, Attorney General Holder Tells Prosecutors to ‘Do the Right Thing’, Associated Press Online, Apr. 9, 2009.


48 E.g., JOHN AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED (1832); CESARE BECCARIA, ON CRIMES AND PUNISHMENTS (Henry Paolucci trans., 1963) (1764); JEREMY BENTHAM, THE RATIONALE OF PUNISHMENT (2009) (1830); RONALD DWORKIN, LAW’S EMPIRE (1986); JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS (1980); LON FULLER, THE MORALITY OF LAW (1964); HART, supra note 42; OLIVER WENDELL HOLMES, THE COMMON LAW (1881); KARL LLEWELLYN, THE BRAMBLE BUSH (1930); JOHN RAWLS, A THEORY OF JUSTICE (1971); JOSEPH RAZ,
many jurisdictions, sentencing guidelines channel judicial authority, identifying appropriate penalties within the broad ranges established by legislatures.\textsuperscript{50}

Judges who survey the penological literature will discover that there are four commonly-recognized cornerstones of punishment:\textsuperscript{51} retribution (also known as just deserts),\textsuperscript{52} deterrence,\textsuperscript{53}


\textsuperscript{50} Sentencing guidelines have proven to be an effective means of channeling judicial discretion. \textit{See, e.g.}, Frase, \textit{supra} note 3; Michael Tonry, \textit{Sentencing Commissions and Their Guidelines}, 17 CRIME \& JUST. 137 (Michael Tonry ed., 1993).

\textsuperscript{51} A great deal of scholarship has been devoted to the explication of punishment, but relatively few have challenged the concept of punishment itself. For an example of this scholarship, see \textit{DEIRDRE GOLASH}, \textit{THE CASE AGAINST PUNISHMENT: RETRIBUTION, CRIME PREVENTION, AND THE LAW} (2006) (challenging the presumption that punishment is the appropriate response to crime).

\textsuperscript{52} \textit{See generally}, e.g., \textit{RICHARD G. SINGER, JUST DESERTS: SENTENCING BASED ON EQUALITY AND DESERT} (1979); Packer, \textit{supra} note 28; \textit{ANDREW VON HIRSCH, DOING JUSTICE: THE CHOICE OF PUNISHMENTS} (1976); Jean Hampton, \textit{The Retributive Idea}, in \textit{FORGIVENESS AND MERCY}, 111-61 (Jeffrie Murphy \& Jean Hampton eds., 1988) (all describing retributive basis of punishment). One of the strongest expressions of retribution was formulated by Kant. \textit{See IMMANUEL KANT, THE PHILOSOPHY OF LAW} (W. Hastie trans., 1887).

\textit{Even if a Civil Society resolved to dissolve itself with the consent of all its members—as might be supposed in the case of a People inhabiting an island resolving to separate and scatter themselves throughout the whole world—the last Murderer lying in the prison ought to be executed before the resolution was carried out. This ought to be done in order that every one may realize the desert}
of his deeds, and that blood guiltiness may not remain upon the people; for otherwise they might all be regarded as participators in the murder as a public violation of Justice.

Id. at 198. Hegel, also a retributivist, suggested that punishment should be conceived of as a right, not as an evil to be suffered:

Punishment is the right of the criminal. It is an act of his own will. The violation of right has been proclaimed by the criminal as his own right. His crime is the negation of right. Punishment is the negation of this negation, and consequently an affirmation of right, solicited and forced upon the criminal by himself.

Karl Marx, Punishment and Society, in PHILOSOPHICAL PERSPECTIVES ON PUNISHMENT 358. 358 (Gertrude Ezorsky ed. 972) (quoting Georg Hegel). Of course, during much of the twentieth century, retributivist theory was derided by jurists and scholars alike. See, e.g., Williams v. New York, 337 U.S. 241, 248 (1949) (“Retribution is no longer the dominant objective of the criminal law.”); Morissette v. United States, 342 U.S. 246, 251 (1952) (referencing the “tardy and unfinished substitution of deterrence and reformation in place of retaliation and vengeance as the motivation of public prosecution”); Furman v. Georgia, 408 U.S. 238, 363 (1972) (”[N]o one has ever seriously advanced retribution as a legitimate goal of our society.” (Marshall, J., concurring); Austin MacCormick, The Prison’s Role in Crime Prevention, 41 J. CRIM. L. & CRIMINOLOGY 36, 40 (1951) (“Punishment as retribution belongs to a penal philosophy that is archaic and discredited by history.”). But, “[o]ver the last quarter of the twentieth century and into the early part of the twenty-first century, retributivism has reestablished itself as the dominant theory behind criminal justice.” Matthew Haist, Deterrence in a Sea of “Just Deserts”: Are Utilitarian Goals Achievable in a World of “Limiting Retributivism”? 99 J. CRIM. L. & CRIMINOLOGY 789, 799 (2009). Even the Supreme Court has acknowledged a role for retributivism in punishment. See Spaziano v. Florida, 468 U.S. 447, 462 (1984) (noting that retribution “is an element of all punishments society imposes”).

53 See generally, e.g., FRANKLIN R. ZIMRING & GORDON J. HAWKINS, DETERRENCE: THE LEGAL THREAT IN CRIME CONTROL (1973); ALFRED BLUMSTEIN ET AL., DETERRENCE AND INCAPACITATION: ESTIMATING THE EFFECTS OF CRIMINAL SANCTIONS ON CRIME RATES (1978); Packer, supra note 28, at 39-48; Daniel S. Nagin, Criminal Deterrence Research at the Outset of the Twenty-First Century, 23 CRIME & JUST. 1 (Michael Tonry ed., 1998);
incapacitation, and rehabilitation. Punishment may serve additional functions, but these four bases shape most jurisprudential thinking about punishment. Often, the four grounds operate in


> If I were having a philosophical talk with a man I was going to have hanged ….

> I should say, I don't doubt that your act was inevitable for you but to make it more avoidable by others we propose to sacrifice you to the common good. You may regard yourself as a soldier dying for your country if you like. But the law must keep its promises.

Letter from Oliver Wendell Holmes, Jr., to Harold J. Laski (Dec 17, 1925), in *1 Holmes-Laski Letters: The Correspondence of Mr. Justice Holmes and Harold J. Laski*, 1916-1925, at 806 (Mark DeWolfe Howe ed., 1953). But deterrence was criticized, sharply, by Hegel. See, e.g., *George Hegel, The Philosophy of Right* §99A (“To justify punishment in this way is like raising one’s stick at a dog; it means treating a human being like a dog instead of respecting his honour and freedom.”).


Recognition that imprisonment’s distinctive feature as a penal method is its incapacitative effect has implications for criminal justice policy. The contribution of prisons to crime control by way of rehabilitation programs or individual and general deterrence is problematic. But there can be no doubt that an offender cannot commit crimes in the general community while incarcerated.


harmony, but they occasionally conflict (e.g., capital punishment is a terrific incapacitant, but does little to rehabilitate). 58

Retributivist theories are retrospective, concerned with the correct punishment due for prior acts, 59 but the other three theories are prospective, focused on how future criminal acts can

Penal Policy and Social Purpose (1981); Packer, supra note 28, at 53-58 (all describing rehabilitative basis of punishment).


57 See Gottfredson, supra note 19, at 3-4 (indicating the relative weight that 18 county sentencing judges assigned to various goals of sentencing).


Death is the surest incapacitation: it eliminates the possibility of the defendant murdering again while inside prison walls, and in the outside world should the defendant ever be on the loose again due to parole, executive clemency, or escape. LWOP [life imprisonment without the possibility of parole] is a potent, but not perfect substitute for death: LWOP negates the possibility of parole, but cannot assure against the defendant’s murdering while inside the prison, or after receiving executive clemency, or escaping.


59 See, e.g., R. A. Duff, Punishment, Communication, and Community 19-20 (2001) (“[Retributivism] justifies punishment in terms not of its contingently beneficial effects but of its intrinsic justice as a response to crime; the justificatory relationship holds between present punishment and past crime, not between present punishment and future effects”).
be prevented. Some theorists argue that retribution – and retribution alone – should determine criminal penalties, but pure retributivists are rarely spotted in the real world. Most jurists believe that deterrence, incapacitation, and rehabilitation are legitimate bases for punishment.

60 See JEFFRIE G. MURPHY & JULES L. COLEMAN, PHILOSOPHY OF LAW: AN INTRODUCTION TO JURISPRUDENCE 118 (2d ed. 1990) (“And how can such a general justifying aim be prevention, since state punishment waits until a crime has already occurred?”). The answer, of course, is that punishment under the utilitarian theory seeks to prevent other criminal acts. This is not a novel insight. In the Protagoras, Plato states:

In punishing wrongdoers, no one concentrates on the fact that a man has done wrong in the past, or punishes him on that account, unless taking blind vengeance like a beast. No, punishment is not inflicted by a rational man for the sake of the crime that has been committed—after all one cannot undo what is past—but for the sake of the future, to prevent either the same man or, by the spectacle of his punishment, someone else, from doing wrong again.


61 See KANT, supra note 52, at 195 (noting that utilitarian aims cannot justify punishment; rather, it can “be imposed only because the individual on whom it is inflicted has committed a Crime”); Michael S. Moore, The Moral Worth of Retribution, in RESPONSIBILITY, CHARACTER, AND THE EMOTIONS 179, 179 (Ferdinand Schoeman ed., 1987) (“Retributivism is the view that punishment is justified by the moral culpability of those who receive it. A retributivist punishes because, and only because, the offender deserves it.”). Presumably, a pure retributivist would not care about the collateral effects of punishment. See, e.g., Alice Ristroph, How (Not) to Think Like a Punisher, 61 FLA. L. REV. 727, 746 (2009) (“[A] moral claim that an offender deserves ten years in prison is not affected by the fact that the state cannot afford to support him, or that the offender’s incarceration will further exacerbate racial disproportions in the prison population.”).

62 See WALKER, supra note 42, at 8 (“In practice Anglo-American sentencers tend to be eclectic, reasoning sometimes as utilitarians but sometimes, when they are outraged by a crime, as retributivists.”)
If the reduction of future crime is an appropriate goal of punishment, it is worth noting that deterrence, incapacitation, and rehabilitation produce empirically measurable results. It can be claimed, for example, that crime X is optimally punished by penalty Y, reducing future offending more than penalty Z. Such claims can be tested and are “falsifiable.” Thus, from the standpoint of utilitarian penology, some punishments are demonstrably superior. Judges can know “what works” in sentencing.

63 See BERNARD E. HARCOURT, AGAINST PREDICTION 33 (2007) (“Simplistic, basic, but predictive—[binary prediction based on objective measures] can be proven right. It can be validated, tested, replicated. It is a form of technical knowledge that makes possible ‘right’ and ‘wrong’ answers.”). This is the principle of falsifiability, as championed by philosopher of science, Karl Popper. KARL POPPER, THE LOGIC OF SCIENTIFIC DISCOVERY 18 (2002) (“I shall require [of a scientific system] that its logical form shall be such that it can be singled out, by means of empirical tests, in a negative sense: it must be possible for an empirical scientific system to be refuted by experience”) (italics in original). The numeric expression of risk may help establish an air of authority that does not extend to qualitative approaches. See HANS EYSENCK, GENIUS: THE NATURAL HISTORY OF CREATIVITY 4 (1995) (quoting Lord Kelvin as stating that “[o]ne’s knowledge of science begins when he can measure what he is speaking about, and expresses it in numbers.”); United States v. Reich, 661 F. Supp. 371, 378 (S.D.N.Y. 1987) (“The formulae and the grid distance the offender from the sentencer – and from the reasons for punishment – by lending the process a false aura of scientific certainty.”); J.C. Oleson, Blowing Out All the Candles: A Few Thoughts on the Twenty-Fifth Birthday of the Sentencing Reform Act of 1984, 45 U. RICH. L. REV. 693, 723 (2011) (“By masking the politics of sentencing beneath a veneer of science, the Guidelines made punishment appear more rational, empirical, and precise.”).

64 Retrospectively-oriented punishments, on the other hand, might be scaled, but cannot be disproved. See Alice Ristroph, Desert, Democracy, and Sentencing Reform, 96 J. CRIM. L. & CRIMINOLOGY 1293, 1334-35 (2006) (“Importantly this ‘age of empiricism,’ the moral claims of retributivism are non-falsifiable: one can dispute whether a punishment accords with community sentiments of desert, but one cannot disprove the underlying claim that it is morally right to impose deserved punishment.”).
How might a judge identify an optimal punishment in a case?

Historically, judges were free to consider any facts that were not expressly prohibited, and to impose any sentence that fell within the broad ranges established by the law. A judge could impose a sentence and give no reason at all, and judicial decisions of this kind were virtually unreviewable. The law of sentencing was so vague that it has been called the “high point in anti-jurisprudence.”

The establishment of sentencing guidelines made sentencing more uniform. In the federal justice system, the passage of the Sentencing Reform Act of 1984 (SRA) made sentencing

65 The phrase is used advisedly, reflecting Martinson’s (in)famous article that closed the door on rehabilitative penology. See Robert Martinson, What Works? Questions and Answers about Prison Reform, 35 PUB. INT. 22 (1974) (concluding from a review of 231 studies that rehabilitative programs did not significantly reduce rates of recidivism); but see Robert Martinson, New Findings, New Views: A Note of Caution Regarding Sentencing Reform, 7 HOFSTRA L. REV. 243, 254 (1979) (recanting his “nothing works” findings by writing that “I withdraw this conclusion”).

66 See supra note 20.

67 See, e.g., Williams v. New York, 337 U.S. 241, 252 (1949) (noting that “no federal constitutional objection would have been possible if the … judge had sentenced him to death giving no reason at all”).

68 See United States v. Tucker, 404 U.S. 443, 447 (1972) (observing that “a sentence imposed by a federal district judge, if within statutory limits, is generally not subject to review”).


more regimented and more predictable. The SRA prospectively abolished federal parole, created the United States Sentencing Commission, and directed the Commission to develop and promulgate federal sentencing guidelines. These steps alone did a great deal to standardize federal sentencing.

In 2005, however, in the bifurcated opinion in U.S. v. Booker, the Supreme Court held that the federal sentencing guidelines violated the Sixth Amendment. The Court remedied this violation by striking down the provisions of the SRA that made the guidelines binding, and making the guidelines advisory. Today, federal district court judges are free to consider any factor enumerated by statute, and may no longer presume that a guidelines sentence is reasonable. This expanded discretion may lead to greater disparity in the sentences that are imposed. Research suggests that, post-Booker, federal sentencing disparity may be increasing.

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71 U.S. SENTENCING COMM’N, FIFTEEN YEARS OF GUIDELINE SENTENCING, at x (2004) ("The guidelines have made sentencing more transparent and predictable.").


75 See STITH & CABRANES, FEAR OF JUDGING: SENTENCING GUIDELINES IN THE FEDERAL COURTS 114 (1998) (noting that “elimination of parole by itself…, quite apart from any effect of the Guidelines, can be expected to reduce sentencing variation”).


77 Id. at 226-27.

78 Id. at 245.


81 See U.S. SENTENCING COMM’N, supra note 9, at 2, but see Ulmer, et al., supra note 10.
Indeed, some commentators have suggested that we are witnessing a return to the dark days of indeterminate sentencing.\footnote{See, e.g., Chiu, supra note 11.}

But if district court judges can no longer rely on guidelines sentences as reasonable,\footnote{See Nelson.} what may they use to guide their decision making? How can they thoughtfully weigh the various sentencing factors identified in 18 U.S.C. § 3553(a)?

Fortunately, these judges need neither to return to arbitrary and idiosyncratic sentencing\footnote{See FRANKEL, supra note 41, at 6 “[F]ederal trial judges, answerable only to their varieties of consciences, may and do send people to prison for terms that may vary in any given case from none at all up to five, ten, thirty, or more years.”}. nor to wait for Congress to enact a comprehensive slate of mandatory minimum sentences.\footnote{Mandatory minimum sentencing has been roundly condemned by expert agencies, academics, justices, and legislators. See, e.g., U.S. SENTENCING COMM’N, MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM (2001); Molly M. Gill, FAMM, Correcting Course: Lessons from the 1970 Repeal of Mandatory Minimums, 21 FED. SENT. REP. 55 (Oct. 2008); Michael Tonry, SENTENCING MATTERS 5 (1996); Michael Tonry, Mandatory Penalties, 16 CRIME & JUST. 243, 243 (Michael Tonry ed., 1987); William H. Rehnquist, Luncheon Address (June 18, 1993), in United States Sentencing Commission, Proceedings of the Inaugural Symposium on Crime and Punishment in the United States 286 (1993) (suggesting that federal mandatory minimum sentencing statutes are “perhaps a good example of the law of unintended consequences”); Speech of Justice Anthony Kennedy, Address to the American Bar Association (Aug. 9, 2003), available at http://www.supremecourtus.gov/publicinfo/speeches/sp_08-09-03.html; Speech of Justice Stephen Breyer, Federal Sentencing Guidelines Revisited (Nov. 18, 1998), reprinted at 11 FED. SENT. REP. 180, 184-85 (1999); Orrin G. Hatch, The Role of Congress in Sentencing: The United States Sentencing Commission, Mandatory Minimum Sentences, and the Search for a Certain and Effective Sentencing System, 28 WAKE FOREST L. REV. 185, 194 (1993) (all criticizing mandatory minimum sentences).}
Another approach is available. Post-Booker, federal judges might draw upon empirical data and impose “evidence-based sentences.” Specifically, using a sentencing information system, judges might be provided with information that would allow them to impose maximally-efficient sentences within the statutory ranges authorized by law, thereby reducing the likelihood of future crime. This is not a new idea. The application of computers to criminal sentencing was proposed forty years ago, and the Judicial Conference of the United States (the policy making body for the federal courts) endorsed the use of empirical data in sentencing thirty years ago. And there is good reason for the federal courts to consider adopting evidence-based sentencing.


90 See Report of the Proceedings of the Judicial Conference of the United States, Sept. 15-16, 1977, at 74 (endorsing “the concept of a new probation information system” that would, inter alia, “provide up-to-date information to guide sentencing courts in selecting sentences for convicted defendants”).
The statistical assessment of recidivism risk has an eighty-year history, is generally more accurate than specific predictions of violence, and consistently outperforms the clinical judgment of even trained and experienced experts. In 1999, Don Gottfredson compared the factors considered by sentencing judges in making subjective predictions about the risk of new


92 See D.A. Andrews & James Bonta, The Psychology of Criminal Conduct 302 (2006, 4th ed.) (noting that, because violence (specifically) is rarer than crime (generally), it is more difficult to predict violence than recidivism). The prediction of violence has been criticized because of a high rate of false positives. See, e.g., Bruce J. Ennis & Thomas R. Litwack, Psychiatry and the Presumption of Expertise: Flipping Coins in the Courtroom, 62 Cal. L. Rev. 693, 711-16 (1974) (describing the prediction of violence as no more accurate than “the flip of a coin”); Morris & Miller, supra note 88, at 15-16 (“With our present knowledge, with the best possible long-term predictions of violent behavior we can expect to make one true positive prediction of violence to the person for every two false positive predictions.”); but see id., at 17 (emphasizing that even at a prediction rate of one-in-three, “a group of three people, one of whom within a few months will commit a crime of extreme personal violence, is a very dangerous group indeed”).

93 See, e.g., Meehl, supra note 16; Gottfredson & Gottfredson, supra note 16; Andrews & Bonta, supra note 92, at 287 tbl. 9.9; William M. Grove, et al., Clinical versus Mechanical Prediction: A Meta-Analysis, 12 Psychol. Assessment 19 (2000); Stephen D. Gottfredson & Don M. Gottfredson, Accuracy of Prediction Models, in 2 Criminal Careers and “Career Criminals” 247 (Alfred Blumstein, et al. eds., 1986) (“[I]n virtually every decision-making situation for which the issue has been studied, it has been found that statistically developed predictive devices outperform human judgment.”). Based the strength of the evidence, one researcher has concluded, “Failure to conduct actuarial risk assessments or consider its results is irrational, unscientific, and unprofessional.” Ivan Zinger, Actuarial Risk Assessment and Human Rights: A Commentary, Canadian J. Criminology & Crim. Justice 607, 607 (2004). Another has suggested that failing to use actuarial risk assessment devices may “be unethical—a kind of sentencing malpractice…” Redding, supra note 86, at 1.
crime,\textsuperscript{94} and compared these against empirically-derived risk factors.\textsuperscript{95} He looked at whether offenders were arrested in the twenty-year period after sentencing and concluded that empirically-derived risk measures were better at predicting future crime than were judges’ subjective impressions.\textsuperscript{96}

Today, there is growing interest in actuarial sentencing. The PEW Center on the States recommended ten evidence-based sentencing initiatives (including the use of risk-needs assessments as a basis for sentencing decisions),\textsuperscript{97} the Crime and Justice Institute and National Institute of Corrections issued a report that champions evidence-based sentencing,\textsuperscript{98} the National Center for State Courts has developed a model curriculum for evidence-based sentencing,\textsuperscript{99} and even the American Law Institute’s recent revision to the Model Penal Code (Sentencing) acknowledges a role for risk assessment instruments in the sentencing process, calling for

\begin{itemize}
\item \textsuperscript{94} See Gottfredson, \textit{supra} note 19, at 5 (noting that judges rely upon “long arrest record, serious offense, low social stability, probation officer recommends custody, property crime, not a person crime, aggravating factors, long conviction record, age (younger)” in predictions of rearrest).
\item \textsuperscript{95} See \textit{id}. at 6 (noting that the empirically-derived measure used “age (younger), long arrest record, race: not white, any heroin or barbiturate use in the past 2 years, number of prior probation sentences, alcohol use as a problem drinker (in record), less serious offense, number of prior jail sentences, property crime, sale of drugs (current offense)” as predictors of rearrest).
\item \textsuperscript{96} \textit{Id}. at 2. See also \textit{supra} note 93 (noting that actuarial techniques outperform clinical prediction).
\item \textsuperscript{97} See PEW CENTER ON THE STATES, ARMING THE COURTS WITH RESEARCH: 10 EVIDENCE-BASED SENTENCING INITIATIVES TO CONTROL CRIME AND REDUCE COSTS (8 Pub. Safety Policy Brief 2009).
\item \textsuperscript{98} Roger Warren, Evidence-Based Practices to Reduce Recidivism: Implications for State Judiciaries 20 (Crime and Justice Institute 2007).
\item \textsuperscript{99} NATIONAL CENTER FOR STATE COURTS, EVIDENCE-BASED SENTENCING TO IMPROVE PUBLIC SAFETY & REDUCE RECIDIVISM: A MODEL CURRICULUM FOR JUDGES (2009).
\end{itemize}
sentencing commissions to develop “offender risk instruments or processes, supported by current and ongoing recidivism research of felons in the state, that will estimate the relative risks that individual felons pose to public safety through future criminal conduct.”

Elsewhere, I have described a sentencing information system that might allow judges to identify relevant data about the offense and offender to generate an easily-interpretable scatter plot.

The severity of sentence would be plotted on the horizontal axis (representing the entire spectrum of terms of imprisonment available under the statute) and the duration without a new arrest (“survival”) would be plotted on the vertical axis. Each point in the cloud of the scatter plot would represent a previous case (offenders matched for offender and offense characteristics), and by clicking on any single point with a mouse, the judge could pull up the specifics of that case: the name and photo of the offender, the offense of conviction, the characteristics of the offender, and the particulars of the sentence imposed. The judge would be able to review any educational, vocational, or treatment programs that successful offenders had completed while serving their sentences, and to search online for available, equivalent programs. If desired,

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101 See Oleson, *supra* note 63.
the underlying documents associated with any of the previous
cases could be retrieved with a click of the mouse.\textsuperscript{102}

By focusing on sentencing alternatives near the top of the vertical-axis (individuals who
survived long periods of time without new arrests), a judge could engage in actuarial sentencing.
A judge could divert correctional resources from low-risk offenders (who actually become \textit{more}
likely to reoffend if over-supervised)\textsuperscript{103} to high-risk offenders in greater need of intensive
services and supervision.\textsuperscript{104} Defendants who are statistically most likely to recidivate could be
sentenced to longer sentences (within the statutory range),\textsuperscript{105} while those who present little risk

\textsuperscript{102} \textit{Id.} at 745-46.

\textsuperscript{103} \textit{See, e.g.}, Christopher T. Lowenkamp & Edward J. Latessa, \textit{Understanding the Risk Principle: How and Why
Correctional Interventions Can Harm Low-Risk Offenders}, in \textsc{Topics in Community Corrections, National
Institute of Corrections Annual Issue} (2004) (noting that providing unnecessary services to low-risk offenders
wastes resources that could be devoted to more-serious offenders and affirmatively \textit{increases} the risk that low-risk
offenders will reoffend).

\textsuperscript{104} \textit{See} \textsc{Pew Center on the States, Maximum Impact: Targeting Supervision on Higher-Risk People,
Places and Times} 3-4 (9 Pub. Safety Policy Brief 2009) ("[T]here is considerable evidence that concentrating both
services and supervision on [high risk offenders] will result in significant reductions in crime and victimization.").

\textsuperscript{105} Criminological research suggests that a modest number of offenders are responsible for a disproportionate
amount of crime. \textit{See, e.g.}, Marvin E. Wolfgang \textit{et al.}, \textit{Delinquency in a Birth Cohort} (1972) (reporting that
6% of delinquents were responsible for 52% of offenses, including 71% of murders and 69% of aggravated
assaults); Sarnoff A. Mednick, \textit{A Bio-Social Theory of the Learning of Law-Abiding Behavior}, in \textsc{Biological Bases
of Criminal Behavior} (Sarnoff A. Mednick & Karl O. Christiansen eds., 1977) (reporting that 1% of men in a
Copenhagen birth cohort were responsible for more than half the crime). If one can selectively incapacitate high-rate
offenders, it may be possible to substantially reduce the crime rate while avoiding the considerable human and fiscal
costs associated with incapacitating large swaths of the population. A seminal work on selective incapacitation was
of recidivism could be sentenced to brief terms of incarceration or non-custodial sentences.\textsuperscript{106} Sentences also could be tailored to the particulars of the offense and the offender.\textsuperscript{107}

\textsuperscript{106} This was the approach adopted by the Commonwealth of Virginia. High-risk offenders are imprisoned while those who are statistically unlikely to recidivate receive non-custodial, alternative sentences. \textit{See} Brian J. Ostrom \textit{et al.}, Nat’l Ctr. for State Courts, Offender Risk Assessment in Virginia 20-22 (2002).

\textsuperscript{107} With the click of a mouse, a judge could look at the specific prison programs that offenders completed while in custody, and could also look at the conditions of supervision that were imposed upon those successful offenders during supervised release. By recommending that an offender be designated to a comparable prison facility, with access to the same prison programs that highly successful offenders had completed, and by imposing comparable
Of course, under this approach (identifying optimal sentences by matching the offender to other offenders with similar characteristics, sentenced for similar crimes, and then looking for the least-punitive punishment that produces the lowest rate of recidivism), two offenders guilty of identical crimes may be sentenced to different sentences because of variation in their personal characteristics. Under an actuarial sentencing regime, parity-in-punishment, often described as the paramount objective of the SRA, may be compromised. But this problem may be more apparent than real. After all, the ability to impose “like” sentences in “like” cases

conditions of release that successful offenders had, a judge would provide an offender with the same environmental opportunities that appeared to make a difference for other, similarly situated offenders.

This approach is consistent with both the parsimony provision in 18 U.S.C. § 3553(a) (“The court shall impose a sentence sufficient, but not greater than necessary”) and 18 U.S.C. § 3553(a)(6) (“The court, in determining the particular sentence to be imposed, shall consider … the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct”).

The Supreme Court endorsed an individualized approach to sentencing in Williams v. New York, 337 U.S. 241 (1949). The Court stated, “The belief no longer prevails that every offense in a like legal category calls for an identical punishment without regard to the past life and habits of a particular offender.” Id. at 247. Of course, such an approach may be distasteful to those who favor retribution-based punishment. The notion than a first-time offender should serve a long prison sentence just because he resembles other first-time offenders (who avoided recidivism only when they received long prison sentences) may seem like punishing him for the crimes of others.

becomes possible only after someone has determined which characteristics are relevant for the purposes of punishment.\footnote{Most people would think nothing of it if, for sentencing purposes, a judge compared a (tall, blue-eyed, blonde) first-time offender convicted of drug trafficking to another (short, brown-eyed, redhead) first-time offender convicted of drug trafficking. But if, for sentencing purposes, the judge compared a (tall, blue-eyed, blonde) five-time rapist to a (tall, blue-eyed, blonde) first-time drug jaywalker, it would seem irrational. See Ronald Blackburn, \textit{On Moral Judgements and Personality Disorders}, 153 BRIT. J. PSYCHIATRY 505, 505-06 (1988) (“Groups that are homogenous in terms of one domain will not be so when classified in terms of another.”); Barbara S. Meierhoefer, \textit{Individualized and Systemic Justice in the Federal Sentencing Process}, 29 AM. CRIM. L. REV. 889, 891 (1992) (“There is no disagreement that similar offenders should be sentenced similarly. The problem … is that there is no consensus as to what defines ‘similar offenders.’”). In order to say that one is comparing like defendants to like defendants, one must decide which factors are relevant. See Peter K. Westen, \textit{The Empty Idea of Equality}, 95 HARV. L. REV. 537, 539 (1982) (noting that “like should be treated alike” is a tautology without real explanatory value).}

Which characteristics \textit{are} relevant? What characteristics should a sentencing information system use in matching a defendant to other offenders? Should the judge consider static factors (i.e., historical characteristics that cannot be altered, such as sex, age, or age at first arrest), dynamic factors (i.e., characteristics, resources, circumstances, behavior, or attitudes that can change throughout one’s lifespan, such as drug use, association with criminal peers, or lack of remorse), or some combination of them?

Congress directed that the SRA guidelines were “entirely neutral as to the race, sex, national origin, creed, religion, and socioeconomic status of offenders,”\footnote{28 U.S.C. § 994(d).} and took into account (though only to the extent that they are relevant to sentencing) eleven characteristics:
(1) age; (2) education; (3) vocational skills; (4) mental and emotional condition to the extent that such condition mitigates the defendant's culpability or to the extent that such condition is otherwise plainly relevant; (5) physical condition, including drug dependence; (6) previous employment record; (7) family ties and responsibilities; (8) community ties; (9) role in the offense; (10) criminal history; and (11) degree of dependence upon criminal activity for a livelihood.113

So directed, the Sentencing Commission seized upon criminal history as very relevant,114 but concluded that four of the eleven characteristics identified by Congress are not ordinarily relevant: a defendant’s education and vocational skills,115 employment record,116 family ties and responsibilities,117 and mental and emotional conditions.118

Of course, the federal sentencing guidelines are no longer binding, and federal judges are free to base their sentences upon any factors permitted by law, including those deemed not

113 Id.


116 Id. at §5H1.5.

117 Id. at §5H1.6.

118 Id. at §5H1.3.

If the judge is interested in identifying the penalty that optimally reduces the risk of recidivism, which variables are most relevant? Should the judge consider the eleven variables (e.g., age, education, vocational skills, mitigating mental and emotional condition, physical condition, employment record, family ties, role in offense, criminal history, and dependence on crime for livelihood) that Congress directed the U.S. Sentencing Commission to consider? What about the variables that Congress told the Commission to ignore (e.g., race, sex, national origin, creed, religion, and socioeconomic status)? Are there other predictors of recidivism that, according to criminological research, the judge should assess? Part III of this Article will discuss the variables that best predict reoffending.

III: Using Empirical Variables to Predict Recidivism

Over time, social scientists have considered a wide variety of variables and attempted to assess their relationship to recidivism. There is a broad consensus about many of these variables. Indeed, “[t]here is no disagreement in the criminological literature about some of the predictors of adult offender recidivism, such as age, gender, past criminal history, early family factors, and criminal associates.”\(^{119}\) It would be useful for a judge to know which factors are correlated with recidivism; it would be even more useful if that judge knew a bit about how those factors might relate to recidivism. Even a cursory review of criminological research could provide judges with a much richer understanding of the variables related to recidivism. Part III.A provides an overview of the development of risk assessment and Part III.B provides some criminological background for the fifteen variables deemed most predictive of recidivism.

\(^{119}\) Gendreau et al., supra note 19, at 576.
A. A Brief History of Predicting Recidivism

For nearly a century, social scientists have endeavored to predict recidivism. Believing that objective indicia can operate as meaningful proxies for recidivism risk, criminologists have attempted to develop accurate and reliable assessment tools. But what should those tools look like? How many variables should be included in risk assessment tools? Many? Few?120

The pioneering parole-prediction instrument developed by Ernest Burgess employed 22 different variables, ranging from father’s nationality to psychiatric prognosis.121 On the other hand, the instrument developed by Sheldon and Eleanor Glueck employed only seven factors.122 Later, Lloyd Ohlin’s model, included in the first published parole manual, Selection for Parole: A Manual of Parole Prediction, included twelve,123 the federal salient factor score, developed by U.S. Parole Commission researchers, used nine,124 and the Greenwood scale, devised in 1982 to identify high-crime defendants for possible selective incapacitation, used seven factors.125

120 Some researchers took the approach of including many unweighted variables; others used just a few weighted variables. See Harcourt, supra note 63, at 68 (“In all of this research, the central battle lines were between the Burgess unweighted, multiple-factor model and the Glueck weighted, few-factor model.”). Significantly, Albert Reiss found that the precision of parole-prediction tools improved as the number of variables decreased. See Albert Reiss, The Accuracy, Efficiency, and Validity of a Prediction Instrument, 56 Am. J. Sociology 552 (1951).


125 See generally Greenwood, supra note 105.
Several key variables (e.g., work record, prior arrests, and psychiatric prognosis) were included in most early parole-prediction instruments. Prior criminal history appeared to be especially predictive.\(^\text{126}\) After all, it was said that “[b]y and large, the more crimes a man has committed, the more likely he is to commit another.”\(^\text{127}\)

Many of these variables still appear in contemporary prediction models. For example, risk assessment instruments such as the Level of Service/Case Management Inventory (LS/CMI),\(^\text{128}\) Violence Risk Appraisal Guide (VRAG),\(^\text{129}\) Lifestyle Criminality Screening Form (LCSF),\(^\text{130}\) General Statistical Information on Recidivism Scale (GSIR),\(^\text{131}\) Correctional Offender Management Profiling for Alternative Sanctions (COMPAS),\(^\text{132}\) and the Risk Prediction Index (RPI)\(^\text{133}\) all use comparable variables. So do certain psychometric instruments that have been

\(^{126}\) See Harcourt, supra note 63, at 67 (“Other researchers were concluding around that time that prior criminal history was the most predictive factor.”).


\(^{128}\) Don Andrews, et al., Level of Service/Case Management Inventory (Multi-Health Systems 2004).


\(^{133}\) See James Eaglin, et al., RPI Profiles: Descriptive Information About Offenders Based on Their RPI Scores (Federal Judicial Center, ed., 1997) (describing development of RPI).
related to recidivism, such as the Hare Psychopathy Checklist-Revised (PCL-R), the psychopathic deviation (pd) scale of the Minnesota Multiphasic Personality Inventory (MMPI), and the California Personality Inventory (CPI). Many state-specific risk instruments use analogous variables, as well. The appendix, infra, reveals that most available risk instruments assess many of the same variables.

Interestingly, of the 200 to 300 variables believed to be relevant to sentencing, a subset – perhaps a few dozen – appear in one form or another on most of the instruments used to predict recidivism risk in adult offenders. But which these variables are most predictive?

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134 ROBERT D. HARE, HARE PSYCHOPATHY CHECKLIST-REVISED (Multi-Health Systems 2002).


139 Many of these variables relate to a set of criminogenic needs referred to as the “big six.” See FAYE S. TAXMAN, ET AL., TOOLS OF THE TRADE: A GUIDE TO INCORPORATING SCIENCE INTO PRACTICE 28 ex.6 (2004), at: http://www.nicic.org/pubs/2004/020095.pdf (identifying antisocial values, criminal peers, low self-control, dysfunctional family ties, substance abuse, and criminal personality as key criminogenic needs that, if unaddressed, will increase the likelihood of recidivism). Others refer to the “big four” (antisocial associates, attitudes, personality, and criminal history). E.g., ANDREWS & BONTA, supra note 92, at 276.
In 1996, using meta-analytic techniques, Paul Gendreau, Tracy Little, and Claire Goggins looked at 131 different studies to identify the static and dynamic variables that appear to be most predictive of reoffending.\textsuperscript{140} The association between these variables and recidivism should not be overstated,\textsuperscript{141} and it should be noted that these variables operate at the individual level (i.e., not looking at neighborhood or national factors, or considering the operation of the criminal justice system), but their analysis revealed fifteen different variables with statistically significant relationships with recidivism.\textsuperscript{142} Composite risk scales had a weighted Pearson product-moment correlation coefficient ($z^+$) of .30.\textsuperscript{143} The strongest single predictor of recidivism was having criminal companions,\textsuperscript{144} with a weighted Pearson product-moment correlation coefficient ($z^+$) of

\begin{itemize}
  \item \textsuperscript{140} See Gendreau et al., \textit{supra} note 19. Interestingly, they concluded that dynamic factors were as effective at predicting recidivism as static factors. \textit{Id.} at 588.
  \item \textsuperscript{141} The predictive validity of these variables is modest. Correlation coefficients ($r$ scores) range between .00 (no correlation) and 1.00 (perfect correlation). An $r$ of .20 or greater is viewed as practically important. Given a minimal correlation coefficient (e.g., $r = .05$), however, the corresponding area under the curve (AUC) statistic is only .53, or slightly higher than random chance (AUC = .50). See ANDREWS & BONTA, \textit{supra} note 92, at 275 (converting between $r$ and AUC statistics). The strongest single correlation in Gendreau’s analysis is .21, which equals an AUC value of about .61. \textit{Id.} Still, it would be wrong to dismiss these variables just because they do not perfectly predict recidivism (AUC = 1.0). Even the well-accepted relationship between heart attacks and the combination of bad cholesterol, smoking, and hypertension only produce AUC values in the .74 and .77 range. \textit{Id.} at 276.
  \item \textsuperscript{142} Gendreau et al., \textit{supra} note 19, at 582.
  \item \textsuperscript{143} \textit{Id.} at 583.
  \item \textsuperscript{144} See \textit{id.} at 597 (counting “identification/socialization with other offenders” as indicia of criminal companions).
\end{itemize}
Also highly predictive were antisocial personality ($z^+ = .18$), adult criminal history ($z^+ = .17$), and race ($z^+ = .17$).

Several other variables appeared to be relevant, mid-range predictors of recidivism: pre-adult antisocial behavior ($z^+ = .16$), family rearing practices ($z^+ = .14$), social achievement ($z^+ = .13$), interpersonal conflict ($z^+ = .12$), and current age ($z^+ = .11$).

Other variables were weak-but-significant predictors of recidivism: substance abuse ($z^+ = .10$), intellectual functioning ($z^+ = .07$), family criminality ($z^+ = .07$), gender ($z^+ = .06$), socio-economic status of origin ($z^+ = .05$), and personal distress ($z^+ = .05$).

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146 Gendreau et al., supra note 19, at 597 (counting the “MMPI Pd, Megargee system, EPI-Psychoticism, CPI-Soc, PCL-R, DSM-III personality disorders, any indices of egocentric thinking” as indica of antisocial personality variables).

147 Id. (counting “adult-prior arrest, probation, jail, conviction, incarceration, prison misconduct” as indica of adult criminal history).

148 Id. (“white vs. black/Hispanic/native”).

149 Id. (counting “preadult-prior arrest, probation, jail, conviction, incarceration, alcohol/drug abuse, aggressive behavior, conduct disorder, behavior problems at home and school, delinquent friends” as indica of pre-adult antisocial behavior).

150 Id. (counting “lack of supervision and affection, conflict, abuse” as relevant indica of family rearing practices).

151 Id. (counting “marital status, level of education, employment history, income, address changes” as indica of social achievement).

152 Id. (counting “family discord, conflict with significant others” as indica of interpersonal conflict).

153 Id. (counting age “at time of data collection/assessment” as relevant variable).
Judges employing these factors at sentencing would be on safe ground, mostly.\textsuperscript{160} Adult criminal history is a relatively uncontroversial measure, after all, even among retributivists;\textsuperscript{161} similarly, considerations of employment (an aspect of social achievement) engender little

\begin{flushleft}
\textsuperscript{154} Id. (counting “recent history of alcohol/drug abuse” as indicator of substance abuse).
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\textsuperscript{155} Id. (counting “WAIS/WISC, Raven, Porteous Q score, learning disabilities, reading level” as indicia of intellectual functioning).
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\textsuperscript{156} Id. (counting “parents and/or siblings in trouble with the law” as indicia of family criminality).
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\textsuperscript{157} Id. (counting “gender” as appropriate measure).
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\textsuperscript{158} Id. (counting “socioeconomic status (SES) of parents (parental education, occupation, or income)” as indicia of social class of origin).
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\textsuperscript{159} Id. (counting “anxiety, depression, neuroticism, low self-esteem, psychiatric symptomatology (i.e., psychotic episodes, schizophrenia, not guilty by reason of insanity, affective disorder), attempted suicide, personal inadequacy” as indicia of personal distress).
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\textsuperscript{160} See Brian Netter, \textit{Using Group Statistics to Sentence Individual Criminals: An Ethical and Statistical Critique of the Virginia Risk Assessment Program}, 97 J. CRIM. L. & CRIMINOLOGY 699, 716 (2007) (“If a model could be crafted based only on these criminologically-based variables [like past crimes, the nature of the instant offense, and remorse], few would complain.”).
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\textsuperscript{161} See U.S. SENTENCING COMM’N, supra note 71.
\end{flushleft}

The criminal history score was designed to predict recidivism, but uses only criminal history to do so (as opposed to also using employment or drug use history, as had the Parole Commission’s salient factor score). In this way, the Commission sought to reduce the tension between preventing future crime and just punishment for the current crime.

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\textit{Id.} at 15; Hofer & Allenbaugh, supra note 7, at 24 (“To minimize the tension between the goals of just desert and incapacitation, the Commission chose to measure recidivism risk based only on an offender's criminal history, on the theory that past offenses also increase an offender's culpability.”). 
\end{flushleft}
debate. But other variables would be problematic, either because they are difficult to evaluate, or because they deal with constitutionally-suspect categories. Problematically, several variables that appear to be significantly correlated with recidivism are constitutionally-suspect: race, age, gender, and socioeconomic status.

In some ways, the situation appears to be a “two cultures” problem. Criminologists use these variables in their models because they are predictive. For their purposes, it does not matter whether these characteristics are deemed off-limits by constitutional scholars and lawyers. But the use of these variables may give those engaged in actual criminal sentencing great pause.

The [risk] prediction instruments were generated, created, driven by sociology and criminology. They came from the social sciences. They were exogenous to the legal system. They had no root, nor any relation to the jurisprudential theories of just punishment. They

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162 See Paul Gendreau et al., Case Needs Review: Employment Domain 1 (Jun. 2000), at: http://www.csc-scc.gc.ca/text/rsrch/reports/r90/r90_e.pdf (“Of all of the predictors of offender recidivism, the employment/education domain (hereafter known as employment) is probably the most prosaic. Indeed, it has engendered little debate…”).

163 For example, intellectual functioning and personal distress rely upon clinical assessments.

164 For example, although race is correlated to recidivism as closely as adult criminal history, race-based classifications are analyzed with strict scrutiny. See Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 227 (1995).


166 See Michael Tonry, Prediction and Classification: Legal and Ethical Issues, 9 CRIME & JUST. 367, 397 (Michael Tonry & Norval Morris eds., 1987) (noting that “many people believe it unjust to base punishment decisions on factors over which the offender has no control”).
had no ties to our long history of Anglo-Saxon jurisprudence—to centuries of debate over the penal sanction, utilitarianism, or philosophical theories of retribution. And yet they fundamentally redirected our basic notion of how best and most fairly to administer the criminal law.\textsuperscript{167}

It very well may be that use of these variables \textit{should} give sentencing judges pause, but there is no doubt that, correctly applied, risk assessment instruments can improve the precision of judges adjudicating on utilitarian grounds. And while applying suspect categories to sentencing decisions might make judges nervous, the variables identified in Gendreau’s meta-analysis are rooted in a well-established body of social science research.\textsuperscript{168} Part III.B will describe some of this work.

\textbf{B. Criminological Evidence for Predictor Variables}

James Austin has noted that criminology is often irrelevant to policy,\textsuperscript{169} but Erik Luna has suggested that criminology could do much to inform the criminal law.\textsuperscript{170} This is particularly true in sentencing. Empirical data can provide judges with essential information about the factors associated with increased risks of future crime; research about these variables can provide a theoretical context. Some of the criminological literature for the fifteen variables identified as predictive by Gendreau is summarized, \textit{infra}.

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\begin{itemize}
\item \textsuperscript{167} \textsc{Harcourt, supra} note 63, at 188.
\item \textsuperscript{168} \textit{See generally} \textsc{Lee Ellis et al., Handbook of Crime Correlates} (2009); \textsc{James Q. Wilson} \& \textsc{Richard Herrnstein, Crime and Human Nature} (1985) (both relating various social science factors to crime).
\item \textsuperscript{169} James Austin, \textit{Why Criminology is Irrelevant}, 2 CRIMINOLOGY \& PUB. POL’Y 557 (2003).
\item \textsuperscript{170} \textit{See} \textsc{Erik Luna, Criminal Justice and the Public Imagination}, 7 OHIO ST. J. CRIM. L. 71, 79 (2009).
\end{itemize}
}
1. Criminal Companions

The notion that criminal companions ($z^* = .21$) might lead to criminal behavior lies at the heart of the theory of differential association.\textsuperscript{171} In articulating this theory, criminologist Edwin Sutherland suggested that criminal behavior is learned, like any other behavior, and is adopted principally through contacts with intimate personal groups.\textsuperscript{172} Of course, whether criminal peers cause crime (through reinforcement of criminal attitudes and behaviors) or are selected as peers because of their pro-criminal values remains unclear,\textsuperscript{173} but Gendreau’s meta-analysis did not attempt to disentangle causality, only to establish a correlation between recidivism and criminal companions. And that correlation does exist.\textsuperscript{174} Indeed, differential association has found considerable support in empirical research.\textsuperscript{175} For example, Travis Hirschi acknowledged the fundamental importance of criminal peers among juvenile delinquents when he pithily observed,

\textsuperscript{171} See Edwin Sutherland, Principles of Criminology 77-100 (7th ed. 1974).
\textsuperscript{172} Id. at 81-82.
\textsuperscript{173} See Wilson & Herrnstein, supra note 168, at 292-99 (noting that the direction of causality between having criminal peers and crime is unknown).
\textsuperscript{175} See Ellis, supra note 168, at 98-99 tbl. 4.6.3a (summarizing literature supporting link between delinquent peers and crime); Charles R. Tittle, et al., Modeling Sutherland’s Theory of Differential Association: Toward an Empirical Clarification, SOC. FORCES 429 (1986) (noting that “despite some important anomalies, our findings support the major theme of Sutherland's thinking. Association with criminal definitions does seem to be a generator of crime, and it appears to exercise its influence indirectly through its effects on a learned symbolic construct-motivation to engage in criminal behavior.”).
“Most delinquent acts are committed with companions; most delinquents have delinquent friends.”¹⁷⁶ The influence of criminal peers also appears to be important among adults. While most adult crime is committed alone,¹⁷⁷ Reiss found that career offenders regularly engage in co-offending.¹⁷⁸

2. Antisocial Personality

Antisocial personality was also predictive of recidivism (c² = .18). Certain personality traits appear to be associated with crime,¹⁷⁹ and a relationship has been posited between certain cognitive styles and offending.¹⁸⁰ A number of personality dimensions appear to be especially correlated with criminal behavior: impulsivity,¹⁸¹ low self-control,¹⁸² and a limited capacity for


¹⁷⁷ See WILSON & HERNSTEIN, supra note 168, at 292 (observing that “most juvenile crime, unlike most adult crime, is committed by persons in groups”).

¹⁷⁸ See, e.g., Albert J. Reiss, Jr., Co-offending and Criminal Careers, 10 CRIME & JUST. 117 (Michael Tonry & Norval Morris eds., 1988) (noting that career criminals often engage in co-offending as well as solo crime).

¹⁷⁹ See, e.g., HANS EYSENCK, CRIME AND PERSONALITY (3rd ed. 1979); ELLIS, supra note 168, at 117-128; SHELDON GLUECK & ELEANOR GLUECK, UNRAVELING JUVENILE DELINQUENCY (1950); Joshua Miller & Donald Lynam, Personality and Antisocial Behavior, 39 CRIMINOLOGY 765 (2001) (all suggesting links between personality traits and crime).


¹⁸¹ See WILSON & HERNSTEIN, supra note 168, at 204-207 (“Many of the correlates of offending may relate to impulsiveness….”).
empathy.\textsuperscript{183} Indeed, a lack of empathy is the hallmark trait of the psychopath, a class of persons dramatically overrepresented in the criminal justice system.\textsuperscript{184} The diagnosis of antisocial personality disorder,\textsuperscript{185} closely aligned with the concept of psychopathy (as described by Hervey


\textsuperscript{183} See Glueck & Glueck, supra note 179 (identifying, inter alia, “lack of concern for others” as a personality trait of antisocial youth).

\textsuperscript{184} See Larry J. Siegel, Criminology 164 (8\textsuperscript{th} ed. 2003) (“Criminologists estimate that 10 percent or more of all prison inmates exhibit psychopathic tendencies.”); Robert I. Simon, Bad Men Do What Good Men Dream 33 (1996) (reporting prevalence of psychopathy as 3\% among men, less than 1\% among women, with population average of 2.8\%, but noting that “[i]n certain prison populations, 75\% of the inmates may have the disorder”). The relationship between psychopathy and crime is so entangled that some have criticized the concept. See, e.g., Glenn D. Walters, The Trouble with Psychopathy as a General Theory of Crime, 48 Int’l. J. Offender Therapy & Comparative Criminology 133 (2004) (noting that psychopathy is often used tautologically, is oversimplified, and is applied via fundamental attribution error). Others, however, have lauded psychopathy as being among the most useful approaches to the study of crime. See, e.g., Matt DeLisi, Psychopathy is the Unified Theory of Crime, 7 Youth Violence and Juv. Just. 256, 256 (2009) (“I argue that psychopathy is the unified theory of delinquency and crime and the purest explanation of antisocial behavior.”). While scores on measurement instruments may be correlated with recidivism, it is not obvious that psychopathy is actually a disorder. See Grant T. Harris, et al., The Construct of Psychopathy, 28 Crime & Just. 197, 230 (Michael Tonry ed., 1998) (concluding that “psychopaths do not seem disordered”).

\textsuperscript{185} See American Psychiatric Association, Diagnostic and Statistical Manual 706 (4\textsuperscript{th} ed., text rev., 2000) (counting arrestable acts, deceitfulness, impulsivity, aggressiveness, reckless disregard for safety, irresponsibility, and lack of remorse among those 18 or older as diagnostic criteria).
Cleckley,\textsuperscript{186} Robert Hare,\textsuperscript{187} Ronald Blackburn,\textsuperscript{188} and Adrian Raine\textsuperscript{189} is highly correlated with offending behavior.\textsuperscript{190} It has also been associated with recidivism.\textsuperscript{191}

3. Adult Criminal History

Although there are policy pitfalls to be found even in something as obviously tied to sentencing as criminal history,\textsuperscript{192} adult criminal history is the staple of risk prediction.\textsuperscript{193} Spohn has written, “Studies of judges’ sentencing decisions reveal that these decisions are based first and foremost on the seriousness of the offense and the offender’s prior criminal record. … Offenders with more extensive criminal histories receive more severe sentences than those with shorter criminal histories.”\textsuperscript{194}

\textsuperscript{188} See Blackburn, supra note 111 (reviewing psychopathy literature).
\textsuperscript{190} See Seena Fazel & John Danesh, Serious Mental Disorder in 23,000 Prisoners: A Systematic Review of 62 Surveys, 359 Lancet 545 (2002) (finding that in a 12-country survey of almost 23,000 prisoners, 47% of males and 21% were diagnosed with antisocial personality disorder).
\textsuperscript{193} See supra notes 126-127.
\textsuperscript{194} Cassia Spohn, How Do Judges Decide? 86 (2d ed. 2009).
Criminal history may be especially attractive to judges because it realizes utilitarian penal objectives while finding its roots in retributivism.\textsuperscript{195} Gendreau’s meta-analysis also found it to be a reasonably strong predictor of recidivism: $z^* = .17$.\textsuperscript{196} Furthermore, a “long arrest record” was included in Gottfredson’s empirically-derived measure of risk.\textsuperscript{197} This is consistent with other research.\textsuperscript{198} After all, it has been said that “nothing predicts behavior like behavior.”\textsuperscript{199} The U.S. Sentencing Commission has suggested that the criminal history categories of the sentencing guidelines (which categorize offenders by frequency, seriousness, and recency of prior offenses) are predictive of future recidivism.\textsuperscript{200} The U.S. Parole Commission’s salient factor score,\textsuperscript{201}

\textsuperscript{195} See supra note 161.
\textsuperscript{196} Gendreau et al., supra note 19, at 583.
\textsuperscript{197} Gottfredson, supra note 19, at 6.
\textsuperscript{201} See Hoffman & Beck, supra note 124 (describing development of salient factor score).
counting forms of prior criminal history for three of nine measured variables, is even more predictive of recidivism than the Commission’s criminal history categories. 202

4. Race

Race was also identified as a reasonably strong predictor in Gendreau’s analysis. In fact, it was as correlated to recidivism as was adult criminal history (\(z^+ = .17\)). 203 Race was also identified as a variable on Gottfredson’s empirically-derived measures of risk, 204 and appeared as a significant predictor in the initial development of the Virginia Criminal Sentencing Commission’s risk prediction instrument. 205 However, it is not directly assessed in any risk prediction instrument in general use. 206

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203 Gendreau et al., supra note 19, at 583.

204 Gottfredson, supra note 19, at 6.

205 Race was strongly significant in the analysis, but it was excluded from Virginia’s risk prediction instrument because it was viewed as a proxy for “economic deprivation, inadequate educational facilities, family instability, and limited employment opportunities, many of which disproportionately apply to the African-American population.” Ostrom, supra note 106, at 27-28.

206 Early risk instruments looked directly at nationality. See, e.g., Burgess, supra note 121. While contemporary risk instruments do not, they do assess other variables that co-vary meaningfully with race, such as socioeconomic status, education, or family criminality. Criminal history is especially problematic. Consequently, while race may not be measured directly, other risk variables may operate as a proxy for race. See Bernard E. Harcourt, Risk as a Proxy for Race, JOHN M. OHLIN LAW AND ECONOMICS WORKING PAPER, no. 535 (2d series), forthcoming in CRIMINOLOGY & PUB. POL.
That race is associated with recidivism is unsurprising.\textsuperscript{207} Flowers has observed, “Race and, to a lesser extent, ethnicity are among the strongest predictors of crime involvement.”\textsuperscript{208} Certainly, it is associated with punishment. Whereas the overall U.S. incarceration rate is approximately 756 per 100,000 (the highest rate in the world – roughly five-to-twelve times the rate of comparable industrialized nations),\textsuperscript{209} racial groups are not incarcerated in the United States at equivalent rates. In fact, a 2007 study revealed that while U.S. whites are incarcerated at a rate of 412 per 100,000, Hispanics are incarcerated at a rate of 742 per 100,000, and blacks are incarcerated at a rate of 2,290 per 100,000!\textsuperscript{210} In some states, blacks are incarcerated at rates greater than 4,000 per 100,000.\textsuperscript{211} Although the explanation is debated,\textsuperscript{212} it is a fact that in the

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\item \textsuperscript{207} See, \textit{e.g.}, ELLIS, \textit{supra} note 168, at 20-32 (summarizing literature supporting relationship between race and crime); Virginia McGovern et al., \textit{Racial and Ethnic Recidivism Risks}, 89 PRISON J. 309 (2009) (analyzing Bureau of Justice statistics and concluding that in the three years after release from state and federal prisons in 1994, white offenders had the lowest rate of recidivism, black offenders had the highest rate of recidivism, and that Hispanic offenders had a rate between black and white offenders).
\item \textsuperscript{208} RONALD BARRI FLOWERS, \textbf{DEMOGRAPHICS AND CRIMINALITY: THE CHARACTERISTICS OF CRIME IN AMERICA} 91 (1989).
\item \textsuperscript{209} See Roy Walmsley, \textit{World Prison Population List} (2009), at: \\
\url{http://www.kcl.ac.uk/depsta/law/research/icps/publications.php?id=8} (reporting prison populations worldwide).
\item \textsuperscript{211} Id. at 8 tbl. 3.
\item \textsuperscript{212} One possibility is that there are genuine differences in the crime rate by race. See, \textit{e.g.}, J. Phillipe Rushton, \textit{Race and Crime: An International Dilemma}, 32 SOCIETY 37 (1995) (suggesting that the biology of race is meaningfully related to criminal behavior throughout the world); John Paul Wright, \textit{Inconvenient Truths: Science, Race, and Crime}, in \textit{BIOSOCIAL CRIMINOLOGY: NEW DIRECTIONS IN THEORY AND RESEARCH} 137, 144 (Anthony Walsh &
U.S., minorities are arrested at higher rates than whites. While African Americans constitute approximately 12.9% of the general population, they accounted for 50.1% of the 2008 arrests

Kevin M. Beaver eds. 2009) (noting “the undeniable fact is that blacks commit more crime than any other group; and they commit more violent crime than any other group”). But many self-report studies do not report race-based differences in the frequency of offending. See, e.g., Ronald Akers, et al., Social Characteristics and Self-Reported Delinquency, in SOCIOLOGY OF DELINQUENCY 48 (Gary Jensen, ed. 1981). If anything, some studies show that African American youths report less delinquency and substance abuse than do white youths. See MONITORING THE FUTURE (Institute for Social Research, ed. 2000). This has led some commentators to ask whether the source of higher African American arrest rates may lie in discrimination within the criminal justice system. See, e.g., DAVID COLE, NO EQUAL JUSTICE: RACE AND CLASS IN THE AMERICAN CRIMINAL JUSTICE SYSTEM 149-153 (1999) (discussing the difficulties associated with establishing racial discrimination with empirical data). Because the subject remains so charged in U.S. society, even asking how race relates to social problems can be deeply contentious. See, e.g., Christopher F. Chabris, IQ Since “The Bell Curve”, Commentary (1998), available at http://www.wjh.harvard.edu/~cfc/Chabris1998a.html (noting that Bell Curve co-author Richard Herrnstein’s “lectures were filled with protesters, and his speeches at other universities were canceled, held under police guard, or aborted with last-second, back-door escapes into unmarked vehicles” and that “[d]eath threats were made”).

See Federal Bureau of Investigation, Arrests by Race (tbl. 43), 2008 Crime in the United States, at http://www.fbi.gov/ucr/cius2008/data/table_43.html (identifying arrest rates by race). The disparity in arrest rates may be even greater than it seems. Since the Uniform Crime Reports use a four-category racial taxonomy (White, Black, American Indian or Alaskan Native, and Asian or Pacific Islander), the inclusion of Hispanics into the category, White, may obscure differential treatment of Hispanic and non-Hispanic whites in the criminal justice system. See Darrell Steffensmeier & Stephen Demuth, Ethnicity and Judges’ Sentencing Decisions: Hispanic-Black-White Comparisons, 39 CRIMINOLOGY 145 (2001) (noting that Hispanics are sentenced more severely than non-Hispanics and that combining the groups masks racial differences in sentencing). In the federal system, Latinos comprise 40% of those sentenced although they comprise just 13% of the general population. See MARK HUGO LOPEZ, A RISING SHARE: HISPANICS AND FEDERAL CRIME (Pew Hispanic Center, ed., 2009).
for murder and nonnegligent manslaughter,\(^{215}\) 32.2\% of the arrests for forcible rape,\(^{216}\) and 56.7\% of the arrests for robbery.\(^{217}\) In fact, African Americans are disproportionately arrested for all 29 listed offenses in the FBI’s Uniform Crime Reports except two: driving under the influence (10.0\%) and liquor laws (11.5\%).\(^{218}\) African Americans are not only more likely to be arrested; they are also more likely to be re-arrested. A massive body of research shows that African Americans and Hispanics are more likely to be rearrested than Whites.\(^{219}\) There may be sound reasons to exclude race from risk prediction instruments,\(^{220}\) and contemporary risk instruments do not include race as an explicit factor, but there is little disputing that – for better or for worse – race is a fairly robust predictor of rearrest in modern America.

5. Juvenile Antisocial Behavior

Further supporting the proposition that “nothing predicts behavior like behavior,”\(^{221}\) Gendreau found that juvenile antisocial behavior was a relevant, mid-range predictor of adult


\(^{215}\) See Federal Bureau of Investigation, supra note 213.

\(^{216}\) Id.

\(^{217}\) Id.

\(^{218}\) Id.


\(^{220}\) See Netter, supra note 160, at 718; see generally infra Part IV (outlining practical, legal, and philosophical obstacles to judicial consideration of suspect factors at sentencing).

\(^{221}\) WALKER, supra note 199.
recidivism ($z^+ = .16$). It seems as if some people with a propensity to break rules as children (and to be sanctioned for it) go on to break laws as adults (and to be sanctioned for it). There is a considerable body of work indicating that juvenile delinquents are more likely to engage in adult crime. For example, in analyzing fifteen longitudinal studies of offending across the life course, Elaine Eggleston and John Laub found that more than half of juvenile delinquents went on to become adult offenders. Some researchers found even higher rates among males released from juvenile facilities, with more than eighty percent of releasees later classified as adult offenders. In fact, the relationship between juvenile offending and adult offending is so

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222 Gendreau et al., *supra* note 19, at 583.

223 Of course, it is possible that juveniles who are identified as delinquent by legal authorities are labeled as such, and are more likely to be arrested as adult offenders either because of self-fulfilling prophesy or because the label invites heightened police attention. This idea lies behind labeling theory See, e.g., Howard Becker, *Outsiders: Studies in the Sociology of Deviance* 9 (1963) (“Deviance is *not* a quality of the act the person commits, but rather a consequence of the application by others of rules and sanctions to an ‘offender.’”).

224 See, e.g., Ellis, *supra* note 168, at 3-6 (identifying studies supporting relationship between officially detected delinquency and adult offenses).


robust that many criminologists have commented upon it, and have questioned whether adult-onset criminality is a genuine phenomenon.

6. Family Rearing Practices

Gendreau also found that family rearing practices was a relevant, mid-range predictor of adult recidivism ($z^* = .14$). There is a substantial body of work reporting a relationship between the extent of parental supervision and offending. “[N]early all of these studies have concluded that as the degree of supervision monitoring increases, involvement of offspring in crime and delinquency decreases.” Similarly, where family relationships are conflicted, crime and delinquency appear to be more prevalent. This finding has been replicated in the United States, Britain, and New Zealand. Where there is actual neglect or abuse in the family,

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227 See, e.g., WOLFGANG, supra note 105 (describing adult-onset criminality as rare); TERRIE E. MOFFITT, et al., SEX DIFFERENCES IN ANTISOCIAL BEHAVIOUR: CONDUCT DISORDER, DELINQUENCY, AND VIOLENCE IN THE DUNEDIN LONGITUDINAL STUDY (2001) (noting that the “onset of antisocial behaviour after adolescence is extremely rare”).


229 WILSON & HERNSTEIN, supra note 168, at 245-263

230 ELLIS, supra note 168, at 93.


233 See MOFFITT, supra note 227.
rates of delinquency and adult criminality are also elevated,\textsuperscript{234} although it is possible that race may affect the strength of this relationship.\textsuperscript{235} Given the robust effect of intra-family conflicts on offending, it should come as no surprise that negative family rearing practices are also associated with recidivism.

7. Social Achievement

Social achievement, a composite measure of variables including marital status, level of education, employment history, and income, appears to be another relevant, mid-range predictor of adult recidivism ($z^* = .13$). Flowers writes, “The evidence suggests that there exists a strong correlation between involvement in crime and the variables of employment, income, education, and marital status.”\textsuperscript{236} Most of the criminological literature indicates that, all things being equal, married people have lower rates of offending than unmarried people.\textsuperscript{237} Recidivism research


\textsuperscript{235} See Kruttschnitt, C., & Dornfeld, M. (1991). Childhood victimization, race, and violent crime. 	extit{Criminal Justice and Behavior}, 18, 448-463 (noting significant association between abuse and offending for white subjects but finding the relationship to be statistically insignificant for black subjects).

\textsuperscript{236} FLOWERS, supra note 208, at 113.

produces the same result: unmarried offenders are more likely to reoffend. 238 Like marriage, education is negatively associated with offending. 239 “[T]he vast majority of studies have concluded that as an individual’s years of education increase, his or her probability of criminal behavior decreases.” 240 Similar research has demonstrated a negative relationship between education and recidivism: those with greater education are less likely to reoffend. 241 Work also appears to play an important role in inhibiting crime. Both frequent unemployment and frequent job changes are positively associated with offending, 242 and both are positively associated with


240 ELLIS, supra note 168, at 36.


recidivism. Most of the criminological research suggests that those who are frequently out of work and who frequently change jobs are more likely to engage in crime and more likely to reoffend. Income matters, too. Sociologically-oriented criminologists often focus on poverty as an explanation for crime, and that explanation is borne out by a significant body of research.

8. Interpersonal Conflict

Interpersonal conflict, marked by family discord or conflict with significant others, is another mid-range predictor of adult recidivism ($z^+ = .12$). A substantial body of research has shown a positive relationship between discordant family relationships and offending, and has indicated that delinquents have fewer friends than do non-delinquents. Criminologists have reported that the relationship between family discord and offending also relates to recidivism:

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243 See Gottfredson & Gottfredson, supra note 238 (relating frequent job changes to recidivism); Eisenberg, M. (1985). Factors associated with recidivism. Austin, TX: Texas Board of Pardons and Paroles (relating unemployment to recidivism).

244 See Ellis, supra note 168, at 36 (“Many of the most popular theories of criminal behavior have focused on poverty as a major causal factor.”).


people who are reared in families marked by high levels of conflict and argument are more likely to reoffend.\textsuperscript{248}

9. Current Age

Gendreau’s meta-analysis also indicated that age at the time of risk assessment is a mid-range predictor of adult recidivism ($z^+ = .11$). Many criminologists have written about the link between age and crime,\textsuperscript{249} prompting Flowers to write, “The demographic correlate most strongly associated with crime is age,”\textsuperscript{250} prompting Siegel to observe that “[t]here is general agreement that age is inversely related to criminality”\textsuperscript{251} and prompting Hirschi and Gottfredson to note, “Age is everywhere correlated with crime.”\textsuperscript{252} Of course, the relationship between age and crime is not purely linear; young children rarely commit crimes. Rather, the relationship is curvilinear, with the highest rates of arrest for property crime occurring at age sixteen (and dropping in half by age twenty) and the highest rates of violent crime occurring at age


\textsuperscript{250} Flowers, supra note 208, at 63.

\textsuperscript{251} Larry J. Siegel, Criminology 67 (8th ed. 2003).

\textsuperscript{252} Hirschi & Gottfredson, supra note 249, at 581.
eighteen. Those between the ages of about 15 or 16 and 24 or 25 appear to be at greatest risk of offending, but after that period, adults gradually “age out” of crime.

10. Substance Abuse

Gendreau’s meta-analysis indicated that a recent history of drug and/or alcohol abuse is a weak, but still significant, predictor of adult recidivism ($z^+ = .10$). A wealth of criminological studies have identified a series of complex linkages between alcohol/drugs and offending.

The relationship of drug use/abuse and criminal behavior manifests itself in several ways. Foremost perhaps is the possession and use of drugs and alcohol where prohibited by law. This has a wide-ranging effect, since it can involve both legal and illegal drugs as well as drugs (such as alcohol) that are legal for adult users but illegal for minors. Second, drug use can act as a precipitating correlate of violent or serious behavioral patterns. Third, drug users may resort to economic crime as a means to support their habit. A final association between crime and drug use is drug dealing and the often high financial stakes, violence, and other crimes involved in the illicit drug trade.

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253 See Siegel, supra note 251, at 67 (reporting FBI uniform crime report statistics).

254 In their book, A General Theory of Crime, Gottfredson and Hirschi imagine how age might be used in a system of selective incapacitation. See Gottfredson & Hirschi, supra note 182, at 263-65. Of course, the principle of age-based incapacitation has no obvious stopping point, leading Harcourt to caution: “Taken to its extreme, the incapacitation argument favors full incarceration of, say, the entire male population between the ages of 16 and 24. That, of course, is absurd—or at least, should be absurd.” Harcourt, supra note 63, at 31.

255 See Wilson & Hernstein, supra note 168, at 126-47.

256 Flowers, supra note 208, at 125.
Summarizing the data that relate alcohol to offending, Ellis and his colleagues note, “[T]he evidence overwhelmingly supports the conclusion that alcohol use and criminality are positively correlated.”257 There is also research establishing a positive relationship between alcoholism and offending,258 and a body of research that indicates an association between alcohol use/alcoholism and recidivism.259 The use of illegal drugs is itself, by definition, criminal, but it has also been linked to both juvenile and adult offending,260 as well as to adult recidivism.261

11. Intellectual Functioning

Intellectual functioning, an aggregate measure consisting of IQ scores, learning disabilities, and reading levels, was identified as another weak, but still significant, predictor of adult recidivism ($z^+ = .07$). This, too, is unsurprising, as many criminologists have asserted a

257 Ellis, supra note 168, at 129-30.


strong relationship between below-average intellectual ability and offending.\textsuperscript{262} Indeed, the relationship between low IQ and offending among young people has been characterized as “one of the most robust findings across numerous studies of juvenile delinquency.”\textsuperscript{263} More than 100 studies have examined the link between grades and offending, and most have reported an association between low grades and crime;\textsuperscript{264} furthermore, a relationship appears to exist between low grades and recidivism.\textsuperscript{265} Below-average IQ scores have been related to offending, as well. Those with IQ scores about eight points below the population average appear to be more likely to engage in criminal conduct,\textsuperscript{266} and a substantial body of work has indicated positive relationships between low IQ and delinquency,\textsuperscript{267} adult offending,\textsuperscript{268} and recidivism.\textsuperscript{269}


\textsuperscript{264} See Ellis, \textit{supra} note 168, at 150.


\textsuperscript{266} See Hirschi & Hindelang, \textit{supra} note 262.

\textsuperscript{267} See, e.g., Glueck & Glueck, \textit{supra} note 173; Lynam, et al., \textit{supra} note 263.


12. Family Criminality

Family criminality was identified as another weak, but still significant, predictor of adult recidivism ($z^+ = .07$). Early theorists believed that crime ran in deviant families. It is said, after all, that “the acorn does not fall far from the tree.” And while there are thorny and unanswered questions about the relative contributions of environmental, biological, psychological, genetic, and social influences on crime, research consistently indicates that criminal parents are significantly more likely to raise criminal children. Indeed, some researchers have argued that parental criminality is the strongest family-related variable in predicting a child’s likelihood of involvement in serious delinquency or crime. The effect of parental criminality can be profound. In the long-running Cambridge Youth Survey, about eight percent of boys with non-criminal fathers became chronic offenders, but thirty-seven percent of boys with criminal fathers did so. Family criminality has also been associated with recidivism: those with criminal parents are more likely to reoffend.


13. Gender

Gender, too, was identified as another weak, but still significant, predictor of adult recidivism in Gendreau’s meta-analysis ($z^+ = .06$). A substantial body of criminological research indicates that men are significantly more likely to engage in criminal conduct (especially serious criminal conduct) than women.\(^{275}\) “The evidence indicates that sex is a significant factor in crime, and that males commit considerably more criminal acts than females.”\(^{276}\) Whether criminologists measure crime with official (arrest) statistics, victimization studies, or self-report studies, data suggest that males are more criminal than females.\(^{277}\) Both biological and social factors may play a role in explaining this difference,\(^{278}\) but the male/female crime gap appears to be an international phenomenon: “[I]n all societies, males are more likely to be identified as criminals by the criminal justice system.”\(^{279}\) Most published studies also indicate that males are more likely to recidivate than females.\(^{280}\)

\(^{275}\) See Thomas Gabor, The Prediction of Criminal Behaviour: Statistical Approaches 28 (1986) ("Cross-national evidence indicates that men are far more likely to engage in criminal activity than are women and that this imbalance becomes more pronounced with the increased gravity of criminal conduct."); Wilson & Hernstein, supra note 168, at 104-25.

\(^{276}\) Flowers, supra note 208, at 77.

\(^{277}\) See Siegel, supra note 251, at 68.

\(^{278}\) Id., at 68-69.

\(^{279}\) Ellis, supra note 168, at 13.

14. Socio-Economic Status of Origin

Socio-economic status of origin – a measure reflecting parental education, occupation, and income – appears to be another weak, but still significant, predictor of adult recidivism ($z^+ = .05$). Ellis and his colleagues report that “there is a negative relationship between parental status and offspring criminality except possibly in the case of overall self-reported delinquency, where the findings have been mixed.”\textsuperscript{281} One study linking parental education to delinquency found that a father’s level of education was negatively correlated with offending (i.e., as fathers’ educational levels increased, offending behaviors decreased), but did not identify a significant association between mothers’ education levels and offending.\textsuperscript{282} This study also reported a negative relationship between parental income and delinquency: as parents’ incomes increased, offending decreased.\textsuperscript{283} Studies have also reported a negative relationship between the status of parents’ occupations and delinquency: as status increased, levels of delinquency and crime decreased.\textsuperscript{284}

15. Personal Distress

Finally, personal distress (evidence of psychiatric disorder) appeared in Gendreau’s meta-analysis as another weak, but still significant, predictor of adult recidivism ($z^+ = .05$). The

\textsuperscript{281} Ellis, supra note 168, at 37-38.

\textsuperscript{282} See David P. Farrington, & Kate A. Painter, Gender Differences in Offending: Implications for Risk-Focused Prevention 50 (2002).

\textsuperscript{283} Id.

question of whether there is an association between mental illness and crime is controversial and the data are often contradictory.\textsuperscript{285} Ellis and his colleagues summarized the extant research by writing, “[T]he vast majority of studies have found a significant positive relationship between mental illness and officially detected involvement in criminal/delinquent behavior.”\textsuperscript{286} Statistics indicate that mentally ill offenders are disproportionately arrested and convicted,\textsuperscript{287} and most studies indicate a positive relationship between mental illness and self-reported offending.\textsuperscript{288} McManus and his colleagues reported a positive correlation between subclinical depression and recidivism,\textsuperscript{289} although other researchers have concluded that it is not mental illness that leads mentally ill offenders to recidivate, but other risk factors such as criminal history, substance abuse, or family rearing practices.\textsuperscript{290}

To recapitulate, Gendreau’s meta-analysis identified fifteen discrete variables that appeared to be significantly associated with recidivism. In descending order of strength of association, they are: (1) criminal companions, (2) antisocial personality, (3) adult criminal history, (4) race, (5) pre-adult antisocial behavior, (6) family rearing practices, (7) social

\textsuperscript{285} See ELLIS, supra note 168, at 162 (noting that “[t]he research reviewed below is controversial”); SIEGEL, supra note 251, at 161 (noting that findings appear contradictory).

\textsuperscript{286} ELLIS, supra note 168, at 162.


\textsuperscript{288} See, e.g., B.G. Link, et al., The Violent and Illegal Behavior of Mental Patients Reconsidered, 57 AM. SOC. REV. 275 (1992).


Of course, these fifteen variables do not operate in isolation. They interact. For example, adult criminal history operates, at least in part, as a function of age.\(^\text{291}\) It also may be meaningfully associated with race.\(^\text{292}\) In one way or another, many of the variables correlated with recidivism are also correlated with social disadvantage. For example, the Virginia Criminal Sentencing Commission decided to omit race from its risk assessment instrument on the grounds that race was highly correlated with social and economic disadvantage.\(^\text{293}\) It did not, however, strike gender from the instrument, even though women earn lower wages than men and enjoy less professional status than men.\(^\text{294}\) Netter asks, “[I]s race the only demographic variable that affects, for example, employment prospects? Characteristics such as ethnicity and religion have both permissible and impermissible covariates. They deserve the same treatment as race.”\(^\text{295}\)

\(^{291}\) See Shawn D. Bushway & Anne Morrison Piehl, The Inextricable Link between Age and Criminal History in Sentencing, 53 CRIME & DELINQUENCY 156 (2007) (noting that older people have had more time to accumulate criminal history events and that, therefore, two offenders with identical criminal history may not be identical in terms of either culpability or crime control interests).

\(^{292}\) See Harcourt, supra note 206.

\(^{293}\) See OSTROM, supra note 106, at 27-28.

\(^{294}\) See, e.g., GOVERNMENT ACCOUNTABILITY OFFICE, WOMEN’S EARNINGS: FEDERAL AGENCIES SHOULD BETTER MONITOR THEIR PERFORMANCE IN ENFORCING ANTI-DISCRIMINATION LAWS (2008) (reporting that in 2000, after controlling for experience, education, work conditions, and demographics, women earned only eighty percent of what men earned).

\(^{295}\) Netter, supra note 160, at 718.
Using regression analysis, criminologists can try to disentangle the influence of the fifteen variables from each other, but in practice, social problems often cluster (e.g., individuals with limited intellectual functioning often enjoy low social achievement; individuals with many criminal peers often have significant histories of juvenile antisocial behavior and adult crime). Those who are interested in evidence-based sentencing must proceed with caution; even if a statistically-meaningful variable is eliminated from a risk assessment instrument on principle (e.g., removing race from the Virginia instrument), that variable may continue to exert gravity upon the remaining variables (e.g., criminal history, social achievement, or socioeconomic status of origin).

While the fifteen variables identified in Gendreau’s meta-analysis represent a substantial body of criminological research and indicate key characteristics that are predictive of recidivism, using those variables in evidence-based sentencing decisions may prove difficult. Some variables will be difficult for courts to know (e.g., ascertaining intellectual functioning may require clinical assessment). In addition to logistical challenges, courts may face legal challenges. Due process claims and equal protection challenges may limit the ability of judges to rely on certain types of data in making sentencing decisions. Suspect variables may or may not survive strict scrutiny analysis. Philosophical challenges may present challenges, too. Using group statistics to sentence individual defendants may seem unfair to sentencing judges, like justice from the film, *Minority Report.* And while some characteristics may justify enhanced punishment on utilitarian grounds, these same traits might make the imposition of punishment problematic on retributivist grounds. These challenges to evidence-based sentencing will described in more detail in Part IV.

IV: Challenges to the Use of Empirical Variables in Evidence-Based Sentencing

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296 DreamWorks 2002.
Courts hoping to draw upon Gendreau’s meta-analysis (and the body of criminological research upon which it is founded) may face three distinct kinds of challenges: logistical (since evidence-based sentencing relies upon data that are both accurate and relevant), legal (since certain characteristics, while arguably germane to sentencing, may not be considered in other circumstances), and philosophical (since imposing punishments by using group statistics may seem unjust, and since factors that exculpate the defendant on a retributivist calculus operate as risk factors in a utilitarian framework). Each of these challenges will be discussed, in turn, infra.

A. Logistical Challenges

Evidence-based sentencing is fundamentally empirical. Instead of sentencing by clinical judgment and intuition, or with sentencing guidelines (that may or may not be founded upon data), evidence-based sentencing uses empirical data to impose criminal sentences. But while some information related to Gendreau’s fifteen variables would be relatively easy for a court to obtain and would prove to be relatively reliable (e.g., the defendant’s age at the time of sentencing, gleaned from official records), obtaining other reliable data relevant to sentencing may prove to be problematic.

How, for example, should a court ascertain a defendant’s association with criminal peers (the variable that Gendreau’s meta-analysis identified as most predictive of adult recidivism)? Several approaches are possible. First, the court can simply ask the defendant. But the defendant may not know. Criminality isn’t a visible characteristic like height or weight, and it is entirely possible that many of the defendant’s friends have committed felonies without his knowledge.\(^\text{297}\) And even if the defendant somehow does know exactly how many friends are criminal peers, he

is unlikely to reveal this information (unless the number is zero). Because the number of criminal peers is positively associated with risk (and because greater numbers of criminal peers thereby legitimates more invasive punishments), it is simply not in the defendant’s interest to provide this information to the court. It makes far more sense for the defendant to remain silent, avoiding the risk of self-incrimination. The burden to ascertain the number of criminal peers, then, will fall upon the court. The court might rely upon official documents such as the defendant’s arrest record (identifying “known associates”), but reliance upon these documents is problematic, telling the court more about the operations of the criminal justice system than about the number of criminal peers a defendant knows. A first-time offender, having no police record, will have no listed “known associates,” even if he has hundreds – thousands – of criminal peers. Similarly, an offender whose criminal peers have avoided detection will have no listed “known associates,” even though these individuals exert the same criminogenic influence as those with extensive

298 Of course, in sentencing a high-risk defendant, a judge may use this information to impose sentencing conditions (e.g., requiring substance-abuse programs to be completed, or increasing the number of face-to-face meetings with a probation officer) instead of increasing the term of imprisonment. Too much should not be made of this distinction, however. While rehabilitation programs and enhanced supervision may be in the defendant’s ultimate interest, they too – just like an increased term of imprisonment – are an imposition upon the defendant’s liberty.

299 See Mitchell v. United States, 526 U.S. 314 (1999) (holding that imposing an increased sentence because of adverse inferences drawn from a defendant’s silence violated the Fifth Amendment prohibition against self-incrimination).

300 See John I. Kitsuse & Aaron V. Cicourel, A Note on the Uses of Official Statistics, 2 SOC. PROBS. 131 (1963) (suggesting that official crime statistics may tell more about police and prosecutorial practices than the prevalence of crime).
criminal records. Inadvertent recording errors, intentionally introduced bias, and the unconscious skewing of subjective facts by actors in the justice system further complicate the problem. Official documentation is only as good as the information recorded within it, and because the path between an offense and an official record is mediated by numerous discretionary decision points, some offenders with numerous criminal peers will not appear to have any criminal associates, while others with few or none will seem to be surrounded by offenders. A court, recognizing the limitations inherent in official documents, might choose to gather its own, independent information. Of course, doing so would be prohibitively expensive, making this an approach that could not be adopted on a wide scale basis. But conceivably a court could direct a probation officer to gather objective information about a given defendant’s criminal peers. Yet even this solution is not as straightforward as it seems, since the defendant, after being found guilty and before sentencing, will probably modify his behavior. The professional drug trafficker will avoid any contact with illegal substances; the racketeer will leave crime business to others in his syndicate. Defendants will adapt to changing circumstances. Obtaining an accurate count of criminal peers at this late stage in the criminal proceedings is doomed. Thus, measuring even a straightforward variable like the number of criminal peers may prove to be elusive for evidence-based courts.

It is not only defendants between arrest and sentencing who will change their behavior, however. Other actors in the criminal justice system will adapt their behavior to evidence-based sentencing, too, with consequences that can be difficult to anticipate. Offenders do not operate in

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See ROSCOE POUND, AN INTRODUCTION TO THE PHILOSOPHY OF LAW 66-67 (1922) (describing discretionary points in the justice system); Bureau of Justice Statistics, Criminal Justice System Flowchart at http://bjs.ojp.usdoj.gov/content/largechart.cfm (visually depicting decisional nodes in the criminal justice system).
a vacuum, but commit crimes in light of expected consequences. The actions of police officers, prosecutors, and judges, then, shape behaviors.\textsuperscript{302} For example, if risk assessment instruments suggest that offenders with certain traits are more likely to offend, law enforcement officers might reasonably decide to focus their limited resources on suspects with those traits. This use of heuristics is the logic of profiling.\textsuperscript{303} Focusing resources on those with high-risk traits will increase the proportion of arrests made among offenders with those traits (vis-à-vis offenders without those traits), and will increase the proportion of offenders with high-risk traits in prison. This may create self-fulfilling prophesies: “Criminal profiling, when it works, is a self-confirming prophesy. It aggravates over time the perception of a correlation between the group trait and crime.”\textsuperscript{304} Of course, if the use of risk assessment instruments allows law enforcement agents to catch and incapacitate more offenders, society may be willing to tolerate the reification of a stereotype. But actuarial methods “may actually encourage, rather than deter, the overall commission of the targeted crime.”\textsuperscript{305} If the criminal behavior of those with high-risk traits is relatively inelastic, they will continue to offend even in the face of heightened law enforcement surveillance and will fill up the prisons; those without high-risk traits, however, observing that

\textsuperscript{302} See Shawn Bushway & Jeffrey Smith, Sentencing Using Statistical Treatment Rules: What We Don’t Know Can Hurt Us, 23 J. QUANTITATIVE CRIM. 377 (2007) (noting that predictions relating risk to recidivism are complicated by the crime-suppressing actions of police, probation officers, and others in the criminal justice system).


\textsuperscript{304} HARcourt, supra note 63, at 145.

\textsuperscript{305} Id., at 145.
law enforcement resources are directed at those with high-risk traits, may quite logically decide to offend, since police resources are directed elsewhere and the probability of successfully committing the crime is high. Under such circumstances, the total amount of a given crime may actually increase.\textsuperscript{306}

Actuarial sentencing faces other logistical challenges. Implementation of an evidence-based system may prove difficult for jurisdictions that have previously captured only limited data.\textsuperscript{307} If, for example, no information was gathered about the criminal peers of previously-sentenced defendants, it will not be possible to evaluate the efficacy of various sentencing options in cases of defendants who had like numbers of criminal peers (i.e., for defendants who had the same numbers of criminal peers, did non-custodial punishments work better than brief or lengthy periods of incarceration?). The evidence-based judge may still impose a sentence based on extant criminological research,\textsuperscript{308} but direct comparisons of defendants is possible only when

\begin{footnotesize}
\begin{enumerate}
\item See id., at 111-71.
\item See ROGER HOOD & RICHARD SPARKS, KEY ISSUES IN CRIMINOLOGY (1970).
\end{enumerate}
\end{footnotesize}
comparable data exists in past and instant cases. Shifting to an evidence-based system of sentencing from a guidelines regime or a system of mandatory minimum penalties would be difficult, as well. This could, for example, prove problematic in the federal sentencing system. Judges would not be able to draw directly from the last twenty years of federal sentencing data since that data would reflect the homogenizing influence of the mandatory guidelines regime. Similarly, mandatory minimum sentences would frustrate any effort to identify optimal sentences that lay below the statutory floor. While it might be possible to use pre-guidelines data, twenty years of crime legislation have changed the statutory landscape enormously, and the availability of parole prior to 1984 would mask the actual sentences served.³⁰⁹

The logistical challenges associated with actuarial sentencing are serious. Even seemingly-straightforward facts (like number of criminal peers) may prove difficult for courts to reliably measure. But logistical challenges will not be the only obstacles that courts face as they use risk assessment tools to engage in evidence-based sentencing: they will also face a variety of legal challenges. These are described in Part IV.B, infra.

B. Legal Challenges

Today, a sentencing judge can draw upon a wealth of criminological studies to appreciate the variables associated with adult recidivism,³¹⁰ can choose from among a variety of

³⁰⁹ Oleson, supra note 63, at 753.
³¹⁰ See generally supra Part III.B.
commercially-available risk assessment instruments,311 and using a sentencing information system, can visually observe which matched offenders have successfully avoided reoffending.312 In the hands of a thoughtful judge, these may be very powerful tools. Judges employing these tools, however, will likely face a number of legal challenges.

While some of the variables assessed by risk assessment instruments are uncontroversial in traditional sentencing colloquies (e.g., adult criminal history),313 a number of other variables related to risk are constitutionally suspect. Stripping people of fundamental rights or interests (such as liberty) on the basis of a suspect classification (such as race or national origin) is viewed with grave suspicion by the courts, and instead of deferring to the legislature as long as there is a rational basis to the statute or rule,314 such practices are scrutinized with strict scrutiny.315 Similarly, deprivations imposed on the basis of gender are evaluated using intermediate review

311 See Part III.A. (describing commercial instruments).

312 See supra notes 101-107 (describing scatterplot-style graphic user interface).

313 See Almendarez-Torres v. United States, 523 U.S. 224, 230 (1998) (noting that the “prior commission of a serious crime … is as typical a sentencing factor as one might imagine”).

314 The rational basis test is permissive. As long as legislation serves a legitimate public purpose, courts employing the rational basis test will ask only “whether the classifications drawn in a statute are reasonable in light of its purpose…. .” McLaughlin v. Florida, 379 U.S. 184, 191 (1964).

315 To survive strict scrutiny analysis, a policy must represent a compelling government interest, must be narrowly tailored to achieve that compelling interest, and must use the least restrictive means for achieving that interest. See, e.g., Shapiro v. Thompson, 394 U.S. 618 (1969); Adarand Constructors v. Peña, 515 U.S. 200 (1995) (both tracing development of strict scrutiny standard).
(which is not as onerous as strict scrutiny, but requires substantially more justification than the rational basis test).\textsuperscript{316}

Most U.S. jurisdictions explicitly prohibit judges from basing their sentencing decisions on considerations of race or gender,\textsuperscript{317} although interestingly, in Canada, judges are affirmatively instructed to consider defendants’ aboriginal status when imposing criminal sentences.\textsuperscript{318} Still, even if U.S. judges do not consider race or gender explicitly, “[v]irtually every sentencing system individualizes sentences based on predictions of future dangerousness.”\textsuperscript{319} Given the relatively robust associations between risk and race/gender, it may be difficult for judges to evaluate risk without implicitly considering race and gender. What, then, might happen when sentencing judges utilize risk assessment instruments that rely upon suspect classifications?


\textsuperscript{317} See Hessick & Hessick, \textit{supra} note 23.

\textsuperscript{318} Canada’s criminal code §718.2(e) calls for explicit consideration of ethnicity at sentencing (“[A]ll available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders, \textit{with particular attention to the circumstances of aboriginal offenders}”) (my italics). In R. v. Gladue, [1999] 1 S.C.R. 688, the Supreme Court of Canada held that §718.2(e) applies to aboriginal peoples living off the reserve, as well as to those living on it and living in a traditional manner. The court reasoned that aboriginal persons have a long-standing disadvantage in Canadian society and these effects are felt for generations.

\textsuperscript{319} See Hessick & Hessick, \textit{supra} note 23, at ___.

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In 2010, in *Malenchik v. Indiana*, the Indiana Supreme Court considered the question of whether a trial court was permitted to consider risk assessment scores from the LSI-R and the Substance Abuse Subtle Screening Inventory (SASSI) when imposing a sentence. Malenchik, who pled guilty to receiving property and admitted to being a habitual offender under Indiana law, challenged his sentence on five bases, arguing: (1) that the trial court’s use of numeric LSI-R and SASSI scores were impermissible; (2) that the scientific reliability of these instruments has not been demonstrated and their use, therefore, contravened state rules of evidence; (3) that the risk assessment instruments, measuring variables such as family disharmony, economic status, and social circumstances, were discriminatory; (4) that use of test results at the sentencing hearing impinges upon the right to counsel; and (5) that use of these risk assessment instruments does not comport with Indiana’s penal code (which is founded upon a principle of reformation, not vindictive justice). A unanimous Indiana Supreme Court, however, rejected each of his claims.

Two important facts supported Malenchik’s first claim that the use of the LSI-R score should not be permitted in sentencing. First, the LSI-R manual, itself, is explicit in stating that the LSI-R was not designed to identify appropriate criminal sentences. “This instrument is not a comprehensive survey of mitigating and aggravating factors relevant to criminal sanctioning and was never designed to assist in establishing the just penalty.” Second, state precedent clearly indicated that sentencing with the LSI-R was impermissible. Specifically, the Indiana Court of Appeals in *Rhodes v. State* had reasoned that the “use of a standardized scoring model, such as

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320 No. 79S02-0908-CR-365 (Ind. June 9, 2010).

321 *Id.*, at 10 (quoting LSI-R Manual at 3).

the LSI-R, undercuts the trial court's responsibility to craft an appropriate, individualized sentence.”\textsuperscript{323} But the Indiana Supreme Court disagreed with the court of appeals. While the court was clear in holding that neither these risk assessment instruments were neither intended nor recommended to supplant the judicial role in ascertaining the appropriate length of sentence,\textsuperscript{324} the court was also unequivocal in stating that a trial court’s consideration of risk assessment instruments was permissible (if not desirable).

\textquote{[T]here is a growing body of impressive research supporting the widespread use and efficacy of evidence-based offender assessment tools. The results of such testing can enhance a trial judge's individualized evaluation of the sentencing evidence and selection of the program of penal consequences most appropriate for the reformation of a particular offender…. We defer to the sound discernment and discretion of trial judges to give the tools proper consideration and appropriate weight. We disapprove of the resistance to LSI-R test results expressed by the Court of Appeals in \textit{Rhodes}.\textsuperscript{325}}

The court invoked these same themes to reject Malenchik’s second claim. While the court might have simply stated that the Indiana Rules of Evidence do not apply in trial court

\begin{footnotes}
\item[323] \textit{Id}. at 1195.
\item[324] \textit{Malenchik}, at 14.
\item[325] \textit{Id.}, at 11.
\end{footnotes}
sentencing proceedings and left it at that, the court elected instead to emphasize the depth and scope of published evaluation research on the LSI-R. It wrote, “Given the extensive supporting research and on-going evaluation…, we believe that assessment tools such as the LSI-R and the SASSI are sufficiently reliable to warrant consideration … [by trial courts] for purposes of sentencing.” Sentencing judges in Indiana, as elsewhere, enjoy broad discretion as to the facts they may consider at sentencing, and the Indiana Supreme Court certainly was not required to justify the reliability of the LSI-R and the SASSI. That it chose to do so may indicate something about the judiciary’s faith in actuarial methods.

The Indiana Supreme Court also rejected Malenchik’s third claim – that use of these risk assessment instruments, measuring variables such as family disharmony, economic status, and social circumstances – was discriminatory. The court noted that information of this kind is required by state statute and included in all presentence investigation reports. Here, too, the court could have left the matter at that, but – once again – it emphasized the empirical foundations of the risk instruments, enthusiastically writing, “[S]upporting research convincingly shows that offender risk assessment instruments, which are substantially based on such personal

326 See id. (“The Indiana Rules of Evidence, except with respect to privileges, do not apply in trial court sentencing proceedings”) (citations omitted).

327 See id., at 6-10 (summarizing evaluation research).

328 Id., at 12.

329 See, e.g., United States v. Tucker, 404 U.S. 443, 446 (1972) (noting that sentencing judges “may appropriately conduct an inquiry broad in scope, largely unlimited either as to the kind of information he may consider, or the source from which it may come”).

330 See Malenchik, at 12.
and sociological data, are effective in predicting the risk of recidivism and the amenability to rehabilitative treatment.”

The Indiana Supreme Court also rejected Malenchik’s fourth claim that, because defense counsel do not have access to risk assessment scoring sheets prior to sentencing hearings, their use impinges upon the right to counsel. The court noted that defense counsel are provided with a copy of the presentence investigation report, and that this documentation adequately provides defense counsel with the requisite information to challenge sentencing provisions based on the risk assessment or to use the assessment scores to argue for a suspended sentence or other favorable sentencing conditions. Once again, the court went out of its way to justify its reasoning by emphasizing the reliability of the LSI-R and the SASSI. The court concluded, “[W]e find that the LSI-R and SASSI assessment tools and other similar instruments employed by probation departments have been sufficiently scrutinized to satisfy the reliability requirement for consideration by trial courts in sentencing proceedings.”

Finally, the Indiana Supreme Court rejected Malenchik’s claim that use of risk assessment instruments is inconsistent with Article 1, Section 18 of the Indiana Constitution, which establishes a penal system founded upon the principle of reformation. The court wrote, “We find the opposite. Such instruments endeavor to provide usable information based on extensive penal and sociological research to assist the trial judge in crafting individualized sentencing schemes with a maximum potential for reformation.”

331 Id., at 12-13.
332 See id., at 13.
333 Id.
334 Id., at 13-14.
It is difficult to read *Malenchik v. Indiana* as anything but an endorsement of actuarial sentencing. In arriving at its holding, the Indiana Supreme Court appears to rely heavily upon the amicus brief of the Indiana Judicial Center,\(^ {335} \) which in turn appears to draw from a cohesive body of scholarship related to LSI-R evaluation and evidence-based practices. While the court did not suggest that the LSI-R should determine the *length* of a defendant’s sentence,\(^ {336} \) it saw no impediment to providing risk assessment scores to judges for use in determining *how* sentences should be served.

Perhaps the *Malenchik* court would have found in favor of the defendant if the trial judge had used only the risk scores (and not also used the contents of the presentence investigation report) in crafting the sentence. Perhaps the *Malenchik* court would have found in favor of the defendant if the trial judge had determined the length of sentence (and not just the conditions of sentencing) by using the LSI-R and the SASSI. Perhaps. Future litigation from various jurisdictions will undoubtedly address some of these questions. But the *Malenchik* opinion is an instructive example of the contemporary judiciary’s desire for tools that afford greater efficacy in sentencing. The opinion suggests that while defendants’ legal claims are essential to jurists, so too is evidence of validity and reliability in risk assessment instruments.

In Part IV.B.1, below, I will consider four of the constitutional challenges that may be leveled at evidence-based sentencing practices. Most courts would not uphold defendants’ challenges to evidence-based sentencing based on free speech, double jeopardy, or trial by jury.

\(^ {335} \) *See id.*, at 6 (“The amicus brief of the Indiana Judicial Center informs the Court of the growing acceptance and use of evidence-based practices in seeking to reduce offender recidivism and to improve sentencing outcomes.”).

\(^ {336} \) *See id.*, at 10 (noting that risk assessment instruments are neither intended nor recommended to supplant the judicial function of determining the length of an appropriate sentence).
rights, but some courts would be sympathetic to equal protection claims. Although courts frequently dismiss constitutional challenges in the sentencing context, a number of courts have struck down sentences that were based upon suspect considerations such as race, gender, or age.337 Even suspect classifications may be permitted at sentencing, however, if they are considered as parts of a larger constellation of risk factors.

In Part IV.B.2, below, I argue that if used in concert with other, unprotected variables, employing even suspect classifications such as race and gender could survive intermediate—or even strict—scrutiny analysis. Although it is sometimes said that strict scrutiny is “‘strict’ in theory and fatal in fact,”338 empirical research suggests that the lethality of strict scrutiny analysis may be somewhat overstated.339 Given the protections of the Equal Protection Clause,340 it is inconceivable that a court would uphold a sentence imposed purely on the basis of race or gender (e.g., “Because you are a black male, you are sentenced to the maximum penalty permitted by law”), but it is possible to imagine that courts would uphold the use of risk assessment instruments that include suspect classifications as well as other, traditional sentencing factors (e.g., “Because your risk assessment scores indicate that you have multiple criminogenic risk factors, all contributing to a great risk of recidivism, you are sentenced to the maximum penalty permitted by law”). In this way, included as part of risk assessments, suspect

337 See, e.g., United States v. Kaba, 480 F.3d 152, 159 (2d Cir. 2007); United States v. Leung, 40 F.3d 577, 586-87 (2d Cir. 1994) (reversing sentence and assigning sentencing to new judge for consideration of race or gender).


340 U.S. CONST., amend. XIV, § 1.
classifications might operate as “plus factors,” allowing judges to assess risk with greater precision to advance the compelling state interest of public safety. Such an approach may survive constitutional scrutiny. After all, in *Grutter v. Bollinger*, the Supreme Court upheld the affirmative action plan at the University of Michigan’s law school after concluding that race was a plus factor that advanced the compelling state interest of a diverse student body.

1. Constitutional Rights

It is not obvious to what extent constitutional rights apply to sentencing proceedings. In *Williams v. New York*, the Supreme Court held that trial judges had nearly unlimited judicial discretion about the facts that may be considered at sentencing and about the weight they should be afforded. Distinguishing sentencing from adjudication of guilt, Justice Black wrote on behalf of the Court:

> Rules of evidence have been fashioned for criminal trials which narrowly confine the trial contest to evidence that is strictly relevant to the particular offense charged. These rules rest in part on a necessity to prevent a time-consuming and confusing trial of collateral issues. They were also designed to prevent tribunals concerned solely with the issue of guilt of a particular offense from being influence to convict for that offense by evidence that the defendant had habitually engaged in other misconduct. A sentencing judge, however, is not confined to the narrow issue of guilt. His task, within fixed statutory or constitutional limits, is to

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342 337 U.S. 241 (1949).
determine the type and extent of punishment after the issue of guilt has been determined. Highly relevant – if not essential – to his selection of an appropriate sentence is the possession of the fullest information possible concerning the defendant’s life and characteristics.  

This type of wide ranging inquiry, looking far beyond the elements of the charged offense, is essential to the kind of real offense sentencing operating in the federal courts. Of course, Williams has been superseded by Federal Rule of Procedure 32(e), but the Supreme Court still cites its principles favorably, and some lower courts continue to rely upon it as if it was still good law. Even courts that do not necessarily cleave to Williams regularly reject constitutional challenges to sentencing proceedings by citing (uncritically) previous practice, stressing the

343 Id., at 246-47.
345 See Hessick & Hessick, supra note 23, at ___.
346 See LAFAVE, supra note 344, at 1216.
need for comprehensive information about the offender, or noting the impracticality of testing every fact at issue in sentencing. Indeed, the legal system recognizes, explicitly, the inability to incorporate a full complement of evidentiary rules during sentencing proceedings.

Still, some constitutional rights are recognized at sentencing. There is, for example, a procedural right to notice, a right to effective counsel, and a right against self-incrimination. There are some substantive rights, as well. Courts have struck down sentences based upon materially false facts, and have invalidated higher sentences that were imposed.

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349 See United States v. Watts, 519 U.S. 148, 151 (1997) (citing “the longstanding principle that sentencing courts have broad discretion to consider various kinds of information”); United States v. Tucker, 404 U.S. 443, 446 (1972) (noting that sentencing judges “may appropriately conduct an inquiry broad in scope, largely unlimited either as to the kind of information he may consider, or the source from which it may come”); Williams v. Oklahoma, 358 U.S. 576, 585 (1959) (“In discharging his duty of imposing a proper sentence, the sentencing judge is authorized, if not required, to consider all of the mitigating and aggravating circumstances involved in the crime.”); Williams v. New York, 337 U.S. 241, 247 (1949) (“Highly relevant – if not essential – to [the judge’s] selection of an appropriate sentence is the possession of the fullest information possible concerning the defendant’s life and characteristics.”).

350 See Williams, at 250 (“[T]he modern probation report draws on information concerning every aspect of a defendant’s life. The type and extent of this information make totally impractical, if not impossible, open court testimony with cross-examination.”).

351 See Federal Rule of Evidence 1101(d); see also supra note 326 (describing same inapplicability in state sentencings).

352 See Alan C. Michaels, Trial Rights at Sentencing, 81 N.C. L. REV. 1771, 1774 (2003) (suggesting that since Williams v. New York was decided, more rights at sentencing have been recognized “than many have supposed”).


upon defendants for successfully having appealed their original sentences. Courts also have struck down sentences that were based upon impermissible classifications, such as race, national origin, and gender. In McKlesky v. Kemp, the Supreme Court made it clear that capital juries were free to “consider any factor relevant to the defendant’s background, character, and the offense,” but that “purposeful discrimination” in sentencing, based upon the race of either the victim or defendant, would constitute a violation of the Equal Protection Clause.

While it is often said that “death is different,” and while “[s]ome procedures that are constitutionally required for capital cases would not be required in noncapital cases,” the

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358 See United States v. Kaba, 480 F.3d 152, 156 (2d Cir. 2007) (“A defendant’s race or nationality may play no role in the administration of justice, including at sentencing.”); United States v. Leung, 40 F.3d 577, 586 (2d Cir. 1994) (“[E]ven the appearance that the sentence reflects a defendant’s race or nationality will ordinarily require a remand for resentencing).

359 See, e.g., United States v. Borrero-Isaza, 887 F.2d 1349, (9th Cir. 1989) (vacating sentence based in part upon the defendant’s national origin); United States v. Gomez, 797 F.2d 417, 419 (7th Cir. 1986) (noting that it would be unconstitutional to punish a defendant more severely based on nationality).

360 See, e.g., United States v. Maples, 501 F.2d 985 (4th Cir. 1974).


362 Id., at 295.

363 Id., at 351.


prohibition against sentencing on the basis of race has been maintained by non-capital courts as well.\footnote{See, e.g., Jackson v. Maryland, 772 A.2d 273, 279 (Md. Ct. App. 2001) ("The constitutional guarantee of due process of law forbids a court from imposing a sentence based in any part on inappropriate considerations, including improper considerations of race.").}

Still, as a general matter (except for these few procedural protections and these few suspect classifications), courts have been loath to uphold constitutional challenges in sentencing. In an insightful article in the \textit{California Law Review},\footnote{Hessick \& Hessick, \textit{supra} note 23, at \textendash\.} Carissa Byrne Hessick and F. Andrew Hessick recently observed, “Instead of engaging in ordinary constitutional analysis when defendants challenge … [sentencing] factors, courts have swept constitutional concerns under the proverbial rug based on the ungrounded conclusion that the sentencing process is somehow different and thus shielded from constitutional review.”\footnote{\textit{Id.}, at \textendash\.} They are correct. Constitutional challenges are upheld only when sentences are based upon clearly impermissible classifications or when clearly established procedural rights are breached.

Yes, if a judge imposed a lengthy sentence on an African American defendant, stating that the specific sentence had been selected on the basis of the defendant’s race, that sentence would be remanded for resentencing because of the risk (or at least the appearance) of invidious discrimination.\footnote{See, e.g., Leung, at 586.} Indeed, an entirely new judge might be assigned for resentencing.\footnote{See \textit{id}.} But absent a sentence starkly imposed on the basis of a constitutionally impermissible factor (e.g.,
race, national origin, or gender),371 or in violation of an established procedural requirement,372 a defendant’s constitutional challenges to his sentence is unlikely to succeed.

What about evidence-based sentences that rely upon assessments of risk? In Malenchik v. Indiana,373 described above,374 the Indiana Supreme Court upheld the use of the trial court’s use of LSI-R and SASSI scores.375 Indeed, the court went farther, stating that sentencing judges should use this information in their sentencing deliberations.376 But what if the risk instruments in Malenchik had included race and gender as explicit assessment criteria? After all, many risk instruments do use gender as a criterion,377 and race has been identified as a significant correlate of recidivism by Don Gottfredson,378 Paul Gendreau,379 and the Virginia Criminal Sentencing

371 See LAFAVE, supra note 344, at 1219 (“[T]he race of the victim or defendant (and, presumably, the gender of the victim or defendant) cannot be the basis for setting a sentence....”).
372 See Hessick & Hessick, supra note 23, at ___ (describing procedural rights enforced by courts even at sentencing).
373 No. 79S02-0908-CR-365 (Ind. June 9, 2010).
374 See supra notes 320-336 and associated text.
375 See Malenchik at 14.
376 Id., at 11 (“Having been determined to be statistically valid, reliable, and effective in forecasting recidivism, the assessment tool scores may, and if possible should, be considered to supplement and enhance a judge's evaluation, weighing, and application of the other sentencing evidence in the formulation of an individualized sentencing program appropriate for each defendant.”) (italics mine).
377 See, e.g., supra notes 137 (identifying Virginia and Washington risk instruments that include gender as a measured characteristic).
378 See Gottfredson, supra note 19, at 6.
379 See Gendreau et al., supra note 19.
Commission. What if a court constructed a sentencing information system that displayed risk as a scatterplot? What if, at sentencing, that court used the sentencing information system to match defendants with other, like offenders in its database, using the fifteen variables identified as most predictive of adult recidivism in Gendreau’s meta-analysis?

Normally, the imposition of differential punishments based on racial classifications would suggest a prima facie violation of the Equal Protection Clause, and would fail under strict scrutiny analysis. Strict scrutiny is intended to be a difficult hurdle for the government to clear.

The Constitution abhors classifications based on race, not only because those classifications can harm favored races or are based on illegitimate motives, but also because every time the government places citizens on racial registers and makes race relevant to the provision of burdens or benefits, it demeans us all. Purchased at the price of immeasurable human suffering, the equal protection principle reflects our Nation’s understanding that such


381 See supra note 102 and associated text.

382 See Gendreau et al., supra note 19 (identifying fifteen variables statistically associated with adult recidivism: (1) criminal companions, (2) antisocial personality, (3) adult criminal history, (4) race, (5) pre-adult antisocial behavior, (6) family rearing practices, (7) social achievement, (8) interpersonal conflict, (9) current age, (10) substance abuse, (11) intellectual functioning, (12) family criminality, (13) gender, (14) socio-economic status of origin, and (15) personal distress).

383 U.S. CONST., amend. XIV, § 1.

384 See supra note 315 and associated text (describing strict scrutiny analysis).
classifications ultimately have a destructive impact on the individual and our society.\textsuperscript{385}

In like manner, imposing disparate penalties based solely on gender would fail under typical intermediate review.\textsuperscript{386} But relating race and gender to risk would increase the likelihood that their use would survive a constitutional challenge on equal protection grounds. Considering race and gender, but in combination with other risk factors, would be even more likely to prevail. The Supreme Court’s 2003 decision in \textit{Grutter v. Bollinger},\textsuperscript{387} a case involving race-based affirmative action in higher education, may indicate how the use of race and gender might also be viewed within the context of evidence-based sentencing.

2. \textit{Grutter v. Bollinger}: A Potential Solution?

\textit{Grutter}, of course, had nothing to do with sentencing. Rather, the question in \textit{Grutter} was “whether the use of race as a factor in student admissions by the University of Michigan Law School … [was] lawful.”\textsuperscript{388} After Barbara Grutter, a white Michigan resident with a 3.8 grade point average (GPA) and a 161 Law School Admissions Test (LSAT) score, was rejected by the University of Michigan’s elite law school, she sued, alleging that the law school had discriminated against her on the basis of race, in violation of the Equal Protection Clause.\textsuperscript{389} The district court held that the law school’s consideration of race as a factor in admissions decisions


\textsuperscript{386} See supra note 316 and associated text (describing intermediate review).

\textsuperscript{387} \textit{Grutter, supra}.

\textsuperscript{388} \textit{Id.}, at 311.

\textsuperscript{389} \textit{Id.}, at 316-17.
was unconstitutional, reasoning that the law school’s stated objective of creating a racially diverse class was not a compelling government interest, and even if it was, that the law school’s admissions policy was not sufficiently narrowly tailored to advance that interest.

Sitting en banc, the court of appeals reversed, finding that racial diversity was a compelling interest, and because the law school’s policy was “virtually identical” to the Harvard admissions program appended to Justice Powell’s controlling opinion in *Regents of the University of California v. Bakke*, finding that Michigan law’s policy was narrowly tailored. In a narrow, five-to-four decision, the U.S. Supreme Court upheld the law school’s use of race in its admission decisions.

The dissenting justices in *Grutter* claimed that the majority pantomimed strict scrutiny analysis but did not actually apply that standard. Justice O’Connor, however, writing for the

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391 *Id.*, at ___.
392 *Id.*, at ___.
393 438 U.S. 265 (1978). The *Bakke* case produced six opinions, none of which commanded a majority of the Court. Four justices would have upheld a medical school admissions policy reserving 16 of 100 seats for minorities; four justices struck down the policy on statutory grounds. Justice Powell’s fifth vote struck down the quota, but also reversed the state court’s injunction against any consideration of race.
394 288 F. 3d 732, 749 (6th Cir. 2002) (en banc).
395 539 U.S. 306 (2003). Justice O’Connor delivered the opinion of the Court and was joined by Justices Stevens, Souter, Ginsberg, and Breyer. Justice Ginsberg filed a concurring opinion. Justices Rehnquist, Scalia, Kennedy, and Thomas each filed dissenting opinions.
396 *Id.* at 343.
397 *See id.*, at 380 (“Although the Court recites the language of our strict scrutiny analysis, its application of that review is unprecedented in its deference.”) (Rehnquist, J., dissenting); 387 (“The Court, however, does not apply
majority, rejected this characterization.\textsuperscript{398} She identified the strict scrutiny standard: “[A]ll racial classifications imposed by government … are constitutional only if they are narrowly tailored to further compelling government interests.”\textsuperscript{399} She agreed with the dissenters that strict scrutiny is a serious matter,\textsuperscript{400} quoting \textit{Adarand Constructors, Inc. v. Peña}:\textsuperscript{401} “[W]henever the government treats any person unequally because of his race, that person has suffered an injury that falls squarely within the language and spirit of the Constitution’s guarantee of equal protection.”\textsuperscript{402} But, Justice O’Connor noted, race-based government action does not violate the constitutional guarantee of equal protection when it serves a compelling governmental interest and is narrowly tailored.\textsuperscript{403}

The Court determined that Michigan law has a compelling interest in attaining a diverse student body. After all, a diverse law school class fosters cross-racial understanding, deconstructs stereotypes, and better prepares its students to work as professionals in an increasingly diverse society. Although Justice O’Connor acknowledges that some of the Court’s precedents imply that remedying past discrimination is the only permissible justification for

\textsuperscript{398} \textit{Id.}, at 334 (stating that “[c]ontrary to Justice Kennedy’s assertions, we do not ‘abandon[ ] strict scrutiny’”).

\textsuperscript{399} \textit{Id.}, at 326.

\textsuperscript{400} \textit{See supra} note 385 and associated text (characterizing racial classifications as inherently destructive).

\textsuperscript{401} 515 U.S. 200 (1995).

\textsuperscript{402} \textit{Id.}, at 229-30 (quoted at \textit{Grutter}, 327).

\textsuperscript{403} \textit{Grutter}, at 327.
govermental racial classification,\footnote{See \textit{id.}, at 328 (noting that “unless classifications based on race are strictly reserved for remedial settings, they may in fact promote notions of racial inferiority and lead to a politics of racial hostility”) (quoting Richmond v. J. A. Croson Co., 488 U.S. 469, 493 (1989)).} she rejected that inference, writing that “we have never held that the only governmental use of race that can survive strict scrutiny is remedying past discrimination.”\footnote{\textit{Id.}}

Having determined that Michigan law enjoys a compelling interest in attaining a diverse student body, the Court asked whether the law school’s admissions scheme was narrowly tailored to achieve that end. Justice O’Connor noted that while a rigid quota system would be impermissible,\footnote{See \textit{id.}, at 334. Characterizing the University of Michigan’s point-based affirmative action policy for undergraduates as a quota led the Court to invalidate it in \textit{Grutter’s} companion case, Gratz v. Bollinger, 539 U.S. 244 (2003).} universities \textit{may} consider race or ethnicity as a plus factor as part of an admissions policy premised upon individualized consideration.\footnote{See id.} Such a policy comports with Justice Powell’s controlling opinion in \textit{Bakke}.\footnote{See supra note 393 (describing \textit{Bakke}).} Because Michigan law considers race among a constellation of other (non-racial) diversity factors, it is employed in a “flexible, nonmechanical way.”\footnote{\textit{Grutter}, at 334.} In the Court’s estimation, this meant that the “admissions program bears the hallmarks of a narrowly tailored plan.”\footnote{\textit{Id.}}

\footnote{404 See \textit{id.}, at 328 (noting that “unless classifications based on race are strictly reserved for remedial settings, they may in fact promote notions of racial inferiority and lead to a politics of racial hostility”) (quoting Richmond v. J. A. Croson Co., 488 U.S. 469, 493 (1989)).}
\footnote{405 Id.}
\footnote{406 See \textit{id.}, at 334. Characterizing the University of Michigan’s point-based affirmative action policy for undergraduates as a quota led the Court to invalidate it in \textit{Grutter’s} companion case, Gratz v. Bollinger, 539 U.S. 244 (2003).}
\footnote{407 See id.}
\footnote{408 See supra note 393 (describing \textit{Bakke}).}
\footnote{409 \textit{Grutter}, at 334.}
\footnote{410 Id.}
While noting the petitioner’s argument that less restrictive, race-neutral, means could also achieve racial diversity, the Court disagreed. “Narrow tailoring does not require exhaustion of every conceivable race-neutral alternative. Nor does it require a university to choose between maintaining a reputation for excellence or fulfilling a commitment to provide educational opportunities to members of all racial groups.”

Alternatives such as a lottery or decreasing the emphasis on GPA and LSAT scores would force administrators to sacrifice diversity, academic excellence, or both. The Court also reasoned that “race-conscious admissions policies must be limited in time…. Enshrining a permanent justification for racial preferences would offend [the] fundamental equal protection principle.”

Noting that twenty-five years had passed since *Bakke*, and that the number of qualified minority applicants had increased, the Court suggested that after twenty-five more years, racial preferences will no longer be required to achieve a diverse student body.

Summarizing the Court’s holding in *Grutter*, Justice O’Connor wrote, “[T]he Equal Protection Clause does not prohibit the Law School’s narrowly tailored use of race in admissions decisions to further a compelling interest in obtaining the benefits that flow from a diverse student body.”

The Court’s reasoning in *Grutter* should prove instructive for judges interested in the constitutionality of evidence-based sentencing. While available risk assessment instruments do not measure race, explicitly, race has been identified as a highly predictive correlate of

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411 *Id.*, at 339.

412 *Id.*, at 341.

413 See *id.*, at 343.

414 *Id.*.
recidivism,\(^{415}\) and other, measured variables may operate as a proxy for race.\(^{416}\) It is also possible that a court would be interested in using race as an explicit variable within a sentencing information system to match defendants against like, previous offenders in an attempt to identify optimal sentence length and conditions.\(^{417}\) If challenged, as in _Malenchik v. Indiana_,\(^{418}\) evidence-based sentencing courts may wish to negotiate strict scrutiny analysis by adapting the logic of _Grutter_.

Even evidence-based sentencing that uses race as an explicit factor to impose punishment is likely to survive strict scrutiny. While it is sometimes said that strict scrutiny is “‘strict’ in theory and fatal in fact,”\(^{419}\) _Grutter_ makes clear that this is not the case: “When race-based action is necessary to further a compelling governmental interest, such action does not violate the constitutional guarantee of equal protection so long as the narrow-tailoring requirement is also satisfied.”\(^{420}\) To survive, evidence-based sentencing must satisfy the three prongs of the strict scrutiny test: (1) a compelling governmental interest, (2) narrowly tailored action, and (3) no less restrictive means to satisfy the government’s interest. Each prong will be considered, below, in turn.

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\(^{415}\) See Ostrom, _supra_ note 106, at 27-28; Gendreau et al., _supra_ note 19; Gottfredson, _supra_ note 19, at 6 (all reporting significant association between race and recidivism).

\(^{416}\) Harcourt, _supra_ note 206.

\(^{417}\) See _supra_ note 102 and associated text (describing graphic interface for sentencing information system).


\(^{419}\) Gunther, _supra_ note 338, at 8.

Certainly, protecting the public from recidivism seems like a compelling governmental interest. In some ways, safeguarding against recidivism seems like the domestic equivalent of national security, which has been upheld even when resulting in widely-condemned action.\footnote{See Korematsu v. United States, 323 U.S. 214 (1944) (upholding internment of Japanese Americans). Today, \textit{Korematsu} is a largely-reviled opinion. Bernard Schwartz has named it as number six among the ten worst decisions of the Supreme Court. \textsc{Bernard Schwartz, A Book of Legal Lists: The Best and Worst in American Law with 100 Court and Judge Trivia Questions} 69 (1997).} But other objectives – even objectives that are lauded by the courts in other circumstances – have been deemed insufficient.\footnote{See, \textit{e.g.}, Palmore v. Sidoti, 466 U.S. 429, 433 (1984) (finding the best interests of a child whose mother was in a mixed-race marriage to be “substantial” but not compelling enough to award custody to the father); Wygant v. Jackson Bd. Of Ed., 476 U.S. 267 (1986) (rejecting the remedying of general societal discrimination as grounds for racial classification).} Justice Thomas suggests that the threshold to establish a compelling governmental interest is \textit{very} high:

Where the Court has accepted only national security, and rejected even the best interests of a child, as a justification for racial discrimination, I conclude that only those measures the State must take to provide a bulwark against anarchy, or to prevent violence, will constitute a pressing public necessity.\footnote{539 U.S. at 353.}

Justice Thomas implies that most governmental interests – even legitimate governmental interests – will fail the first prong of the strict scrutiny test. But evidence-based sentencing is in luck: the prevention of crime has already been identified as a compelling governmental interest
by the U.S. Supreme Court. In the 1984 case, Schall v. Martin,424 Justice Rehnquist asserted the fact in strong terms, writing that “[t]he ‘legitimate and compelling state interest’ in protecting the community from crime cannot be doubted.”425

The second prong asks whether evidence-based sentencing’s use of racial classifications is narrowly tailored. Here, Grutter may prove instructive. If a sentencing court were to draw upon research associating race and crime,426 and then impose a blunt distribution of punishment in which African Americans always received the maximum penalty permitted by law, Asians always received the minimum penalty, and whites always received the midpoint penalty, this would presumably flunk strict scrutiny. Quotas of this kind are not narrowly tailored.427 But using race in a flexible and non-mechanical manner would satisfy the narrow tailoring prong.428 If race was employed as a “plus factor” and included among other relevant variables in a statistical model, it would help the sentencing judge to better ascertain the most effective sentence for each individual defendant. Racial differences, after all, are statistically correlated with recidivism risk,429 and in the words of the Grutter Court, “the very purpose of strict scrutiny is to take … ‘relevant differences into account’.”430

425 Id., at 264; see De Veau v. Braisted, 363 U.S. 144, 155 (1960); Terry v. Ohio, 392 U.S. 1, 22 (1968).
426 See Wright, supra note 212, at 146 (“INTERPOL statistics on homicide, rape, and serious assault consistently show that Orientals have the lowest involvement in serious crime, followed by Caucasians, and then blacks.”).
427 See 539 U.S. at 335 (“To be narrowly tailored, a race-conscious admissions program cannot use a quota system—it cannot insulate each category of applicants with certain desired qualifications from competition with all other applicants.”).
428 See id. (upholding policy of individualized consideration).
429 See supra note 415 and associated text (indicating that race is correlated with recidivism rates).
The third prong, demonstrating that no less restrictive means will satisfy the compelling governmental interest, is relatively straightforward. Research has shown that excluding race from mathematical models of recidivism degrades that predictive power of the model significantly. Joan Petersilia and Susan Turner found that omitting race-correlated factors from a model to predict recidivism reduced the accuracy of the model by five to twelve percentage points.\(^{431}\) Race and its correlates can be excluded from evidence-based sentencing, but only at the cost of sacrificing the ability of the government to achieve its compelling interest (preventing crime). In terms of attaching temporal limits to the use of race in evidence-based sentencing, courts could choose to include racial variables in their models for as long as those variables are significant predictors of recidivism, relinquishing their use if and when they cease to be significantly predictive. This approach is consistent with the race-neutral ideals articulated by the Court.\(^{432}\)

In summation, evidence-based sentencing, like the affirmative action program upheld by the Court in *Grutter v. Bollinger*, would probably survive strict scrutiny analysis. But evidence-based sentencing is different from affirmative action in at least one essential respect. In *Grutter*, the Court was permitting the use of race to offset the negative effects of past discrimination.\(^{433}\) That is not the objective of evidence-based sentencing. Instead of trying to redress this country’s


\(^{431}\) See Petersilia & Turner, supra note 22.

\(^{432}\) See *Grutter*, at 342-43 (noting that because racial classifications are so potentially dangerous to society, they should not be extended any longer than necessary).

\(^{433}\) C.f., Richmond v. J. A. Croson Co., 488 U.S. 469, 493 (1989) (plurality opinion) (noting that if racial classifications are not used for remedial purposes, they may exacerbate racial tensions).
stark racial disparities in the criminal justice system, actuarial sentencing builds upon a statistical association between variables (such as race) and crime to predict recidivism. These predictions may justify – at least in part – the imposition of disparate criminal sentences based on a number of variables correlated with risk, including race. Thus, evidence-based sentencing has the potential to reify, rather than ameliorate, extant racial disparities.

Ironically, if a state determined that it was a laudable goal to artificially reduce the number of minorities in its prisons – using actuarial sentencing to ensure that the proportion of incarcerated blacks corresponded to the proportion of blacks in the overall population – this would probably violate the Equal Protection Clause.

Of course, courts applying strict scrutiny analysis will not ask whether the ends of actuarial sentencing are laudable and desirable goals. It does not matter. “[T]he standard of review under the Equal Protection Clause is not dependent on the race of those burdened or

434 Racial disparity is endemic in the U.S. criminal justice system. Supra note 212. Because it is such a serious issue, there is a massive literature – some of which is quite empirical, some quite abstract – on the subject. See, e.g., DAVID BALDUS, ET AL., EQUAL JUSTICE AND THE DEATH PENALTY: A LEGAL AND EMPIRICAL ANALYSIS (1990); COLE, supra note 212; RANDALL KENNEDY, RACE, CRIME, AND THE LAW (1997); GLENN C. LOURY, RACE, INCARCERATION, AND AMERICAN VALUES (2008); SAMUEL WALKER, ET AL., COLOR OF JUSTICE: RACE, ETHNICITY AND CRIME IN AMERICA (2d ed. 2000); BRUCE WESTERN, PUNISHMENT AND INEQUALITY IN AMERICA (2007); Donna Coker, Foreword: Addressing the Real World of Racial Injustice in the Criminal Justice System, 93 J. CRIM. L. & CRIMINOLOGY 827 (2003) (all describing racial disparity in the justice system).

435 See HARCOURT, supra note 63, at 190 (“The use of actuarial methods tends to accentuate the prejudices and biases that are built into the penal code and into criminal law enforcement.”).

436 This would operate as a mechanical quota, and be more akin to the unconstitutional undergraduate admissions policy of Gratz v. Bollinger, 539 U.S. 244 (2003), than the permissible law school policy evaluated in Grutter.
benefited by a particular classification.” 437 Courts subjecting evidence-based sentencing to strict scrutiny analysis will ask only whether the prevention of crime is a compelling government interest (it is). 438 They will ask whether the racial classification is narrowly tailored (it will probably be deemed so). 439 And they will ask whether a less restrictive means will achieve the compelling government interest (research suggests that it will not). 440

Once that constitutional door is open to race, all other sentencing factors can pass through: gender, age, marital status, education, class, and so forth. For if a sentencing information system that explicitly includes race as a variable can survive strict scrutiny, then any such system that explicitly includes gender as a variable also would survive intermediate review (as this is a less onerous standard). 441 And where race and gender are permitted as sentencing factors, other personal characteristics, ceteris paribus, will be permitted, as well.

Certainly, if a sentencing information system that explicitly includes race as a variable can pass constitutional muster, then the use of risk assessment instruments that do not measure race, per se, but do measure correlated variables (e.g., criminal history) 442 would be permissible. The likely constitutionality of evidence-based sentencing may come as a relief to sentencing judges who believe—probably correctly 443—that they can impose better sentences by employing actuarial techniques, and to judges who are frustrated by sentencing guidelines that must be

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437 Croson, 488 U.S., at 494 (plurality opinion).

438 See supra note 425 and associated text.

439 See supra note 428 and associated text.

440 See supra note 431 and associated text.

441 See supra note 316 (describing intermediate review).

442 See Harcourt, supra note 206 (noting that criminal history may operate as a proxy for race).

443 See supra note and associated text.
calculated\textsuperscript{444} but cannot be followed.\textsuperscript{445} For these judges, evidence-based sentencing may serve as a bona fide paradigm shift, a new way forward.\textsuperscript{446} But the constitutionality of evidence-based sentencing does not solve the serious—and perhaps intractable—philosophical problems that lurk within the approach.

C. Philosophical Challenges

Given that risk assessment has been used within the criminal justice system for at least eighty years,\textsuperscript{447} commentators have commented upon many of the philosophical conundrums associated with evidence-based sentencing.\textsuperscript{448} A full catalog is well beyond the scope of this article, but four particularly thorny issues bear mentioning: (1) the very nature of the assessed variables may make evidence-based sentencing unfair, (2) the prospective orientation of evidence-based sentencing troubles some commentators, (3) risk-correlated variables that warrant increased punishments on utilitarian grounds may suggest reduced punishments when


\textsuperscript{445} See Nelson v. United States, 555 U.S. ___ (2009) (holding that without further analysis, district courts may not consider a guidelines sentence to be presumptively reasonable).

\textsuperscript{446} See Oleson, \textit{supra} note 63, at 738 (analogizing the increasingly-elaborate federal sentencing guidelines to Ptolemaic models of the solar system and suggesting that a paradigm shift to a data-driven Copernican model is needed).

\textsuperscript{447} See Burgess, \textit{supra} note 121 (publishing pioneering risk assessment tool in 1928); \textit{see also} HARCOURT, \textit{supra} note 63, at 47-107 (tracing rise of risk-based actuarialism).

considered from a retributivist perspective, and (4) those who advocate for evidence-based sentencing because it may reduce the penalties for a given population may or may not understand that other populations will be penalized. Each of these issues will be outlined, below, in turn.

The fifteen variables associated with adult recidivism in Gendreau’s meta-analysis\(^{449}\) may prove to be philosophically problematic when employed in evidence based sentencing. Some of those fifteen variables (e.g., antisocial personality, criminal companions, substance abuse, even employment) are bourgeoisie and paternalistic in nature. For example, while there may be a statistical relationship between the number of criminal peers with whom a defendant associates and recidivism risk,\(^{450}\) it is nevertheless troubling to consider affirmatively punishing a defendant for merely associating with “the wrong sort of person.” Similarly, while unemployment may indeed be associated with recidivism,\(^{451}\) the notion that we will criminally punish someone (or increase his punishment)\(^{452}\) for not holding down a job is repugnant. In a like manner, it is not difficult to believe that substance abuse is associated with recidivism,\(^{453}\) but the idea of

\(^{449}\) Gendreau et al., supra note 19 (identifying fifteen variables statistically associated with adult recidivism).

\(^{450}\) See supra note 175 and associated text.

\(^{451}\) See supra note 243 and associated text.

\(^{452}\) See Elizabeth T. Lear, Double Jeopardy, the Federal Sentencing Guidelines, and the Subsequent-Prosecution Dilemma, 60 BROOK. L. REV. 725, 726 (1994) (noting that courts have “devised a convenient yet dangerous fiction in the form of the ‘punishment – enhancement’ distinction. According to this theory, a sentence enhancement does not constitute punishment”).

\(^{453}\) See supra notes 258, 261 and associated text.

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enhancing a defendant’s punishment simply because he is addicted to alcohol and/or drugs veers close to the government action outlawed by the Supreme Court in *Robinson v. California*.454

Even more troublesome is the prospect of punishing a defendant for an ascribed characteristic. Judge might reasonably be willing to increase a defendant’s punishment because of something that he did or did not do (e.g., get arrested, go to college, get married, and so forth), but judges might rightly balk at increasing a punishment because of who someone *is*. Research suggests that for better or worse, in the real world, ascribed characteristics *do* play a role in the discretionary decisions made by actors in the criminal justice system,455 but this may offend our moral intuitions. “[M]any people believe it unjust to base punishment decisions on factors over which the offender has no control”456 People do not choose to be born male or female, or born to criminal or non-criminal parents, or born with high IQ scores or learning disabilities. These traits may be correlated with recidivism risk, but to impose disparate punishments based upon ascribed characteristics seems palpably unfair. Upon reflection, however, it becomes clear that this is but one example of a much larger philosophical problem that permeates the criminal justice system:

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454 370 U.S. 660 (1962) (noting that drug addiction is an illness, not a crime, and holding that ninety days in jail for being ill violated the Eighth Amendment’s prohibition against cruel and unusual punishment); *but see* Powell v. Texas, 392 U.S. 514 (1968) (distinguishing punishable behavior [public intoxication] from non-punishable disease [alcoholism]).


moral luck.457 Every day, myriad externalities over which people exercise no control determine whether (and how much) they will be punished. The distracted driver who strikes and kills a pedestrian in a crosswalk will be charged with vehicular manslaughter; but without a pedestrian in the crosswalk, that same driver, engaging in the same conduct, will have committed no offense. Similarly, the pugilist who beats his victim into unconsciousness in a hospital parking lot will be convicted only of assault (his victim lives); but the pugilist who inflicts identical injuries on his victim, but does so in remote Alaska, will be convicted of second-degree murder, because his victim dies en route to the hospital. The ascribed characteristics used in evidence-based sentencing may be philosophically problematic, but the philosophical problem is much greater than that: moral luck shapes all phases of the criminal justice system.458

A second philosophical challenge to evidence-based sentencing relates to punishing defendants not for what they have done, but for what other (statistically-similar) offenders have done. Reminiscent of the concept of “pre-crime” punished in Minority Report,459 the forecasting of future criminality and the imposition of punishment based on risk of recidivism may offend some judges’ sense of justice.460 “It is a fundamental orthodoxy of our criminal justice system that the punishment should fit the crime and the individual, not the statistical history of the class of persons to which the defendant belongs.”461 But the imposition of a particular punishment in

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459 See supra note 296.

460 See, e.g., Marcus, supra note 27.

order to reduce the risk of future crime is nothing new in the law: indeed, it is axiomatic to the principle of general deterrence.\footnote{See supra note 53.} If anything, it is philosophically more suspect to severely punish one offender in an attempt to deter other potential criminals than it is to impose a punishment based upon penalties that were assigned to other, like offenders.\footnote{In the former case, judges employ the defendant as a scapegoat whose suffering serves a larger social objective; in the latter case, judges use historical information to impose sentences that conserve law enforcement resources, enhance the possibilities of rehabilitation, and maximize public safety.} After all, this is what common law judges do: they analogize the facts of the instant case to the facts of controlling precedent and then impose judgments faithful to the principle of stare decisis.\footnote{A few scholars have written thoughtfully about a common law of sentencing. \textit{See, e.g.}, Douglas A. Berman, \textit{A Common Law for the Age of Federal Sentencing: The Opportunity and Need for Judicial Lawmaking}, 11 STAN. L. & POL’Y REV. 93 (1999); Nancy Gertner, \textit{From Omnipotence to Impotence: American Judges and Sentencing}, 4 OHIO ST. J. CRIM. L. 523 (2007).}

A third philosophical challenge to evidence-based sentencing lies in the divergent paths mapped by the penological bases of forward-looking utilitarianism and backward-looking retribution. George Bernard Shaw, cognizant of the tension between rehabilitation and retribution, articulated an acerbic syllogism, “Now, if you are to punish a man retributively, you must injure him. If you are to reform him, you must improve him. And men are not improved by injuries.”\footnote{GEORGE BERNARD SHAW, 22 \textit{THE COLLECTED WORKS OF BERNARD SHAW} 173, 184 (1932).} Of course, this view is not limited to playwrights; some leading legal scholars also view risk and desert as fundamentally immiscible principles.\footnote{See Robinson, \textit{supra} note 2; Christopher Slobogin, \textit{Model Penal Code Symposium: Introduction to the Symposium on the Model Penal Code’s Sentencing Proposals}, 61 FLA. L. REV. 665 (2009) (noting that desert and...
to the extent that immutable characteristics are predictive of recidivism (justifying punishment on utilitarian grounds), they may imply that defendants lack meaningful control over their criminal behavior (thereby making the imposition of punishment problematic on retributivist grounds). The more robust a variable is in predicting recidivism, the more meddlesome it becomes from a desert-based viewpoint. A characteristic that predicted recidivism with perfect accuracy would force jurists and criminologists to reassess their understandings of criminal responsibility, asking, “Is it the defendant who recidivates or the characteristic?” At the bottom of this philosophical well, of course, lies the perennial problem of free will: if man does not have free will, why does the law insist upon punishing him as if he does?467 In The Limits of the Criminal Sanction, Herbert Packer provides a chillingly urbane answer, suggesting that the rationale may be efficacy: “Very simply, the law treats man’s conduct as autonomous and willed, not because it is, but because it is desirable to proceed as if it were”468

Evidence-based sentencing, relying upon the assumption that risk factors increase the likelihood of recidivism in statistically predictable fashion, suggests that choice is not absolute. For the philosophically minded, this understanding, however, raises fundamental questions about free will and human nature that may very well lie beyond the ability of the sciences to answer.469

crime control often “are at odds, not just because a dangerous person might not be blameworthy (or vice versa), but because characteristics that appear mitigating—youth, addiction, impaired functioning—are frequently risk factors”).


468 PACKER, supra note 28, at 74-75.

469 See, e.g., William James, The Dilemma of Determinism, in THE WILL TO BELIEVE 149 (1949).
A fourth philosophical challenge to evidence-based sentencing lies relates to a dilemma. Advocates who embrace evidence-based sentencing (a means) because they like the result (an end) in a given case or for a given population may not appreciate that other populations will be penalized. For example, a defense lawyer defending a middle-aged, middle-class, married, white woman on a first offense might be enthusiastic about the use of evidence-based sentencing, because the presumably-low risk score could justify a non-custodial sentence. But that lawyer should understand that his next client might be a male eighteen-year-old African American with a lengthy criminal history. Risk cuts both ways.

Of course, it is possible to use evidence-based sentencing to reduce—but not increase—penalties. This is similar to what Virginia did with its risk assessment instrument.\footnote{Supra note 106 (noting that low risk defendants were assigned to non-custodial, alternative punishments).} Assuredly, the number of prison inmates could be reduced through the use of risk instruments,\footnote{If the State of California should lose in \textit{Schwarzenegger v. Plata} (09-1233) (argued Nov. 30, 2010), this might be a sensible approach for California to adopt in reducing its prison population by 46,000 inmates so as to comply with the court order of the Ninth Circuit.} and the net amount of total punishment could be decreased. But the choice to make sentencing decisions by evaluating the correlates of recidivism risk implies that, at least in relative terms, there will be winners and losers. In relative terms, it is possible to create addition through subtraction. If, for example, everyone in an office gets a raise except for you, you have not lost money in terms of absolute value, but because everyone else now has more buying power, you have lost money in relative terms. Similarly, if risk profiles are used to reduce the terms of incarceration for women, whites, the middle-aged, and the college-educated, this will not, in itself, increase the sentences imposed upon young minority males without college degrees, but it will exacerbate the existing
sentencing disparities. Sentencing disparities of this kind could precipitate legislative action, similar to what prompted passage of the Sentencing Reform Act of 1984. Applying similar reasoning, Carissa Byrne Hessick notes that opponents of mass incarceration must be mindful of the policy implications when they use risk-based arguments to advocate for reduced penalties of a given population. “If both race-effects commentators and gender-effects commentators are looking to draw attention to the severity of modern sentencing policy by highlighting its effects on a particular disadvantaged group, then it is important that the arguments from each group of commentators not support more severe sentencing for another disadvantaged group.”

Classifications of risk create winners and losers, but they also shape our legal conceptions in subtle and insidious fashion. They have spawned a “new penology” that – for better or worse – is also creating a new way of sentencing.

The prediction of future dangerousness has begun to colonize our theories of punishment. This is remarkable because it flips on its head the traditional relationship between social science and the legal norm. The prediction instruments were generated, created, driven by sociology and criminology. They came from the social sciences. They were exogenous to the legal system. They had no


473 See Carissa Byrne Hessick, Race and Gender as Explicit Sentencing Factors, 14 J. GENDER RACE & JUST. 127 (2010).

474 Id., at ___.

475 See Feeley & Simon, supra note 32.

476 See supra note 14.
root, nor any relation to the jurisprudential theories of just punishment. They had no ties to our long history of Anglo-Saxon jurisprudence – to centuries of debate over the penal sanction, utilitarianism, or philosophical theories of retribution. And yet they fundamentally redirected our basic notion of how best and most fairly to administer the criminal law.  

V: Conclusion: Hard Choices about Hard Time

Harcourt is correct in stating that risk prediction has shaped our thinking about punishment, yet it remains unclear whether evidence-based sentencing is something to be feted or to be feared. Certainly, it will be an attractive prospect for state judges forced to “sentence smarter” because of limited resources. It will also be attractive to federal judges who are frustrated by sentencing guidelines that must be calculated yet cannot be followed. It is noteworthy that organizations of jurists and legal scholars are already legitimating the approach: evidence-based sentencing is supported by the PEW Center on the States, the National Institute of Corrections, the National Center for State Courts, and it has been acknowledged by the American Law Institute.

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477 Harcourt, supra note 63, at 188.
478 See id.
479 See supra note 17.
481 See Nelson v. United States, 555 U.S. __ (2009) (holding that without further analysis, district courts may not consider a guidelines sentence to be presumptively reasonable).
482 See supra note 97.
483 See supra note 98.
Judges have good reason to adopt evidence-based sentencing. Research indicates that actuarial sentencing is superior to unstructured judgment, as is also true of decision making in other contexts. While modern risk prediction instruments are only moderately predictive of recidivism, they are empirically constructed and correspond to extant criminological research such as Gendreau’s meta-analysis described in Part III.B of this Article. It has been suggested that not using risk assessment instruments may constitute negligence in sentencing.

Evidence-based sentencing will probably withstand constitutional challenges. Courts, as a general matter, are reluctant to enforce constitutional rights at sentencing, and the “pull of prediction” will further induce judges to uphold sentences imposed on the basis of risk. Given the Supreme Court’s reasoning in Grutter v. Bollinger, even sentencing regimes that employ race as an explicit correlate of recidivism risk are likely to survive strict scrutiny analysis.

484 See supra note 99.
485 See supra note 100.
486 See Gottfredson & Gottfredson, supra note 93, at 247.
487 See CHRISTOPHER SLOBOGIN, PROVING THE UNPROVABLE 107 (2007) (reporting AUC values between .7 and .8 for modern actuarial instruments).
488 See Gendreau et al., supra note 19.
489 See Redding, supra note 86, at 1.
490 See Part IV.B, supra.
491 See Hessick & Hessick, supra note 23, at ___.
492 HARCOURT, supra note 63, at 173.
494 See Part IV.B.2, supra.
Evidence-based sentencing, though, still faces a number of serious challenges. Some of these are logistical (What kind of data should judges use? Is the available data reliable? Will actuarial sentencing reduce crime levels, or will it increase them?), some are philosophical (Can risk coexist with desert? Is it justice to punish not for crime, but for the presence of a risk factor? And does it matter if that risk factor is ascribed?).

Risk assessment has fundamentally transformed penology,\textsuperscript{495} and is transforming the way that sentencing judges do business. Opening their eyes to the consequences of risk, judges are like the character of Neo in \textit{The Matrix}:\textsuperscript{496} Instead of swallowing the blue pill and waking up in their beds, believing whatever they want to believe, those who have embraced a jurisprudence based on risk have decided to swallow the red pill.\textsuperscript{497} And, as in the film, the reality revealed to them is harsh. Indeed, the world of risk is littered with inequities and injustices. Why in the world should defendants be punished \textit{more} because they were victims of child abuse? How is it possible that people should be punished \textit{more} because they were born with low IQ scores? Are their underlying hardships not punishment enough?\textsuperscript{498} Lawyers are weaned on lofty principles like “all men are created equal,”\textsuperscript{499} but a in a world of risk and moral luck, this assertion looks like an empty platitude, a false promise, and a lie. A golden lie, perhaps, but a lie nevertheless.

\textsuperscript{495} See Feeley & Simon, \textit{supra} note 32.

\textsuperscript{496} Warner Bros. Pictures, 1999.


\textsuperscript{498} See, \textit{e.g.}, Anthony Clare, \textit{Psychiatry in Dissent} 354 (1980) (quoting the maxim \textit{furiosus satis ipso furore punitur} [the mad man is sufficiently punished by his madness]).

\textsuperscript{499} Declaration of Independence (1776).
Judges, recoiling from such a bleak vision, may wish they had opted for the blue pill.500 But there is no going back. Harcourt writes, “What, then, should we do? Where do we go if we forsake the actuarial? Do we return to clinical judgment? No. Clinical judgment is merely the human, intuitive counterpart to the actuarial. It is simply the less rigorous version of categorization and prediction – the hunch instead of the regression.”501

Having swallowed the red pill, it becomes clear that three options are available to judges considering evidence-based sentencing: (1) adoption of actuarial techniques, using whatever variables are most predictive, regardless of what they are; (2) adoption of actuarial techniques, eliminating from the model any variables that are objectionable on legal or philosophical grounds; or (3) rejection of actuarial techniques.

The first option is to embrace evidence-based sentencing and to use whatever predictive measures that science and the law will allow. Suspect variables (e.g., race, gender, age, marital status, education level, and class) can be employed in sentencing decisions, perhaps to determine length of sentence,502 and perhaps to impose conditions of confinement and/or supervision.503

500 See B.F. Skinner, WALDEN TWO 240 (2005) (describing a conversation between Frazier, who asks “What would you do if you found yourself in possession of an effective science of behavior?” and Castle, who answers, “I think I would dump your science of behavior in the ocean.” When Frazier asks if he would deny men all the help he could otherwise give them, Castle says that by dumping the knowledge in the ocean, he would give them their freedom. Frazier warns that in so doing he would only hand control over to others).

501 Harcourt, supra note 63, at 237-38.

502 See, e.g., Greenwood, supra note 105 (describing principle of selective incapacitation).

503 See Slobogin, supra note 456, at 302 (suggesting that in some jurisdictions “retributive considerations might be considered relevant only in setting the outer limit of the sentence, with its precise length in a given case dependent upon an evaluation of dangerousness and rehabilitative potential”).
Of course, providing judges with a sentencing information system that identifies optimal punishments for matched cases in a straightforward manner creates the possibility that judges will simply run the numbers and impose the penalty identified by the software. After all, even though sentencing judges were critical of mandatory federal guidelines, they adhered to them, and they continue to do so, even post-Booker. Even if judges do look beyond the statistics and beyond the four corners of the law, risk predictions are likely to frame the judge’s thinking and to influence the sentence that is eventually imposed. On the other hand, a

504 Judges may be unlikely to look beneath the interface of the sentencing information system and challenge the underlying statistical basis. See Redding, supra note 86, at 16n.79 (“Judges and lawyers typically have little or no training in science, and few understand basic statistical concepts.”).

505 See Johnson & Gilbert, supra note 12, at 3 (1997) (“The general pattern of judge responses suggests that, while most are willing to work within a guidelines system in some form, they strongly prefer a system in which judges are accorded more discretion….”); See U.S. Sentencing Comm’N, supra note 71, at A-1, 1 (reporting that approximately 40% of surveyed judges believed the guidelines had a high degree of general effectiveness).


507 See id., at vi (noting a post-Booker conformity rate of 85.9%).

508 This is relatively infrequent. See J.C. Oleson, The Antigone Dilemma: When the Paths of Law and Morality Diverge, 29 Cardozo L. Rev. 669, 684 (noting “existing precedents often directly preclude judges from imposing a sentence that is moral and just”).

judge’s blind adherence to a reliable sentencing information system might not be entirely bad: studies indicate that we may be better served by an algorithm than by the judge’s judgment.\textsuperscript{510}

The second option is to employ evidence-based sentencing, but to exclude variables that are legally impermissible or that offend our sense of justice. While even the explicit use of race might survive strict scrutiny analysis,\textsuperscript{511} courts may choose to omit race from their models of recidivism.\textsuperscript{512} But as variables are omitted from mathematical models, the predictive value of those models is degraded.\textsuperscript{513} And what variables are unobjectionable and should be retained? If even something as quotidian as criminal history, a staple in traditional sentencing,\textsuperscript{514} can operate as a proxy for race,\textsuperscript{515} what variables are free from suspicion? Gender? Age? Family background? As each variable is discarded as antithetical to American legal values,\textsuperscript{516} the predictive value of the model dwindles until we are left with something no more robust than the best guess of a judge.\textsuperscript{517}

\textsuperscript{510} See supra note 93.

\textsuperscript{511} See Part IV.B.2, supra.

\textsuperscript{512} See Ostrom, supra note 106, at 27-28 (noting that race was omitted from Virginia’s prediction instrument).

\textsuperscript{513} See Petersilia & Turner, supra note 22.

\textsuperscript{514} See supra note 313.

\textsuperscript{515} See Harcourt, supra note 206.

\textsuperscript{516} See Goodman, supra note 461.

\textsuperscript{517} See supra note 501 and associated text.
The third option is to reject the actuarial approach.\textsuperscript{518} Just as there is something seductive about the promise of risk prediction, there is something alluring about rejecting the role of the computer in any endeavor that is as fraught with meaning as criminal sentencing:

\begin{quote}
We forget that the computer is just a tool. It is supposed to help, not substitute for thought. It is completely indifferent to compassion. It has no moral sense. It has no sense of fairness. It can add up figures, but can’t evaluate the assumptions for which the figures stand. Its judgment is no judgment at all. There is no algorithm for human judgment.\textsuperscript{519}
\end{quote}

But if we do not discriminate between offenders using risk (the regression line), and do not discriminate using clinical judgment (the hunch), then we do not discriminate. In this case, we treat all offenders alike, even though there may be meaningful differences between them.\textsuperscript{520} We may over-punish, allowing prisoners to languish needlessly in prisons, at taxpayer expense, doing serious damage to individuals, families, and communities.\textsuperscript{521} Alternatively, we may under-

\begin{footnotesize}
\textsuperscript{518} This is Harcourt’s suggestion. Specifically, he advocates randomization instead of discrimination by risk. See generally HARcourt, supra note 63.


\textsuperscript{521} See Oleson, supra note 63, at 759-60 (summarizing undesirable effects of mass incarceration).
\end{footnotesize}
punish, allowing truly dangerous offenders back into the community to commit new crimes and create new victims.\textsuperscript{522} The American Law Institute has described the conundrum:

In short, we can avoid the unneeded incarceration of those incorrectly identified as dangerous offenders (whom we cannot separate in advance from the truly dangerous) only by accepting the cost of serious victimizations of innocent parties (whom we cannot identify in advance). There is no wholly acceptable alternative in either direction—indeed, both options approach the intolerable. The proper allocation of risk, as between convicted offenders and potential crime victims, is a policy question as difficult as any faced by criminal law in a civilized society.\textsuperscript{523}

Without question, evidence-based sentencing raises excruciatingly difficult questions. But these are questions that \textit{must} be answered. “Jurisprudential considerations in premising legal decisions on these specific risk factors can no longer be avoided.”\textsuperscript{524} Evaluations of risk are ever more ubiquitous in our “risk society.”\textsuperscript{525} Judges and jurists must understand how and when to incorporate these conceptions into modern sentencing practice.

\textsuperscript{522} \textit{See} Paul H. Robinson, \textit{Fundamentals of Criminal Law} 37 (2d ed. 1995) (“To deter an offender from repeating his actions, a penalty should be severe enough to outweigh in his mind the benefits of the crime.”).


\textsuperscript{524} Monahan, \textit{supra} note 29, at 434-35.

### Appendix: Summary of Variables Assessed by Risk Instruments

<table>
<thead>
<tr>
<th>Assessment Instrument</th>
<th>Number of Variables</th>
<th>Variables Measured</th>
</tr>
</thead>
</table>
| Burgess (1928)        | 22                  | • Nature of offense  
                        |                     | • Number of associates in committing offense for which convicted  
                        |                     | • Nationality of the inmate’s father  
                        |                     | • Parental status, including broken homes  
                        |                     | • Marital status of the inmate  
                        |                     | • Type of criminal, as first offender, occasional offender, habitual offender, professional criminal  
                        |                     | • Social type as ne’er-do-well, gangster, hobo  
                        |                     | • Country from which committed  
                        |                     | • Size of community  
                        |                     | • Type of neighborhood  
                        |                     | • Resident or transient in community when arrested  
                        |                     | • Statement of trial judge and prosecuting attorney with reference to recommendation for or against leniency  
                        |                     | • Whether or not commitment was upon acceptance of lesser plea  
                        |                     | • Nature and length of sentence imposed  
                        |                     | • Months of sentence actually served before parole  
                        |                     | • Previous criminal record of the prisoner  
                        |                     | • His previous work record  
                        |                     | • His punishment record in the institution  
                        |                     | • His age at the time of parole  
                        |                     | • His mental age according to psychiatric examination  
                        |                     | • His personality type according to psychiatric examination  
                        |                     | • Psychiatric prognosis  |
| Glueck & Glueck (1930)| 7                   | • Industrial habits  
                        |                     | • Seriousness and frequency of prereformatory crime  
                        |                     | • Arrests for crimes preceding  
                        |                     | • Penal experience preceding  
                        |                     | • Economic responsibility preceding  
                        |                     | • Mental abnormality on entrance  
                        |                     | • Frequency of offenses in the reformatory  |
| Ohlin (1951)          | 12                  | • Type of offense  
                        |                     | • Sentence  
                        |                     | • Type of offender  |
| **Salient Factor Score (1974)** | 9 | • Prior convictions  
• Prior incarcerations  
• Age at first commitment  
• Auto theft  
• Prior parole revocation  
• Drug history  
• Education grade achieved  
• Employment  
• Living arrangements on release |
|--------------------------------|---|---------------------------------------------------------------|
| **Greenwood (1982)**          | 7 | • Prior conviction for the same charge  
• Incarceration for more than 50% of the previous 2 years  
• Conviction before the age of 16  
• Having served time in a juvenile facility  
• Drug use during the previous 2 years  
• Drug use as a juvenile  
• Unemployment for more than 50% of the previous 2 years |
| **LS/CMI**                    | 10| • Criminal History  
• Education/Employment  
• Financial  
• Family/Marital  
• Accommodation  
• Leisure/Recreation  
• Companions  
• Alcohol/Drug Problems  
• Emotional/Personal  
• Attitudes/Orientation |
| **VRAG**                      | 12| • Lived with both biological parents to age 16  
• Elementary School Maladjustment  
• History of alcohol problems  
• Marital status  
• Criminal history score for nonviolent offenses  
• Failure on prior conditional release  
• Age |
<table>
<thead>
<tr>
<th>Score</th>
<th>LCSC 14</th>
<th>GSIR 15</th>
<th>COMPAS 15</th>
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<tbody>
<tr>
<td></td>
<td>Patient Injury</td>
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<td></td>
<td>Any female victim</td>
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<td></td>
<td>Meets DSM criteria for any personality disorder</td>
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<td></td>
<td>Failed to provide support for at least 1 biological child</td>
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<td></td>
<td>Terminated formal education prior to graduating from high school</td>
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<td>Duration of longest job ever held</td>
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<td>Number of times terminated from a job for irresponsibility or quit with no apparent reason</td>
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<td></td>
<td>History of drug or alcohol abuse</td>
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<td>Marital background</td>
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<td></td>
<td>Physical appearance (tattoos)</td>
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<td></td>
<td>Nature of offense (intrusive v. nonintrusive)</td>
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<td>History of prior arrests for intrusive behavior</td>
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<td>Use of weapon or threatened use of weapon during offense</td>
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<td>Physical abuse of significant others</td>
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<td>Number of prior arrests</td>
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<td>Age at time of first arrest</td>
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<td></td>
<td>History of being a behavior/management problem at school</td>
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<td>Current offense</td>
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<td>Age</td>
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<td>Previous incarceration</td>
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<td>Revocation or forfeiture</td>
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<td>Act of escape</td>
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<td>Security classification</td>
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<tr>
<td></td>
<td>Age at first adult conviction</td>
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<td></td>
<td>Previous convictions for assault</td>
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<td></td>
<td>Marital status</td>
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<td>Interval at risk since last offense</td>
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<td></td>
<td>Number of dependants</td>
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<td></td>
<td>Current total aggregate sentence</td>
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<td></td>
<td>Previous convictions for sex offenses</td>
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<td></td>
<td>Previous convictions for break and enter</td>
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<td>Employment status</td>
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<td></td>
<td>Criminal Involvement</td>
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<td></td>
<td>History of Noncompliance</td>
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<td></td>
<td>History of Violence</td>
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<td>Financial Problems</td>
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<td></td>
<td>• Weapon use during offense</td>
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<td>• Employment status</td>
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<td></td>
<td>• History of illegal drug use or alcohol abuse</td>
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<td></td>
<td>• Absconding from previous supervision</td>
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<td><strong>PCL-R</strong></td>
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<tr>
<td></td>
<td>• Glib and superficial charm</td>
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<td>• Grandiose (exaggeratedly high) estimation of self</td>
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<td>• Need for stimulation</td>
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<td></td>
<td>• Pathological lying</td>
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<td></td>
<td>• Cunning and manipulativeness</td>
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<td></td>
<td>• Lack of remorse or guilt</td>
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<td>• Shallow affect (superficial emotional responsiveness)</td>
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<td>• Callousness and lack of empathy</td>
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<td>• Parasitic lifestyle</td>
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<td></td>
<td>• Poor behavioral controls</td>
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<td></td>
<td>• Lack of realistic long-term goals</td>
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<td>• Irresponsibility</td>
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<td>• Failure to accept responsibility for own actions</td>
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<td></td>
<td>• Many short-term marital relationships</td>
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<td>• Hypomania (Ma)</td>
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<td>• Social introversion-extroversion (Si)</td>
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<td>• Good Impression (Gi)</td>
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<td>• Communality (Cm)</td>
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<td>• Achievement via Conformance (Ac)</td>
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<td>• Psychological Mindedness (Py)</td>
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<td>• Flexibility (Fx)</td>
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<td>• Femininity/Masculinity (F/M)</td>
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<th>Virginia Criminal Sentencing Commission Risk Instrument</th>
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<tr>
<td>• Gender</td>
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<tr>
<td>• Age</td>
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<tr>
<td>• Marital status</td>
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<td>• Employment status</td>
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<tr>
<td>• Whether the offender acted alone when committing the crime</td>
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<tr>
<td>• Additional offenses at conviction</td>
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<tr>
<td>• Arrest or confinement within the past 12 months</td>
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<tr>
<td>• Prior criminal record</td>
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<tr>
<td>• Prior drug felony convictions</td>
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<tr>
<td>• Adult incarceration</td>
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<td>• Juvenile incarceration</td>
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<thead>
<tr>
<th>Missouri Sentencing Advisory Commission Risk Assessment Scale</th>
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<tr>
<td>• Prior unrelated findings of guilt misdemeanor/jail sentences of 30+</td>
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<tr>
<td>• days</td>
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<tr>
<td>• Prior unrelated felony findings of guilt</td>
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<td>• Prior prison incarcerations</td>
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<td>• Five years without a finding of guilt or incarceration</td>
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<tr>
<td>• Revocations of probation or parole</td>
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<td>• Recidivist related present offense</td>
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<tr>
<td>• Age</td>
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<tr>
<td>• Prior escape</td>
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<td>Washington State Offender Accountability Act Static Risk Instrument</td>
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<td>----------------------------------------------------------</td>
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<tr>
<td>• Substance abuse (DOC substance abuse test and verified drug history)</td>
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<tr>
<td>• Education</td>
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<td>• Employment</td>
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<tr>
<td>• Age at time of current sentence</td>
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<tr>
<td>• Gender</td>
<td></td>
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<tr>
<td>• Prior juvenile felony convictions</td>
<td></td>
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<tr>
<td>• Prior juvenile non-sex violent felony convictions for: homicide, robbery, kidnapping, assault, extortion, unlawful imprisonment, custodial interference, domestic violence, or weapon</td>
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<tr>
<td>• Prior juvenile felony sex convictions</td>
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<tr>
<td>• Prior commitments to a juvenile institution</td>
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<tr>
<td>• Total number of commitments to the Department of Corrections</td>
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<tr>
<td>• Number of adult felony sentences: murder/manslaughter</td>
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<tr>
<td>• Number of adult felony sentences: sex offense</td>
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<tr>
<td>• Number of adult felony sentences: violent property conviction for a felony robbery/kidnapping/extortion/unlawful imprisonment/custodial/interference offense/harassment/burglary 1/arsenal 1</td>
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<tr>
<td>• Number of adult felony sentences: assault offense—not domestic violence related</td>
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<tr>
<td>• Number of adult felony sentences: domestic violence assault or violation of a domestic violence related protection order, restraining order, or no-contact order/harassment/malicious mischief</td>
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<td>• Number of adult felony sentences: weapon offense</td>
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<td>• Number of adult felony sentences: property offense</td>
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<td>• Number of adult felony sentences: drug offense</td>
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<td>• Number of adult felony sentences: escape</td>
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<td>• Number of adult misdemeanor sentences: assault offense—not domestic violence related</td>
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<tr>
<td>• Number of adult misdemeanor sentences: domestic violence assault or violation of a domestic violence related protection order, restraining order, or no-contact order</td>
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<td>• Number of adult misdemeanor sentences: sex offense</td>
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<tr>
<td>• Number of adult misdemeanor sentences: other domestic violence: any non-violent misdemeanor convictions such as trespass, property destruction, malicious mischief, theft, etc., that are connected to domestic violence</td>
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<tr>
<td>• Number of adult misdemeanor sentences: weapon offense</td>
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<td>• Number of adult misdemeanor sentences: property</td>
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<tr>
<td>Offense</td>
<td>Number of adult misdemeanor sentences: drug offense</td>
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<td></td>
<td>Number of adult misdemeanor sentences: escapes</td>
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<td>Number of adult misdemeanor sentences: alcohol offense</td>
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<td></td>
<td>Total sentence/supervision violations</td>
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