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MONEYBALL SENTENCING

DAWINDER S. SIDHU*

Abstract: Sentencing is a backward- and forward-looking enterprise. That is, sentencing is informed by an individual's past conduct as well as by the criminal justice system's prediction of the individual's future criminal conduct. Increasingly, the criminal justice system is making these predictions on an actuarial basis, computing the individual's risk of recidivism according to the rates of recidivism for people possessing the same group characteristics (e.g., race, sex, socio-economic status, education). The sentencing community is drawn to this statistical technique because it purportedly distinguishes with greater accuracy the high-risk from the low-risk, and thereby allows for a more efficient allocation of sentencing resources, reserving incarceration for the truly dangerous and saving the low-risk from needless penal attention. Despite these asserted benefits, risk-assessment tools are exogenous to the theories of punishment, the very foundation for sentencing in Anglo-American jurisprudence. This Article reviews the legality and propriety of actuarial predictive instruments, using these theories and governing constitutional and statutory law as the touchstone for this analysis. This Article then applies these normative and legal principles to seventeen major characteristics that may comprise an offender's composite risk profile. It argues that risk-assessment instruments are problematic for three reasons: they include characteristics that are prohibited by constitutional and statutory law; subject the individual to punishment for characteristics over which the individual has no meaningful control; and presume that the individual is a static entity predisposed, if not predetermined, to recidivate, thereby undermining individual agency and betting against the individual's ability to beat the odds.

INTRODUCTION

Moneyball reveals how the Oakland Athletics upended the conventional approach by which major league baseball teams predicted future player per-

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* Associate Professor of Law, University of New Mexico School of Law. My thanks to Geoff Cheshire, Jeffrey Minear, Max Minzner, Brent Newton, and workshop participants at the Georgetown University Law Center's Center for the Constitution and Stanford Law School's Constitutional Law Center for helpful comments and conversations; and to the exceptional staff of *Boston College Law Review*, especially Benjamin Ernst, Bryan Curran, Andrew Haile, Eric Hawkins, and Michael Welsh, for improving the Article's quality. This Article was prepared during the author's time as a Supreme Court Fellow at the U.S. Sentencing Commission. The views expressed herein do not represent the positions of the Court or the Commission. Those views, and any errors, rest with the author alone.

formance.¹ Traditionally, these teams projected player performance through intuition and observation,² without much regard to statistics.³ In 2002, the budget-conscious Athletics sought a different assessment method, one that would “minimize risk.”⁴ The Athletics turned to statistical analyses of past player performance as the basis for its predictions of future player performance.⁵ This data-driven approach served as an effective and efficient guide of future player performance,⁶ and was appreciably “better than the hoary alternative, rendering decisions by gut feeling.”⁷ The Athletics’ success did not go unnoticed. Indeed, its empirical method of predicting performance is now the norm in professional baseball.⁸

The United States criminal justice system is undergoing a similar transition.⁹ Whereas the Athletics tried to predict a player’s future performance, the criminal justice system seeks, among other things, to predict a defendant’s future dangerousness. As United States Supreme Court Justice John Paul Stevens recognized, “prediction of future criminal conduct is an essential element in many of the decisions rendered throughout our criminal justice system,” including whether a defendant should be imprisoned and, if so, for how long.¹⁰ These sorts of predictions are, Justice Stevens added, a “task performed countless times each day throughout the American system of criminal justice.”¹¹

Historically, courts have calculated an offender’s risk of recidivism on the basis of an impressionistic, “‘seat of the pants’ guess, about ‘what seems about

¹ See generally MICHAEL LEWIS, *MONEYBALL: THE ART OF WINNING AN UNFAIR GAME* (2003) (recounting the story of the Oakland Athletics baseball team using statistics to predict future player performance).

² See *id.* at 242 (“If you trusted [a pitcher’s numbers], you didn’t have to give two minutes’ thought to how a guy looked, or how hard he threw. You could judge a pitcher’s performance objectively, by what he had accomplished.”).

³ See *id.* at 9 (quoting a scout who admitted that he “never looked at a single statistic of Billy’s” and noting that Beane’s batting average dropped significantly prior to the draft, yet “scouts never considered this”).

⁴ *Id.* at 136.

⁵ See *id.* at 241 (“[I]f you focused on the right statistics you could certainly project a guy based on [minor league] numbers.”). While Beane is perhaps best-known for the *Moneyball* approach, its “spiritual father” is sportswriter Bill James. See *id.* at 64–83 (discussing James’ influence).

⁶ See *id.* at 270 (“In all of Major League Baseball only the New York Yankees won as many games as the Oakland A’s. . . . [T]he teams in baseball’s best division . . . finished in inverse order to their payrolls, [with the A’s in first place] . . .”).

⁷ *Id.* at 136.

⁸ See BENJAMIN BAUMER & ANDREW ZIMBALIST, *THE SABERMETRIC REVOLUTION: ASSESSING THE GROWTH OF ANALYTICS IN BASEBALL*, at ix (2014) (estimating that “over three-quarters of major league teams have individuals dedicated to” player analytics).

⁹ See Malcolm M. Feeley & Jonathan Simon, *The New Penology: Notes on the Emerging Strategy of Corrections and Its Implications*, 30 *CRIMINOLOGY* 449, 450 (1992).

¹⁰ *Jurek v. Texas*, 428 U.S. 262, 275 (1976) (opinion of Justices Stewart, Powell, and Stevens).

¹¹ *Id.* at 276.

right' for the case."¹² Mainly for cost reasons,¹³ however, the criminal justice system has been shifting away from this approach. More and more, courts today are adopting the use of risk-assessment tools in sentencing.¹⁴ These risk-assessment tools take information on recidivism rates for groups and use them to estimate the risk of recidivism for individuals possessing those same group characteristics.¹⁵

Consider an example. A court is considering the appropriate sentence for a drug addict from a broken home. Prosecutors present evidence that drug addicts from broken homes are more likely to recidivate than others. The court takes this into account and may give the offender a sentence of imprisonment or a harsher prison term precisely because he was identified as a member of the higher-risk group. A parole board, possessing similar data, may deny release to an inmate with the same socio-economic, substance abuse, and family traits. By contrast, a sentencer may grant bail to an educated, older white female, or send her to a diversion program, due to evidence that individuals with the same educational, age, race, and gender demographics are less likely to recidivate.

The sentencing community is drawn to these methods because they are said to distinguish with greater accuracy the high-risk from the low-risk, and thereby allow for the more efficient allocation of sentencing resources.¹⁶ For example, according to their champions, risk-assessment tools help reserve incarceration for the most dangerous and save the low-risk from needlessly languishing in jail or prison.¹⁷ These benefits are particularly attractive in an environment in which our prisons are bloated and our political leaders are cost-conscious.

¹² Paul H. Robinson, *One Perspective on Sentencing Reform in the United States*, 8 CRIM. L.F. 1, 4 (1997). Robinson, a member of the inaugural U.S. Sentencing Commission, further explains that, "More often than not, this judgment involves *no* analysis" and that "judges give a particular kind of sentence in a particular case because 'that is the way it has always been done.'" *Id.* at 4–5.

¹³ See John Monahan & Jennifer L. Skeem, *Risk Redux: The Resurgence of Risk Assessment in Criminal Sanctioning*, 26 FED. SENT'G REP. 158, 158 (2014) (explaining that "[m]oney appears to be the principal answer" for "the sudden return of risk to a place of penological prominence").

¹⁴ See John Monahan, *Violence Risk Assessment: Scientific Validity and Evidentiary Admissibility*, 57 WASH. & LEE L. REV. 901, 905–06 (2000) ("[T]he field of 'violence risk assessment' has seen a dramatic shift away from studies attempting to validate the accuracy of clinical predictions, and toward studies attempting to isolate specific risk factors that are actuarially (meaning statistically) associated with violence.").

¹⁵ See Robert A. Prentky et al., *Sexually Violent Predators in the Courtroom*, 12 PSYCHOL. PUB. POL'Y & L. 357, 370 (2006) (defining risk-assessments as "empirically derived mechanical rules for combining information to produce a quantitative estimate of risk").

¹⁶ See Monahan, *supra* note 14, at 905–06.

¹⁷ See Roger K. Warren, *Evidence-Based Sentencing: The Application of Principles of Evidence-Based Practice to State Sentencing Practice and Policy*, 43 U.S.F. L. REV. 585, 588 (2009).

It may come as no surprise, therefore, that at least twenty states are using some form of actuarial risk-assessments.¹⁸ In addition, prominent legal institutions like the American Law Institute (ALI) and the National Center for State Courts have endorsed these tools.¹⁹ Indeed, ALI's draft revisions to the Model Penal Code would require state sentencing commissions to use risk-assessment instruments.²⁰ Accordingly, courts' daily predictions about criminal defendants future behavior are now being performed increasingly on the basis of actuarial risk-assessments. This trend reveals a growing national acceptance of this statistical technique.²¹

But there is one problem: risk-assessment tools have no legitimate basis in any recognized penological theories. As one prominent penologist observes, these instruments have "no root, nor any relation to the jurisprudential theories of just punishment."²² Other criminal scholars have similarly noted that "courts rarely have had to address jurisprudential considerations in making violence risk assessments," but because "such instruments . . . are being used with increasing frequency in criminal sentencing," jurisprudential considerations "can no longer be avoided . . ."²³ This mismatch between theory and practice cannot be tolerated any longer.

¹⁸ See NANCY LEVIGNE ET AL., URBAN INST., JUSTICE REINVESTMENT INITIATIVE STATE ASSESSMENT REPORT 39 (2014), available at <http://www.urban.org/uploadedpdf/412994-Justice-Reinvestment-Initiative-State-Assessment-Report.pdf>, archived at <https://perma.cc/4357-C9TL?type=pdf> [hereinafter "JUSTICE REINVESTMENT REPORT"]; Sonja B. Starr, *Evidence-Based Sentencing and the Scientific Rationalization of Discrimination*, 66 STAN. L. REV. 803, 809 (2014). As this Article was being prepared for print, Senators John Cornyn and Sheldon Whitehouse introduced a bipartisan bill that would require risk-assessments of federal offenders. See S. 467, 114th Cong. (2015); News Release, U.S. Sen. John Cornyn, Sens. Cornyn, Whitehouse Introduce Prison Reform Legislation (Feb. 10, 2015), available at http://www.cornyn.senate.gov/public/index.cfm?p=NewsReleases&ContentRecord_id=f6840b81-c2dd-4393-8ff9-f7861e79436d, archived at <http://perma.cc/94AW-C2VQ>.

¹⁹ See BRIAN J. OSTROM ET AL., NAT'L CTR. FOR STATE COURTS & VA. CRIM. SENTENCING COMM'N, OFFENDER RISK ASSESSMENT IN VIRGINIA 1–2 (2012), available at http://www.vscs.virginia.gov/risk_off_rpt.pdf, archived at [<https://perma.cc/24BX-ZCCY?type=pdf>].

²⁰ See MODEL PENAL CODE: SENTENCING § 6B.09 (Tentative Draft No. 2, Mar. 25, 2011), available at <http://www.ali.org/00021333/Model%20Penal%20Code%20TD%20No%202%20-%20online%20version.pdf>, archived at <https://perma.cc/7L3V-LHM2?type=pdf> [hereinafter "MPC DRAFT"].

²¹ See Morris B. Hoffman, *Emptying Prisons Is no Panacea*, USA TODAY (Sept. 30, 2014, 8:44 PM), <http://www.usatoday.com/story/opinion/2014/09/30/emptying-prisons-rehabilitation-detering-punishment-column/16508959/>, archived at <http://perma.cc/S5TH-Z4VS>. Evidence-based sentencing has been called a "fad." *Id.* As these practices are poised to be more prevalent, not less fashionable, the question becomes how, not so much whether, they should be used.

²² BERNARD E. HARCOURT, AGAINST PREDICTION: PROFILING, POLICING, AND PUNISHING IN AN ACTUARIAL AGE 188 (2007). Indeed, Harcourt argues that, in the context of risk-assessments, efficiency has displaced the theories of punishment as the first principle. See *id.* at 173–92.

²³ John Monahan, *A Jurisprudence of Risk Assessment: Forecasting Harm Among Prisoners, Predators, and Patients*, 92 VA. L. REV. 391, 434–35 (2006); see John C. Coffee, Jr., *The Repressed Issues of Sentencing: Accountability, Predictability, and Equality in the Era of the Sentencing Commission*, 66 GEO. L.J. 975, 981 (1978) (urging that the sentencing community turn to the "task of taming the wild horse of categorical prediction").

This Article is the first to critically examine the legality and propriety of risk-assessment instruments through the lens of widely-accepted theories of punishment, and to apply corresponding principles to seventeen major characteristics²⁴ that may inform actuarial risk assessments. This Article argues that risk-assessment instruments are problematic for three reasons:

First, certain group-based characteristics discussed in the risk-assessment context—i.e., race, sex, national origin, religion, socio-economic status—are forbidden by the Fourteenth Amendment’s Equal Protection Clause or declared expressly off-limits by the Sentencing Reform Act of 1984 (“SRA”),²⁵ which governs sentencing in the federal courts.

Second, risk-assessment tools identify risk on the basis of an offender’s group membership or group identity, assign the same monolithic risk profile to everyone in the group, and premise punishment on group characteristics which the individual possesses by accident of birth or cannot otherwise meaningfully change. In doing so, risk-assessment tools sever the link between punishment and individual conduct, and between punishment and individual control.

Third, risk-assessment tools effectively consider the offender to be a static entity predisposed, if not predetermined, to recidivate based on the aggregate behavior of individuals sharing the same group identity, and do not recognize offenders as dynamic agents capable of reforming, and subsequently lowering their chance of recidivating.

In light of these three principles, this Article argues that, of the seventeen major characteristics, only adult criminal history is an appropriate factor in actuarial risk-assessments, provided that adult criminal history is limited by temporal and qualitative considerations.

Before proceeding, two qualifications on the scope of this Article must be noted. First, this Article assumes, and does not challenge, the superior accuracy of actuarial risk-assessments relative to clinical assessments of risk.²⁶ The as-

²⁴ These characteristics are race, sex, national origin, religion, socio-economic status, education and vocational skills, employment record, family rearing practices, family structure, community ties, family criminality, age, anti-social attitudes and personality, criminal companions, mental illness and substance abuse, pre-adult anti-social behavior, and adult criminal history.

²⁵ 28 U.S.C. § 994(d) (2012). The SRA is part of the Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, § 98 Stat. 1976.

²⁶ Others have addressed this question, with conflicting results. Compare HARCOURT, *supra* note 22, at 239 (quoting scholars who doubt that actuarial assessments produce better results than conventional clinical predictions), and Christopher Slobogin, *Dangerousness and Expertise*, 133 U. PA. L. REV. 97, 11819 (1984) (“[P]redictions using the best actuarial techniques appear to be no better or worse than the best clinical predictions at identifying those individuals most likely to commit violent acts.”), with VERNON L. QUINSEY ET AL., *VIOLENT OFFENDERS: APPRAISING AND MANAGING RISK* 218 (2006) (noting approvingly scholars who accept the use of actuarial instruments), and Grant T. Harris et al., *Evidence for Risk Estimate Precision: Implications for Individual Risk Communication*, 33 BEHAV. SCI. L. 111, 111 (2015) (“The discriminative validity of several actuarial instruments is well established.”), and Prentky et al., *supra* note 15, at 372 (“Most scholars have concluded that the predictive efficacy of actuarial methods of risk assessment is superior to clinically derived assess-

assessments themselves may be highly effective at identifying high-risk and low-risk offenders. *Even if* the assessments are accurate, however, their usage should give us pause—for reasons beyond their efficacy or accuracy.²⁷

Second, while risk-assessment tools have been used primarily for “back-end” or post-sentencing purposes, this Article is most interested in the potential for risk-assessments to influence “front-end” sentencing: specifically a judge’s decision to imprison an offender, and to elongate an offender’s prison term. The Attorney General recently asked the U.S. Sentencing Commission “to study the use of data-driven analysis in front-end sentencing—and to issue policy recommendations based on this careful, independent analysis.”²⁸ These comments reveal the need for an examination of “big data” in front-end sentencing decisions. They also underscore the fact that this inquiry is particularly ripe for national, state, and local consideration and implementation.

This Article proceeds by way of the following structure: Part I reviews the four primary reasons why society may legitimately punish an individual, the relative prominence of these theories of punishment both historically and currently, and the emergence of hybrid theories of punishment. Part II offers a descriptive account of actuarial risk-assessment tools in the criminal justice system, explaining their content, increasing popularity, and purported benefits. Part III argues that actuarial predictions of recidivism must be limited for the three reasons enumerated above. Part IV applies this analysis to the seventeen principal characteristics discussed in the risk-assessment context, explaining why only adult criminal history, modified by temporal or qualitative considerations, is valid from a penological standpoint. Part IV also responds to potential counter-arguments. Finally, Part V concludes.

I. THEORIES OF PUNISHMENT

This Part offers necessary background material for the consideration of whether and to what extent *Moneyball* decision-making should be imported into the sentencing context. First, Section A describes the philosophical reasons why society should punish others. Second, Section B discusses the relative dominance of these reasons over time and in the present day. Finally, Section C examines the development of mixed theories of punishment.

ments of risk . . .” (citations omitted)). It is beyond the scope of this Article to resolve this disagreement.

²⁷ See *United States v. C.R.*, 792 F. Supp. 2d 343, 462 (E.D.N.Y. 2011) (“Evidence-based sentencing . . . must be handled gingerly.”), *vacated sub nom*, *United States v. Reingold*, 731 F.3d 204 (2d Cir.), *remanded to* 972 F. Supp. 2d 457 (E.D.N.Y. 2013).

²⁸ Eric Holder, U.S. Attorney General, Address at the National Association of Criminal Defense Lawyers 57th Annual Meeting and 13th State Criminal Justice Network Conference (Aug. 1, 2014), available at <http://www.justice.gov/iso/opa/ag/speeches/2014/ag-speech-140801.html>, archived at <https://perma.cc/88HM-J678> [hereinafter “Holder Remarks”].

A. Reasons to Punish

Laws establish the outer bounds of proper conduct. In order to give effect, laws must have punishments. As Alexander Hamilton recognized, “It is essential to the idea of a law, that it be attended with . . . a penalty or punishment for disobedience. If there be no penalty annexed to disobedience, the resolutions or commands which pretend to be laws will, in fact, amount to nothing more than advice or recommendation.”²⁹ If laws require punishments, however, we must ask precisely why an individual should be punished. Specifically, the need to punish invites subsequent considerations of how the power to punish should be exercised and, more generally, what philosophical principles should guide those punishment decisions.

The four primary theories of punishment fall within two categories: deontological and utilitarian.³⁰ One theory, retribution, stands alone in the deontological camp. Retribution asserts that punishment is an offender’s just deserts for what he or she has done in the past.³¹ Leading retributivist theorist Immanuel Kant wrote that punishment “must in all cases be imposed only because the individual on whom it is inflicted *has committed a crime*.”³² This is so regardless of any potential, subsequent value of the punishment to others.³³ Retribution can neither be reduced to “an eye for an eye” system of justice, nor can it be deemed merely “vengeance in disguise.”³⁴ Rather, under a retributivist

²⁹ THE FEDERALIST NO. 15 (Alexander Hamilton).

³⁰ See Alfred Blumstein, *The Search for the Elusive Common ‘Principle,’* 82 NW. U. L. REV. 43, 44 (1988) (“The four traditional purposes—retribution, deterrence, incapacitation, and rehabilitation—serve only *two* distinct objectives. These objectives are retribution . . . and crime reduction.”); Aya Gruber, *A Distributive Theory of Criminal Law*, 52 WM. & MARY L. REV. 1, 4 (2010) (“From the collective theorizing of thousands of the brightest minds, tomes of legal literature, and hundreds of years of debate, two predominant justifications of criminal punishment have emerged: retributivism and utilitarianism. Although there are multiple twists on these themes, the basic concept is that criminal liability is justified either because the offender deserves punishment or because punishment makes society safer . . .”).

³¹ See H.L.A. HART, PUNISHMENT AND RESPONSIBILITY 9 (2d ed. 1968) (defining retribution as “the application of the pains of punishment to an offender who is morally guilty”); MICHAEL S. MOORE, PLACING BLAME: A GENERAL THEORY OF THE CRIMINAL LAW 91 (2010) (“We are justified in punishing because and only because offenders deserve it.”); HERBERT L. PACKER, THE LIMITS OF CRIMINAL SANCTION 35, 37 (1968) (“[B]ecause man is responsible for his actions, he ought to receive his just deserts.”); John Rawls, *Two Concepts of Rules*, 64 PHIL. REV. 3, 4 (1955) (“[R]etribution holds that] punishment is justified on the grounds that wrongdoing merits punishment.”).

³² IMMANUEL KANT, THE PHILOSOPHY OF LAW 195 (W. Hastie transl., Edinburgh, T&T Clark 1887) (1796).

³³ See *id.* at 198 (“[T]he last murderer lying in the prison ought to be executed before the resolution was carried out.”); see also MOORE, *supra* note 31, at 88 (“The distinctive aspect of retributivism is that the moral desert of an offender is a *sufficient* reason to punish him . . .”).

³⁴ See Moore, *supra* note 31 at 88 (“[R]etributivism is sometimes identified with a particular measure of punishment such as *lex talionis*, an eye for an eye . . .”); OLIVER WENDELL HOLMES, JR., THE COMMON LAW 45 (1909). Holmes characterized retribution in these terms, as did Herbert Wechsler. See Herbert Wechsler, *The Challenge of a Model Penal Code*, 65 HARV. L. REV. 1097,

framework, the offender is paying a “debt” owed to society for the improper “benefits and burdens” that he or she received from or imposed on others, which, when paid, restores an equilibrium within society. In this respect, a retributivist model is primarily backward-looking: it focuses on the wrong previously committed.

By contrast, the three instrumentalist theories of punishment—deterrence, incapacitation, and rehabilitation—are primarily forward-looking. They justify criminal sanction because of the social utility derived from punishing the offender. These utilitarian justifications are predicated on realizing a social good; retribution, by contrast, sees punishment as intrinsically good.

Of the utilitarian rationales for punishment, the deterrence theory holds that punishment should serve to discourage the offender (specific deterrence) and members of the public (general deterrence) from offending in the future.³⁵ Jeremy Bentham, the legal theorist most associated with deterrence, suggested that punishment is legitimate only to the extent that it reduces the “tendency towards the prevention of like acts.”³⁶ In this sense, punishment is a cost that the offender and others will seek to avoid.³⁷ Punishment therefore operates as a social message that criminal actions will be met by adverse consequences, such as those visited upon the instant offender.

The theory of incapacitation is premised on the simple notion that punishment should physically separate the offender from others and thus limit his or her ability to engage in further harmful actions.³⁸ Blackstone wrote that incapacitation “depriv[es] the party injuring of the power to do future mischief.”³⁹ It is a form of social protection by way of social segregation; an offender is exiled for the welfare of others in general society.⁴⁰ In short, incapaci-

1103 (1952); *see also* HERBERT MORRIS, ON GUILT AND INNOCENCE: ESSAYS IN LEGAL PHILOSOPHY AND MORAL PSYCHOLOGY 34 (1976).

³⁵ *See* JEREMY BENTHAM, THE RATIONALE OF PUNISHMENT 19 (1830). Bentham wrote, for example, that punishment should serve two functions: “[p]articular prevention, which applies to the delinquent himself; and general prevention, which is applicable to all the members of the community without exception.” *Id.*

³⁶ JEREMY BENTHAM, THEORY OF LEGISLATION 322 (1802).

³⁷ *See* 4 WILLIAM BLACKSTONE, COMMENTARIES *11. Blackstone noted that punishment exists as “a precaution against future offences of the same kind,” and that this precaution “is effected . . . by the amendment of the offender himself” and “by deterring others by the dread of his example from offending in the like way . . .” *Id.*

³⁸ *See* *Miller v. Alabama*, 132 S. Ct. 2455, 2490 (2012) (Alito, J., dissenting) (“If imprisonment does nothing else, it removes the criminal from the general population and prevents him from committing additional crimes in the outside world.”); Lynne N. Henderson, *The Wrongs of Victim’s Rights*, 37 STAN. L. REV. 937, 989 (1985) (“Proponents of the incapacitation approach believe that the best way to prevent a particular offender from committing future crimes is to remove him from society.”).

³⁹ 4 BLACKSTONE, *supra* note 37, at *11–12.

⁴⁰ *See* Michele Cotton, *Back with a Vengeance: The Resilience of Retribution as an Articulated Purpose of Criminal Punishment*, 37 AM. CRIM. L. REV. 1313, 1316 (2000) (“Incapacitation uses

tation is said to be justifiable because it serves as a blunt form of threat-removal.

Finally, the rehabilitative theory of punishment posits that a sentence should afford the offender an opportunity for personal reform and development.⁴¹ Any gains from this positive transformation will be realized not only by the individual, but by society, as the offender will pose less danger to society after release. Such self-improvement may take place as a result of atonement or penance, which may be the product of the offender's moral code or religious tradition, or guilt or similar appreciation for one's actions, which may be secular or emotional in nature.⁴² It also may take place by way of treatment,⁴³ including the completion of programs that address the offender's personal well-being, mental health, substance abuse addiction, education, and/or capacity to respond to triggers to anti-social action.⁴⁴ In short, rehabilitation demands a social investment in the offender, which will pay dividends in the offender and in his or her community.

With an understanding of the four major theoretical reasons why the state may punish an individual, we may consider the extent to which the criminal justice system has invoked these reasons over time and today.

B. The Relative Salience of the Reasons to Punish

The American criminal justice system has not settled on any one theory as the single or main principled foundation for punishment.⁴⁵ Rather, at various

imprisonment to remove the offender from society to protect it from the danger he poses. This concept is also conveyed by the use of the terms 'isolation,' 'segregation,' 'restraint,' and 'confinement.'").

⁴¹ See *United States v. Cole*, 622 F. Supp. 2d 632, 638 (N.D. Ohio 2008) ("Rehabilitation, generally, endeavors to turn one person's path.").

⁴² Cotton, *supra* note 40, at 1317 (describing rehabilitation as including "an opportunity for penitent reflection"). For a discussion of "secular atonement" that incarceration affords, see Stephen P. Garvey, *Punishment as Atonement*, 46 UCLA L. REV. 1801, 1810–27 (1999).

⁴³ Of course, the personal transformation signified by atonement or penance, for example, should not be seen as inconsistent with, or an absolute alternative to, rehabilitation by way of treatment. Both may be used simultaneously, and as mutually reinforcing and reciprocal supplemental approaches. In other words, there is no "either-or" situation within the ambit of rehabilitation.

⁴⁴ Cotton, *supra* note 40, at 1316–17 (defining rehabilitation as "an opportunity to provide training for skills useful in the marketplace, treatment for psychological problems and drug addiction"); Richard S. Frase, *Punishment Purposes*, 58 STAN. L. REV. 67, 70 (2005) (remarking that rehabilitation "assumes that the offender has identifiable and treatable problems which cause him to commit crimes" and therefore "seeks to reduce the offender's future criminality by addressing those causes through education and treatment in prison or in a nonprison program").

⁴⁵ See Paul H. Robinson & John M. Darley, *The Utility of Desert*, 91 NW. U. L. REV. 453, 455 (1997) ("The debate between the desert justification and the various utilitarian justifications such as deterrence, incapacitation, and rehabilitation has continued to divide criminal law thinkers to this day.").

points in American history, one or multiple theories have served as the primary justification for punishment.⁴⁶

In early America, punishment was directed largely at deterring crime.⁴⁷ Banishing offenders, a form of exile akin to incapacitation, also animated punishment.⁴⁸ Retribution became a factor only in the context of the most serious offenses, such as murder.⁴⁹ Rehabilitation did not seem to inform punishment, as sentencers were said to be concerned not with “reform[ing] the offender but [with] fright[ening] him into lawful behavior.”⁵⁰

In the nineteenth century, however, rehabilitation emerged as a major sentencing model.⁵¹ As one criminal law scholar writes, the country “move[d] . . . toward the development of penitentiaries focused on the spiritual rehabilitation of lawbreakers.”⁵² This emphasis on rehabilitation continued in the twentieth century.⁵³ Further “advances in medicine and psychology . . . reinforce[d] [the] view of criminal offenders as ‘sick’” as well as the goal of “sentencing schemes . . . to help ‘cure’ the patient.”⁵⁴

The attraction of the rehabilitative model faded in the twentieth century. Since rehabilitative punishment seeks to improve the offender such that he or she is better able to stay within the bounds of the law, judges necessarily had to tailor sentences to maximize the opportunity for that internal development.⁵⁵ This individualized sentencing led to inevitable disparities in sentencing. The notion that each individual is different and has unique needs created tension

⁴⁶ *Payne v. Tennessee*, 501 U.S. 808, 819 (1991) (“The principles which have guided criminal sentencing . . . have varied with the times.”).

⁴⁷ See David J. Rothman, *Perfecting the Prison: United States, 1789–1865*, in *THE OXFORD HISTORY OF THE PRISON: THE PRACTICE OF PUNISHMENT IN WESTERN SOCIETY* 111, 112 (Norval Morris & David J. Rothman eds., 1995) (“The primary goal in dispensing . . . penalties was deterrence, in the hope that the punishment would serve to keep the offender from repeating the crime in this particular community.”).

⁴⁸ See *id.* at 113 (“[B]anishment represented the town’s efforts to avoid the repetition of a crime by getting rid of the offender . . .”).

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.* at 116 (“Reform, not deterrence, was now the aim of incarceration. The shared assumption was that since the convict was not innately depraved but had failed to be trained to obedience by family, church, school, or community, he could be redeemed by the well-ordered routine of prison.”).

⁵² Douglas A. Berman, *The Enduring (and Again Timely) Wisdom of the Original MPC Sentencing Provisions*, 61 FLA. L. REV. 709, 715 (2009).

⁵³ See *Williams v. New York*, 337 U.S. 241, 248 (1949) (“Reformation and rehabilitation of offenders have become important goals of criminal jurisprudence.”).

⁵⁴ Berman, *supra* note 52, at 715.

⁵⁵ Carissa Byrne Hessick & F. Andrew Hessick, *Recognizing Constitutional Rights at Sentencing*, 99 CALIF. L. REV. 47, 52 (2011) (“These discretionary systems originally were premised on the punishment rationale of rehabilitation. Discretionary schemes allowed judges to tailor sentences to the specific characteristics of the individual defendant with an eye towards reforming the defendant’s lawbreaking ways.”).

with the proposition that similar defendants receive similar sentences.⁵⁶ A combination of disparities in sentencing and uncertainty in the term of imprisonment provoked significant changes in the modern criminal justice system.

In 1984, Congress responded to these twin concerns by enacting the Sentencing Reform Act (“SRA”).⁵⁷ In particular, the SRA established the Sentencing Guidelines, an advisable range of sentencing outcomes based on two inputs: the offense conduct (i.e., what the offender has done this time) and the offender’s criminal history (i.e., what the offender has done in the past).⁵⁸ These ranges act as a “national norm” that judges must consult upon the imposition of a sentence.⁵⁹ In particular, a federal judge must use the Guidelines as the “starting point and initial benchmark” for his or her analysis of an appropriate sentence.⁶⁰ The SRA also established the U.S. Sentencing Commission,

⁵⁶ Parole officers engaged in similar discretionary decision-making in determining whether and when inmates were sufficiently rehabilitated and prepared for release into general society. See Douglas A. Berman, *From Lawlessness to Too Much Law? Exploring the Risk of Disparity from Differences in Defense Counsel Under Guidelines Sentencing*, 87 IOWA L. REV. 435, 440 (2002) (“[B]road judicial discretion in the ascription of sentencing terms—complemented by parole officials exercising similar discretion concerning prison release dates—was viewed as necessary to ensure that sentences could be tailored to the rehabilitative prospects and progress of each offender.”).

⁵⁷ See *Mistretta v. United States*, 488 U.S. 361, 363–66 (1989); U.S. SENTENCING GUIDELINES MANUAL ch. 1, pt. A (2013) [hereinafter GUIDELINES MANUAL] (explaining that, through the SRA, “Congress first sought honesty in sentencing” by avoiding “indeterminate sentence[s] of imprisonment,” and “[s]econd, Congress sought reasonable uniformity in sentencing by narrowing the wide disparity in sentences imposed for similar criminal offenses committed by similar offenders”).

⁵⁸ *Peugh v. United States*, 133 S.Ct. 2072, 2079 (2013) (noting that the Guidelines are “a system under which a set of inputs specific to a given case (the particular characteristics of the offense and offender) yielded a predetermined output (a range of months within which the defendant could be sentenced)”). The Guidelines’ Sentencing Table features the offense conduct and the offender’s criminal history background as the two axes that operate as the primary factors as to the defendant’s appropriate sentence. See GUIDELINES MANUAL, *supra* note 57, ch. 5, pt. A (sentencing table). The ranges themselves were the average sentences imposed at the time of the SRA’s enactment. Justice Stephen Breyer, a member of the inaugural Sentencing Commission, explained that the Commission “decided to base the Guidelines primarily upon typical, or average, actual past practice.” Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*, 17 HOFSTRA L. REV. 1, 17 (1988).

⁵⁹ According to multiple courts, the Guidelines are useful in that they establish a “national norm” as to the appropriate sentence for like offenses by like offenders. See, e.g., *United States v. Gonzalez-Huerta*, 403 F.3d 727, 738 (10th Cir. 2005); *United States v. Smith*, 445 F.3d 1, 5 (1st Cir. 2006); *Federal Sentencing Options After Booker: Hearing Before the U.S. Sentencing Commission*, 112th Cong. 6–10 (2012) (statement of Paul J. Barbadoro, U.S. Dist. J.), available at http://www.uscc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20120215-16/Testimony_16_Barbadoro.pdf, archived at <http://perma.cc/GS23-2398> (“Judges . . . appreciate knowing whether their sentences are in step with other sentences by other judges for similar cases.”). In 2005, the Supreme Court declared these ranges advisory, rather than mandatory. See *United States v. Booker*, 543 U.S. 220, 226–27 (2005).

⁶⁰ *Gall v. United States*, 552 U.S. 38, 39 (2007). To the extent that a sentence imposed by a federal judge deviates from the Guidelines system, a judge must explain in greater detail why the non-Guidelines sentence is appropriate. See *id.* at 50.

an independent agency within the federal courts whose role is to create, revisit, and revise the Guidelines.⁶¹

The SRA codified the four basic purposes of criminal punishment. The statute expressly provides that a court imposing a sentence must consider the need “to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense” (which corresponds with the retributive justification of punishment); “to afford adequate deterrence to criminal conduct” (deterrence); “to protect the public from further crimes of the defendant” (incapacitation); and “to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner” (rehabilitation).⁶² The SRA does not select a preferred justification to guide sentencing decisions, nor does it create any specific hierarchy among the purposes.⁶³ Instead, all are listed in a co-equal manner.⁶⁴ The SRA gives judges the general—and rather difficult—instruction to impose a sentence that is “sufficient, but not greater than necessary” to effectuate these four purposes.⁶⁵

C. Hybrid Theories of Punishment

Judges may find it quite challenging, if not impossible, to fulfill the SRA’s mandate to impose a punishment that reflects the four purposes. Indeed, many scholars view the retributivist and utilitarian purposes of punishment as incon-

⁶¹ See GUIDELINES MANUAL, *supra* note 57, ch. 1, pt. A, subpt. 2 (“[The SRA] empowered the Commission with ongoing responsibilities to monitor the guidelines [and] submit to Congress appropriate modifications of the guidelines and recommended changes in criminal statutes,” and this “mandate rested on congressional awareness that sentencing is a dynamic field that requires continuing review by an expert body to revise sentencing policies . . .”). For a summary of the Commission’s responsibilities, see *Mistretta*, 488 U.S. at 369–70.

⁶² 18 U.S.C. § 3553(a)(2) (2012).

⁶³ See Douglas A. Berman, *Reconceptualizing Sentencing*, 2005 U. CHI. LEGAL F. 1, 11–13 (“Though in the Sentencing Reform Act Congress expressed a fundamental concern with principled sentencing, the SRA did not adopt a particular punishment philosophy; rather, its statutory statement of purposes listed all of the traditional justifications of punishment. . . . [T]hrough two decades of federal sentencing reform neither Congress nor the United States Sentencing Commission has expressly defined or fully articulated the central or primary purposes for federal sentencing.”). To be sure, “the Constitution does not mandate adoption of any one penological theory,” and “a sentence can have a variety of justifications.” *Ewing v. California*, 538 U.S. 11, 25 (2003) (internal quotes and citation omitted).

⁶⁴ Judges and others have debated which theory has dominated and should dominate sentencing. See, e.g., *United States v. Jackson*, 835 F.2d 1195, 1199 (7th Cir. 1987) (Posner, J., concurring) (opining that “deterrence is the surest ground for punishment, since retributive norms are so unsettled”); Aaron H. Caplan, *Freedom of Speech in School and Prison*, 85 WASH. L. REV. 71, 100–01 (2010) (suggesting that rehabilitation has played a secondary role among penological interests).

⁶⁵ 18 U.S.C. § 3553(a).

sistent.⁶⁶ As John Rawls wrote, “one feels the force of *both* arguments and one wonders how they can be reconciled.”⁶⁷

This tension is especially pronounced in the strict form of retributivism, which is expressed today in two main strands. The “affirmative” strand of retributivism contends that an offender who breaks the law *must* be punished, irrespective of the public safety gains of punishment.⁶⁸ The second strand of retribution, the soft or “negative” view, holds that punishment, *if inflicted*, must be because of the offender’s desert.⁶⁹ Utilitarians do not have an automatic, “affirmative” analogue. The single utilitarian position is conditional: an offender should be punished only if there are public safety benefits to punishment.⁷⁰ This Article, which presumes the offender is guilty and will be punished no matter the theory of punishment, need not resolve this disharmony.

Turning to Rawls’ question of whether retribution and utilitarianism can be reconciled, legal philosophers have taken on the onerous task of fusing the two purposes into a single suitable instrument of punishment. In particular, they have posited that retributive values may serve as “side restraints” on the achievement of utilitarian objectives. The term “side constraint,” attributed to philosopher Robert Nozick, refers to restrictions on the process of achieving some end or objective. Nozick writes, for example, that individual rights may not be an end that competes with other social ends, but rather a limitation on the means used to further social ends, whatever they may be.⁷¹

To provide another example, Bentham, perhaps the foremost advocate of utilitarianism, proposed that punishment be justified for utilitarian reasons. Yet any resulting punishment, Bentham argued, should be proportionate to the seriousness of the offense—despite the fact that seriousness is a retributivist consideration.⁷² In this respect, retributive notions of seriousness are a side constraint on utilitarian goals. To offer yet another example, renowned legal philosopher H.L.A. Hart recognized that “any morally tolerable account of this

⁶⁶ See PACKER, *supra* note 31, at 36 (positing that the two overarching purposes of punishment—retribution, “the deserved infliction of suffering on evil doers,” and utilitarianism, “the prevention of crime”—are “almost universally thought of as being incompatible”).

⁶⁷ Rawls, *supra* note 31, at 5. His solution was that “utilitarian arguments are appropriate with regard to questions about practices, while retributive arguments fit the application of particular rules to particular cases.” *Id.*

⁶⁸ See Kenneth W. Simons, *Retributivism Refined—Or Run Amok?*, 77 U. CHI. L. REV. 551, 557 (2010) (reviewing LARRY ALEXANDER & KIMBERLY KESSLER FERZAN, WITH STEPHEN MORSE, *CRIME AND CULPABILITY: A THEORY OF CRIMINAL LAW* (2009)).

⁶⁹ *See id.*

⁷⁰ See Guyora Binder & Nicholas J. Smith, *Framed: Utilitarianism and Punishment of the Innocent*, 32 RUTGERS L.J. 115, 116 (2000) (“Utilitarian penology treats punishment as . . . permissible *only when* its benefits in reducing future crime outweigh the pain, fear, and public expense it imposes.”) (emphasis added).

⁷¹ ROBERT NOZICK, *ANARCHY, STATE, AND UTOPIA* 29 (1974) (suggesting that rights may be “side constraints upon the actions to be done,” irrespective of the goals of the actions).

⁷² *Id.* at 12.

institution [of criminal punishment] must exhibit it as a compromise between distinct and partly conflicting principles.”⁷³ He suggested that blameworthiness, fairness, and proportionality should restrain punishments otherwise justified on utilitarian grounds.⁷⁴ These arguments that utilitarian imperatives be qualified by retributivist principles represent a merger between, or hybrid form of, retributive and utilitarian theories.

These attempts at reconciliation, particularly Hart’s formulation, are regarded as “extremely influential” and are heralded for their “dominance.”⁷⁵ Indeed, hybrid or mixed theories of punishment have been implemented in a number of states. One criminal law professor observes that “most jurisdictions have adopted a model that uses retribution as a limitation on utilitarian goals.”⁷⁶

The benefits of the hybrid approach are readily understandable. The side constraint approach avoids the “either-or” problem of choosing between the two theoretical camps. As the criminal law theorist Herbert Packer noted, “it would be socially damaging in the extreme to discard either” the retributivist or consequentialist theory.⁷⁷ Indeed, a mixed theory affords the criminal justice system the ability to take advantage of the virtues of both theories as the cases demand. This is valuable because no single purpose for punishment is satisfactory in all sentencing occasions.⁷⁸ It also comports with the reality of sentencing. Packer observes that “the institution of criminal punishment draws substance from both of these ultimate purposes”⁷⁹

Finally, in the federal system, where the SRA mandates that judges impose sentences that reflect retributivist and utilitarian purposes,⁸⁰ the hybrid approach may be somewhat of a necessity. The hybrid system facilitates this task. Accordingly, the four purposes of punishment “can all be pursued under a regime with

⁷³ See HART, *supra* note 31, at 1.

⁷⁴ *Id.* at 11–13.

⁷⁵ Ian P. Farrell, *Gilbert & Sullivan and Scalia: Philosophy, Proportionality, and the Eighth Amendment*, 55 VILL. L. REV. 321, 359 (2010).

⁷⁶ Leo M. Romero, *Punitive Damages, Criminal Punishment, and Proportionality: The Importance of Legislative Limits*, 41 CONN. L. REV. 109, 123 (2008).

⁷⁷ PACKER, *supra* note 31, at 37.

⁷⁸ See Paul H. Robinson, *Hybrid Principals for the Distribution of Criminal Sanctions*, 82 NW. U. L. REV. 19, 36 (1987). Alfred Blumstein offers four hypotheticals that, together, help highlight the value of an integrated sentencing model: an income tax violator would receive a sentence animated most by deterrence, a man who kills his wife in the heat of passion would receive a sentence justified most by just deserts, and a robber with a substance abuse problem would be deemed less blameworthy than a conspirator who is clean even though the diseased confederate is more likely to recidivate. Blumstein, *supra* note 30, at 47.

⁷⁹ PACKER, *supra* note 31, at 37; cf. Monahan, *supra* note 23, at 427 (“[M]odern sentencing is either purely retributive, or it is a mix of retributive and crime-control considerations.”).

⁸⁰ See 18 U.S.C. § 3553(a) (2012).

retributivism as a side constraint, as long as such pursuits do not violate the side constraint.”⁸¹

II. EVIDENCE-BASED SENTENCING

This Part summarizes actuarial risk-assessment instruments. First, Section A offers an overview of the emergence of risk-assessment tools in criminal sentencing. Second, Section B gives examples of how risk-assessment tools are utilized in practice. Finally, Section C summarizes the purported benefits of risk-assessment tools in criminal sentencing.

A. *What—Predicting Risk of Recidivism*

Recidivism, an offender’s relapse into criminal behavior, is a fundamental issue in sentencing. The prospect of recidivism leads courts to seek sentences that mitigate the likelihood that an individual may re-offend. It also moves courts to ensure that, if an individual does re-offend, subsequent sentences can respond commensurately to the individual’s demonstrated inability or unwillingness to conform to the law.

From its earliest moments, the American criminal justice system has been concerned by recidivism. In colonial America, laws dealing with recidivism trace back to at least 1695.⁸² As an example of one such law, Virginia in 1705 addressed “the persistent problem of hog stealing by passing a statute that provided progressively more severe penalties for each subsequent offense.”⁸³

In order to tailor initial sentences to reduce or eliminate recidivism, sentencers must gauge the potential for the offender to recidivate. They must, in essence, forecast a person’s penchant for future criminality.

The American criminal justice system entered this prediction business almost a century ago. The first recorded effort to predict recidivism was developed in 1928 for an Illinois parole board.⁸⁴ Two years later, criminologists published a study of 510 offenders released from 1911 through 1922, in which they specifically analyzed these offenders’ recidivism rates, identifying several recurring causes.⁸⁵

⁸¹ Youngjae Lee, *The Constitutional Right Against Excessive Punishment*, 91 VA. L. REV. 677, 743 (2005).

⁸² See Note, *Selective Incapacitation: Reducing Crime Through Prediction of Recidivism*, 96 HARV. L. REV. 511, 511 (1982).

⁸³ *Id.* (citing LAWS OF VIRGINIA 276–78 (W. Hening ed., 1823)).

⁸⁴ See Coffee, *supra* note 23, at 1011.

⁸⁵ See generally SHELDON GLUECK & ELEANOR T. GLUECK, 500 CRIMINAL CAREERS (1930) (providing in-depth analysis of 500 criminals’ careers). For follow-up and related studies by these impressive authors, see generally SHELDON GLUECK & ELEANOR T. GLUECK, LATER CRIMINAL CAREERS (1937); SHELDON GLUECK & ELEANOR T. GLUECK, CRIMINAL CAREERS IN RETROSPECT

Though the practice of predicting future criminality stretches back many years, the prediction enterprise did not begin in earnest until the last three decades. The courtroom context of setting bail helps illustrate this. Historically, judges would grant bail, except for those who presented a flight risk and those who were alleged to have committed capital crimes and thus were deemed imminent threats to public safety on the basis of the capital offense.⁸⁶ In the contemporary criminal justice system, however, federal law and corresponding state statutes have vastly expanded the scope of those who may be detained pretrial.⁸⁷ Under the Bail Reform Act of 1984, for instance, judges were authorized to deny bail to those who were categorically treated as threats to public safety on account of their charge, and also to those that the judges determined would “endanger the safety of any other person or the community.”⁸⁸ This non-categorical approach demanded that judges engage in predictions of which offenders would likely not re-offend, and therefore could be released pretrial, and those who presented a substantial threat of endangering others and thus could be detained pretrial.

Today, predictions of recidivism are ubiquitous in criminal sentencing. According to Justice John Paul Stevens, “prediction of future criminal conduct is an essential element in many of the decisions rendered throughout our criminal justice system,” and a “task performed countless times each day throughout the American system of criminal justice.”⁸⁹ Elsewhere, the Court observed, “prediction of future criminal conduct . . . forms an important element in many decisions”⁹⁰ One judge noted that “[p]rediction is inherent in sentencing decisions,”⁹¹ while a law professor who writes frequently on this subject, put it more bluntly: “everybody’s doing it.”⁹²

Beyond bail, predictions of future dangerousness inform numerous sentencing decisions. These include “whether multiple sentences should run consecutively or concurrently,” “the appropriate conditions of probation,” and “the nature of any sanction to be imposed upon violation of probation.”⁹³ This Article

(1943); SHELDON GLUECK & ELEANOR T. GLUECK JUVENILE DELINQUENTS GROWN UP (1940); SHELDON GLUECK & ELEANOR T. GLUECK UNRAVELING JUVENILE DELINQUENCY (1950).

⁸⁶ See Shima Baradaran & Frank L. McIntyre, *Predicting Violence*, 90 TEX. L. REV. 497, 503 (2012).

⁸⁷ See *id.* at 499.

⁸⁸ 18 U.S.C. § 3142(b) (2012).

⁸⁹ *Jurek v. Texas*, 428 U.S. 262, 275 (1976) (opinion of Justices Stewart, Powell, and Stevens).

⁹⁰ *Schall v. Martin*, 467 U.S. 253, 278 (1984).

⁹¹ See Michael A. Wolff, *Evidence-Based Judicial Discretion: Promoting Public Safety Through State Sentencing Reform*, 83 N.Y.U. L. REV. 1389, 1406 (2008).

⁹² Michael Tonry, *Legal and Ethical Issues in the Prediction of Recidivism*, 26 FED. SENT’G REP. 167, 168 (2014).

⁹³ Roger K. Warren, *Evidence-Based Practices and State Sentencing Policy: Ten Policy Initiatives to Reduce Recidivism*, 82 IND. L.J. 1307, 1311 (2007).

focuses mainly on whether and for how long an offender should be imprisoned.⁹⁴

In short, forecasting the risk of recidivism is an important function in the criminal justice system; these predictions are widespread and common within the system; and the predictions influence an extensive range of sentencing decisions.

B. How—From Clinical Judgments to Actuarial Instruments

For the most part, predicting an offender's risk of recidivating has been done by way of clinical assessments. Akin to the observational, intuitive judgments relied on by baseball teams to estimate a player's future performance, clinical predictions of risk are characterized as "an informal, 'in the head,' [and] impressionistic, subjective conclusion" about the offender's future dangerousness.⁹⁵ In the clinical model, assessments are generally made in two ways. One, mental health professionals such as a psychologist or psychiatrist may evaluate an individual and then communicate their assessment to the court.⁹⁶ Or, two, an actor in the criminal justice system like a judge or a parole board makes a direct assessment of the individual's dangerousness. Generally, a clinical assessment is based on a comprehensive interview of the individual, interviews of those in the individual's family and social circles, and a review of files on the individual's mental history insofar as these materials may relate to the individual's future dangerousness.⁹⁷

To provide an example of the contents of the interviews, in one clinical survey an individual's propensity for violence is ascertained by reference to twelve questions. These questions include whether the individual lived with both of his or her parents to the age of sixteen, whether the individual experienced any behavioral problems in elementary school, whether the individual has a history of alcohol abuse, and whether the individual is married.⁹⁸ The twelve inputs also include an assessment of whether the individual meets the

⁹⁴ The in-out decision and length of incarceration decision are themselves composites of several subsidiary questions, including "whether an offender is suitable for a non-incarceration sanction," what may be "the most appropriate form of intermediate or non-incarceration sanction," whether the offender is eligible for a diversion program, and whether the offender is amenable to treatment. *Id.*

⁹⁵ William M. Grove & Paul E. Meehl, *Comparative Efficiency of Informal (Subjective, Impressionistic) and Formal (Mechanical, Algorithmic) Prediction Procedures: The Clinical Statistical Controversy*, 2 PSYCHOL. PUB. POL'Y & L. 293, 294 (1996).

⁹⁶ The acceptance in court of such professional opinion is reflected by the following Supreme Court comment: "The suggestion that no psychiatrist's testimony may be presented with respect to a defendant's future dangerousness is somewhat like asking us to disinvent the wheel." *Barefoot v. Estelle*, 463 U.S. 880, 896 (1983).

⁹⁷ See Slobogin, *supra* note 26, at 119.

⁹⁸ VERNON L. QUINSEY ET AL., *VIOLENT OFFENDERS: APPRAISING AND MANAGING RISK* 162 (2d ed. 2006) (displaying a chart noting the twelve variables and their corresponding correlation with recidivism).

clinical standard for having either a personality disorder or schizophrenia, or being a psychopath.⁹⁹

Increasingly, the criminal justice system has been transitioning from these types of clinical predictions to actuarial predictions of risk. It has been noted that, “the field of ‘violence risk assessment’ has seen a dramatic shift away from studies attempting to validate the accuracy of clinical predictions, and toward studies attempting to isolate specific risk factors that are actuarially (meaning statistically) associated with violence.”¹⁰⁰ Others have recognized this “transformation” in penal ideology and the “emergence of . . . language of probability and risk increasingly replaces earlier discourses of clinical diagnosis and retributive judgment.”¹⁰¹

This begs the question: what is an actuarial risk-assessment? The actuarial model “relies solely on variables known to correlate statistically with violent behavior” and in particular “produces a numerical probability that an individual with given characteristics will act violently within a fixed time period.”¹⁰² Psychologists provide a helpful definition of actuarial risk-assessments: “empirically derived mechanical rules for combining information to produce a quantitative estimate of risk.”¹⁰³ The contents of the tools themselves can vary widely—they may analyze as few as ten factors or as many as one hundred.¹⁰⁴

Beyond the meaning of actuarial risk-assessments, examples of these predictive instruments may be helpful. While others have focused on state risk-assessments, these two examples are drawn from the federal sentencing system. The aforementioned Bail Reform Act of 1984 requires a judge, in consideration of whether an individual should be detained pretrial, to be assured that the individual would not pose a threat to the “safety of any other person and the community”¹⁰⁵ The statute compels judges to weigh, in making this determination, the charged offense, the evidence against the individual, and, most important here, the “history and characteristics of the person”¹⁰⁶ These “history and characteristics” include, according to the statute, “the person’s character, physical and mental condition, family ties, employment, financial resources,

⁹⁹ *Id.*

¹⁰⁰ John Monahan, *Violence Risk Assessment: Scientific Validity and Evidentiary Admissibility*, 57 WASH. & LEE L. REV. 901, 905–06 (2000) (internal footnote omitted).

¹⁰¹ Malcolm M. Feeley & Jonathan Simon, *The New Penology: Notes on the Emerging Strategy of Corrections and Its Implications*, 30 CRIMINOLOGY 449, 450 (1992).

¹⁰² Slobogin, *supra* note 26, at 110.

¹⁰³ See Prentky et al., *supra* note 15, at 370; see also PAUL MEEHL, CLINICAL VERSUS STATISTICAL PREDICTION 3 (1954) (“The mechanical combining of information for classification purposes, and the resultant probability figure which is an empirically determined relative frequency, are the characteristics that define the actuarial or statistical type of prediction.”).

¹⁰⁴ See Joseph Walker, *States Turn to Software to Make Parole Decisions*, WALL ST. J., Oct. 12, 2013, at A1.

¹⁰⁵ 18 U.S.C. § 3142(g) (2012).

¹⁰⁶ *Id.* § 3142(g)(1)–(3).

length of residence in the community, community ties, past conduct, history relating to drug or alcohol abuse, [and] criminal history,”¹⁰⁷ as well as “whether, at the time of the current offense or arrest, the person was on probation, on parole, or on other release pending trial, sentencing, appeal, or completion of sentence for an offense under Federal, State, or local law”¹⁰⁸

In response to the fact that pretrial detention had become the rule and not the exception, and given the economic, logistical, and constitutional costs of such significant pretrial detention, federal pretrial service officers developed an actuarial tool, known as the Pretrial Risk Assessment (“PTRA”).¹⁰⁹ The PTRA consists of several scored inputs, which are divided into two domains: “criminal history” and “other.”¹¹⁰ The criminal history questions include whether the individual has any felony convictions and if so how many, whether the individual has any pending felonies or misdemeanors, the type and class of the current offense, and the individual’s age.¹¹¹ The “other” inputs include the highest level of education achieved by the individual, the individual’s employment status and history, where the individual lives and whether he or she owns this place of residence, and the individual’s substance or alcohol abuse, if any.¹¹² The individual is then assigned to one of five risk levels.¹¹³ Pretrial services officers will report his or her assessment, and make a corresponding detention or release recommendation to a judge.¹¹⁴

Whereas PTRA addresses pretrial detention, the Post-Conviction Risk Assessment (“PCRA”) concerns the other end of the sentencing process: post-release supervision. In the 1970s, the federal judiciary “required probation officers to classify persons under supervision into maximum, medium, and minimum supervision categories dependent upon the nature and seriousness of the original offense, extent of prior criminal history, and social and personal background factors in the individual case.”¹¹⁵ Federal probation officers therefore

¹⁰⁷ *Id.* § 3142(g)(3)(A). This Article excluded from this list one characteristic (i.e., the person’s “record concerning appearance at court proceedings[.]”) as it does not seem germane to the question of future dangerousness. *See id.*

¹⁰⁸ *Id.* § 3142(g)(3)(B).

¹⁰⁹ *See* Christopher T. Lowenkamp & Jay Whetzel, *The Development of an Actuarial Risk Assessment Instrument for U.S. Pretrial Services*, 73 *FED. PROBATION* 33, 33–35 (2009).

¹¹⁰ OFFICE OF PROBATION & PRETRIAL SERV., *FEDERAL PRETRIAL RISK ASSESSMENT USER’S MANUAL AND SCORING GUIDE 2* (2010). The nine unscored inputs, which do not “contribute to the overall risk score,” are not included. *Id.*

¹¹¹ *Id.* at 5, 7–10. Questions relating to failure to appear are excluded. *See id.* at 6.

¹¹² *Id.* at 12–14, 16–17. Questions relating to failure to appear are excluded. *See id.* at 19–27.

¹¹³ *Id.* at 3.

¹¹⁴ *See* Timothy P. Cadigan & Christopher T. Lowenkamp, *Implementing Risk Assessment in the Federal Pretrial Services System*, 75 *FED. PROBATION* 30, 30–33 (2011).

¹¹⁵ ADMIN. OFFICE OF THE U.S. COURTS, *AN OVERVIEW OF THE FEDERAL POST CONVICTION RISK ASSESSMENT 4* (2011), available at http://www.uscourts.gov/uscourts/FederalCourts/PPS/PCRA_Sep_2011.pdf, archived at <http://perma.cc/LX6A-YB3S> (citation and internal quotes omitted) [hereinafter “PCRA OVERVIEW”].

developed and used actuarial tools designed to help them determine “how much time and effort to devote to working with certain groups of persons.”¹¹⁶

The PCRA remains the probation office’s current predictive instrument and consists of fifteen scored inputs.¹¹⁷ These include the offender’s age, the total number of the offender’s adult convictions, prior arrests for violent crimes, domestic violence, and other prior arrests, the offender’s history of sex offending offenses, the different types of offenses that the offender has engaged in, how many times the offender was “written up” and “officially punished” while incarcerated, whether the offender committed a new crime while under previous periods of supervision, the highest level of education that the offender has completed, whether the offender was employed at the time the pre-sentence investigation report was prepared and at the time of arrest, and whether the offender has a current alcohol or drug problem.¹¹⁸ An offender’s actuarial risk profile can then determine the level of supervision the probation office will dedicate to the offender.

In addition to these federal actuarial tools, twenty states have adopted, or are adopting, actuarial risk assessment instruments: Arizona, Arkansas, Delaware, Hawaii, Indiana, Kansas, Kentucky, Michigan, Missouri, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, South Dakota, Utah, Virginia, Washington, and West Virginia.¹¹⁹ In addition, external legal organizations have also endorsed risk-assessments. The American Law Institute, perhaps most prominent of these groups, has proposed revisions to the Model Penal Code that would require state sentencing systems to implement actuarial risk assessments.¹²⁰ The National Center for State Courts has actively advocated for the use of these tools as well.¹²¹

In sum, the criminal justice system is moving away from a clinical or impressionistic method of assessing the risk of recidivism to an actuarial model. The embrace of this data-driven approach has reached the federal level and is spreading across the states.

C. Why—Benefits of Risk-Assessment Tools

What accounts for this trend? Risk-assessment tools are popular because they are said to offer several distinct and attractive benefits. First, the tools are premised upon statistical analysis. This is noteworthy because of legislators’ and

¹¹⁶ *Id.* (citation and internal quotes omitted).

¹¹⁷ See James L. Johnson et al., *The Construction and Validation of the Federal Post Conviction Risk Assessment (PCRA)*, 75 FED. PROBATION 16, 29 (2011).

¹¹⁸ See *id.*

¹¹⁹ JUSTICE REINVESTMENT REPORT, *supra* note 18, at 39; Starr, *supra* note 18, at 809.

¹²⁰ See MPC DRAFT, *supra* note 20, § 6B.09.

¹²¹ See OSTROM ET AL., *supra* note 19, at 1–2. The Pew Center on the States is another respected organization that has signed on to these tools. See PEW CENTER ON THE STATES, TIME SERVED: THE HIGH COST, LOW RETURN OF LONGER PRISON TERMS 42–43 (2012).

judges' preferences to rely on empirical approaches. The Sentencing Guidelines, for example, use the average sentences imposed during the pre-Guidelines era as their starting point for calculating uniform guidelines.¹²² The Sentencing Commission consciously selected this data-driven approach as an alternative to the difficult task of choosing between or integrating competing sentencing philosophies.¹²³ Risk assessment instruments thus seek to follow this preference for empirical information.

Second, in contrast to clinical evaluations of risk, which are a function of the "subjective impression" of the mental health professional,¹²⁴ actuarial risk assessments are the product of mathematical scores and thus "yield an objective estimate of violence risk."¹²⁵ Third, and relatedly, whereas clinical opinions may vary widely depending on the professional conducting the evaluation, actuarial risk assessments produce consistent and reliable numbers no matter who does the calculation.¹²⁶ Fourth, and relatedly, allowing judges to receive and act on numbers that are identical for all judges will promote judicial uniformity and limit judicial discretion.¹²⁷

Fifth, and importantly, compared to clinical assessments, actuarial risk assessments are purported to be more effective in forecasting who will recidivate¹²⁸ and in sorting offenders into more detailed risk categories.¹²⁹ For example, a mental health expert may be able to state that an offender is "dangerous" or "non-dangerous";¹³⁰ a risk assessment instrument, however, may assign offenders to different gradients of risk, such as "high," "moderate," "low-moderate," and "low."¹³¹

¹²² See GUIDELINES MANUAL, *supra* note 57, ch. 1, pt. A, subpt. 1(3).

¹²³ See *id.*

¹²⁴ Slobogin, *supra* note 26, at 122.

¹²⁵ Monahan, *supra* note 23, at 406.

¹²⁶ See Slobogin, *supra* note 26, at 122–23. *But see* Coffee, *supra* note 23, at 1002 ("[The] neutrality [offered by actuarial tools] becomes untenable when the poor, high-risk offender receives a longer sentence for such a crime than the rich, low-risk offender.").

¹²⁷ See Wolff, *supra* note 91, at 1416 ("Evidence-based sentencing' should replace the misunderstood phrase 'judicial discretion.' As with many decisions in our courts and in our criminal justice system, discretion is inherent. Instead of removing discretion, we should be prepared to defend our decisions by basing them on evidence . . .").

¹²⁸ See Monahan, *supra* note 23, at 408 ("The general superiority of actuarial over clinical risk assessment in the behavioral sciences has been known for half a century."). Experts have expressed disagreement as to whether actuarial risk assessments are indeed better.

¹²⁹ See Kelly Hannah-Moffat, *Criminogenic Needs and the Transformative Risk Subject: Hybridizations of Risk/Need in Penalty*, 7 PUNISHMENT & SOC'Y 1, 29–51 (2004) ("[R]isk instruments demonstrate an increasingly refined capacity to sort and classify criminalized populations."), *quoted in* Jordan M. Hyatt et al., *Reform in Motion: The Promise and Perils of Incorporating Risk Assessments and Cost-Benefit Analysis into Pennsylvania Sentencing*, 49 DUQ. L. REV. 707, 729 (2011).

¹³⁰ See Slobogin, *supra* note 26, at 123.

¹³¹ See Johnson et al., *supra* note 117, at 20.

The claimed efficiencies of risk assessment tools are possible because the tools are the product of multiple characteristics that correlate with higher recidivism.¹³² The Supreme Court has recognized that “a prediction of future criminal conduct is ‘an experienced prediction based on a host of variables’ which cannot be readily codified.”¹³³ That said, proponents of risk-assessment instruments have identified several characteristics that have such a positive correlation. Criminologists note that a defendant’s following characteristics parallel recidivism: criminal companions has the strongest association; antisocial personality, criminogenic needs, adult criminal history, and race are highly correlative; pre-adult antisocial behavior, family rearing practices, social achievement, interpersonal conflict, and current age have somewhat of a relationship; and substance abuse, family structure, intellectual functioning, family criminality, gender, socio-economic status of origin, and personal distress have a “weak-but-significant” correlation.¹³⁴

Sixth, to the degree that the actuarial risk assessments are able to accurately filter offenders into different risk categories, these tools may be able to direct programmatic efforts and save prison beds for the high-risk, while diverting the low-risk to settings requiring less attention. This could save significant taxpayer money, which is especially appealing in a time when American prisons are overcrowded and the costs of incarceration are of great public concern. Citing Oleson, a federal district court judge wrote, “If race, gender or age are predictive as validated by good empirical analysis, and we truly care about public safety while at the same time depopulating our prisons, why wouldn’t a rationale [sic] sentencing system freely use race, gender or age as predictor of future criminality?”¹³⁵

Seventh, risk assessment tools are purported to help prevent excessive—and therefore unjustified—punishment. In the words of law professor John Coffee, “it is unnecessarily cruel to impose more punishment than is minimally necessary to realize our incapacitory purpose. Arguably, a failure to so differentiate thus becomes unconscionable.”¹³⁶ Risk-assessments that capture an

¹³² See Hyatt et al., *supra* note 129, at 729 (positing that actuarial risk-assessments “can help . . . refocus the sentencing process on the offender’s conduct and the characteristics that are most relevant to determining the risk to the community that they may pose”).

¹³³ *Schall*, 467 U.S. at 279 (quoting *Greenholtz v. Inmates of Neb. Penal & Corr. Complex*, 442 U.S. 1, 16 (1979)).

¹³⁴ See J.C. Oleson, *Risk in Sentencing: Constitutionally Suspect Variables and Evidence-Based Sentencing*, 64 SMU L. REV. 1329, 1350–51 (2011). These characteristics will be evaluated in Part IV on the basis of a standard established in Part III.

¹³⁵ Richard G. Kopf, *Like the Ostrich That Buries Its Head in the Sand, Mr. Holder Is Wrong About Data-Driven Sentencing*, HERCULES AND THE UMPIRE (Aug. 10, 2014), <http://herculesandtheumpire.com/2014/08/10/like-the-ostrich-that-buries-its-head-in-the-sand-mr-holder-is-wrong-about-data-driven-sentencing>, archived at <http://perma.cc/H95S-UGV9>.

¹³⁶ Coffee, *supra* note 23, at 1005.

individual's risk profile and dictate commensurate punishment are said to reduce the possibility that individuals will be unduly jailed or incarcerated.

In sum, there are numerous purported benefits to actuarial risk-assessments, which are grounded in their empirical nature. To many, these tools carry the promise of objective and consistent sentencing decisions, appropriately restrained judicial decision-making, and an efficient deployment of strained penal resources.

III. LIMITS ON RISK-ASSESSMENTS

Having explored the benefits and increasing popularity of risk-assessment tools, we must now analyze their legality and propriety. This Part suggests that three considerations should guide an evaluation of risk-assessment tools. First, Section A explores whether constitutional or statutory law forbids any of the traits. Second, Section B examines whether the traits track individual conduct. Finally, Section C questions whether the traits reflect the ability of the individual to reduce, over time, his or her likelihood of recidivating.

A. Risk-Assessments and Legal Limits

1. Statutory Limits

Congress enacted the SRA as a response to concerns about disparate and indeterminate sentencing.¹³⁷ The SRA's primary accomplishment was to establish the Sentencing Guidelines, which all federal judges must now use as the starting point for a sentencing determination.¹³⁸

Most relevant for our purposes, the SRA states that a judge, in imposing a sentence, "shall consider . . . the nature and circumstances of the offense and the history and characteristics of the defendant . . ." ¹³⁹ This language is unmistakably broad. Despite this, however, the universe of offender characteristics that a federal judge may weigh is not unbounded. In fact, the SRA specifies that some offender characteristics are expressly prohibited from consideration. The SRA states that the Guidelines must be "entirely neutral as to the race, sex, national origin, creed, and socioeconomic status of offenders."¹⁴⁰ The Senate Report explains that this limiting provision was designed

to make it absolutely clear that it was not the purpose of the list of offender characteristics set forth [above] . . . to suggest in any way

¹³⁷ See *Mistretta v. United States*, 488 U.S. 361, 363–66 (1989); Doug Keller, *Why the Prior Conviction Sentencing Enhancements in Illegal Re-Entry Cases Are Unjust and Unjustified (and Unreasonable Too)*, 51 B.C. L. REV. 719, 725 (2010).

¹³⁸ See *Gall v. United States*, 552 U.S. 38, 49 (2007).

¹³⁹ 18 U.S.C. § 3553(a)(1) (2012).

¹⁴⁰ 28 U.S.C. § 994(d) (2012).

that . . . it might be appropriate, for example, to afford preferential treatment to defendants of a particular race or religion or level of affluence, or to relegate to prisons defendants who are poor, uneducated, and in need of education and vocational training.¹⁴¹

Accordingly, Congress declared race, sex, national origin, religion, and socio-economic status off-limits in risk-assessment instruments in the federal system.¹⁴²

While the SRA only governs the federal system, it may be instructive for the states as well. Most states have not announced their respective punishment goals,¹⁴³ but those who have seem to embody the same general philosophical justifications for criminal sanction.¹⁴⁴ Accordingly, Congress's view of these factors may illuminate whether and to what extent states should be able to adopt the same factors in their respective risk-assessment tools. That is, the federal view of these characteristics can inform whether and how to apply these traits in state sentencing systems.

As such, the rest of this Part provides grounds to curb risk-assessment tools in both the state and federal systems. For now, it is established that the SRA, by its own terms, forbids the use of race, sex, national origin, religion, socio-economic status in federal sentencing, including penal evaluations of an individual's propensity to recidivate.

2. Constitutional Limits

Constitutional considerations limit many factors often used in risk-assessment tools. In both federal and state sentencing, risk-assessment tools must comply with the Equal Protection Clause of the Fourteenth Amendment and the equal protection guarantee that has been read into the Fifth Amendment.¹⁴⁵ According to the Supreme Court, "the Equal Protection Clause . . . is essentially a

¹⁴¹ S. REP. NO. 98-225, at 171 (1983).

¹⁴² Parts III.B and C will provide additional, independently sufficient reasons why these factors cannot be included in risk-assessments, cementing the argument that these five factors are inappropriate for predictive purposes. See *infra* notes 193–275 and accompanying text.

¹⁴³ See *State v. Roth*, 471 A.2d 370, 376 (N.J. 1984) ("Our Legislature has not stated the aims to be achieved by punishment. Indeed few Legislatures have, and where they have, the statement has been too general to be of service.") (internal quotations omitted).

¹⁴⁴ See, e.g., MONT. CODE ANN. § 46-18-101 (2013) (setting forth Montana's sentencing policy, which enumerates the four traditional purposes of punishment); N.Y. PENAL LAW § 1.05(6) (McKinney 2009) (noting the utilitarian reasons for punishment); *Naovarath v. State*, 779 P.2d 944, 956 (Nev. 1989) (noting the four purposes of punishment).

¹⁴⁵ U.S. CONST. amend V ("No person shall be . . . deprived of life, liberty, or property, without due process of law . . ."); *id.* § 1 ("No State shall . . . deny to any person within its jurisdiction the equal protection of the laws."); see *Bolling v. Sharpe*, 347 U.S. 497, 499–500 (1954) (explaining that the Due Process Clause of the Fifth Amendment contains an equal protection component applicable to the federal government). For convenience, this Article uses the "Equal Protection Clause" or "Equal Protection" as shorthand for these complementary constitutional provisions.

direction that all persons similarly situated should be treated alike.”¹⁴⁶ This principle, however, is not absolute. Indeed, there are circumstances under which a government actor may treat similarly situated individuals differently in a manner consistent with the Equal Protection Clause.¹⁴⁷

a. Suspect Classifications

When the government treats similarly situated individuals differently because of race,¹⁴⁸ national origin,¹⁴⁹ or religion,¹⁵⁰ courts require a “compelling” justification for the differential treatment and ask the government to demonstrate that the means chosen are “narrowly tailored” to further the compelling end.¹⁵¹ This level of review is known as “strict scrutiny.” The Supreme Court has identified a limited set of reasons that are sufficiently “compelling” to justify differential treatment on the basis of these suspect classifications. First, the Court has held that an institution of higher education may consider race in admissions in order to achieve the educational benefits of a diverse student body.¹⁵² Second, an employer may use race to remedy past discrimination for which it is responsible.¹⁵³ Third, in deference to national security exigencies, the Court has permitted the government to consider race in the execution of wartime policies, such as the internment of individuals of Japanese ancestry during World War II.¹⁵⁴ The Court has also held that strict scrutiny is the prop-

¹⁴⁶ *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 449 (1985).

¹⁴⁷ *See Engquist v. Or. Dep’t of Agric.*, 553 U.S. 591, 602 (2008) (“When those who appear similarly situated are nevertheless treated differently, the Equal Protection Clause requires at least a rational reason for the difference, to ensure that all persons subject to legislation or regulation are indeed being ‘treated alike, under like circumstances and conditions.’”). A classic example of the Supreme Court rejecting an Equal Protection challenge is *Williamson v. Lee Optical of Okla., Inc.* *See* 348 U.S. 483 (1955).

¹⁴⁸ *See Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 299 (1978) (plurality opinion) (“[When government decisions] touch upon an individual’s race or ethnic background, [a plaintiff] is entitled to a judicial determination that the burden he is asked to bear on that basis is precisely tailored to serve a compelling governmental interest.”).

¹⁴⁹ *See Cleburne*, 473 U.S. at 440 (“[W]hen a statute classifies by race, alienage, or national origin . . . such discrimination is unlikely to be soon rectified by legislative means, these laws are subjected to strict scrutiny and will be sustained only if they are suitably tailored to serve a compelling state interest.”).

¹⁵⁰ *See City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976) (holding that “a classification . . . drawn upon inherently suspect distinctions such as race, religion, or alienage” is reviewed under strict scrutiny).

¹⁵¹ *See Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 235 (1995) (“Federal racial classifications, like those of a State, must serve a compelling governmental interest, and must be narrowly tailored to further that interest.”).

¹⁵² *See Grutter v. Bollinger*, 539 U.S. 306, 322–44 (2003).

¹⁵³ *See City of Richmond v. J.A. Croson, Co.*, 488 U.S. 469, 498–506 (1989).

¹⁵⁴ *See generally Korematsu v. United States*, 323 U.S. 214 (1944) (upholding the legality of internment of Japanese-Americans); *Hirabayashi v. United States*, 320 U.S. 81 (1943) (upholding the legality of a curfew on individuals of Japanese descent). While *Korematsu* has not been overruled, it

er standard that governs an Equal Protection challenge to administrative racial segregation by penal institutions.¹⁵⁵ In clarifying only the applicable standard of review, the Court did not, on the merits, approve the use of race in the penal context.

Actuarial risk profiles on the rates of recidivism for particular races, national origins, or religions are facial classifications. For example, assessments of the rates of recidivism for African-Americans, Mexicans, or Muslims constitute facial racial, national origin, and religion classifications, respectively. Courts therefore would apply strict scrutiny to these risk-assessments. The Supreme Court's Equal Protection jurisprudence makes clear that the use of race, national origin, or religion by the government is permissible only in the three contexts just mentioned: to ensure a diverse student body in higher education, to remedy past discrimination for which an employer is responsible, and to respond to public safety emergencies. These exceptions do not include the use of suspect classifications for general public safety purposes, including criminal sentencing.¹⁵⁶ Nor does the Court's ruling that administrative racial segregation in prisons be subject to strict scrutiny offer any hope of the creation of an additional exception that may encompass the reduction of recidivism. This is because that case concerned the proper placement or location of individuals once in prison, as opposed to whether an individual should be in prison in the first place, a major focus of risk-prediction instruments.

The Supreme Court's jurisprudence leaves no room for race-conscious risk-assessment tools. Moreover, in reading separate opinions from individual Justices, one may count five sitting Justices who would prohibit the use of race in actuarial risk-assessment instruments. In the 2011 United States Supreme Court case *Buck v. Thaler*, Justice Samuel Alito issued a statement respecting the denial of certiorari, joined by Justices Stephen Breyer and Antonin Scalia.¹⁵⁷ In that case, an African-American man "was sentenced to death based on the jury's finding that the State had proved [the man's] future dangerousness to society."¹⁵⁸ At the sentencing phase, a psychologist provided expert testimony

nonetheless has been recognized as wrongly decided. See An Act to Implement Recommendations on Wartime Relocation and Internment of Civilians, Pub. L. No. 100-383, § 1(2), 102 Stat. 903 (1988) (codified at 50 U.S.C. app. § 1989a(a) (2012)) (apologizing for the Japanese internment); *Korematsu v. United States*, 584 F. Supp. 1406, 1409 (N.D. Cal. 1984) (vacating *Korematsu's* conviction).

¹⁵⁵ See *Johnson v. California*, 543 U.S. 499, 505–15 (2005). For more information, see generally Symposium, *The Long Shadow of Korematsu*, 40 B.C. L. REV. 1 *passim* (1998).

¹⁵⁶ Some may argue that the national security exception to race-based discrimination—identified most notably in *Korematsu*—covers threats to public safety, which risk-assessments ostensibly address. In response, this Article would stress that the emergency wartime situation of *Korematsu* is qualitatively different than the general public safety concern that animates risk-assessment inquiries. See *Korematsu*, 323 U.S. at 218 (acknowledging that the race-based practices at issue could be constitutionally justify only by the "gravest imminent danger to the public safety").

¹⁵⁷ 132 S. Ct. 32, 32 (2011) (statement of Alito, J.).

¹⁵⁸ *Id.* at 33.

that African-Americans are “statistically more likely than the average person to engage in crime.”¹⁵⁹ These three Justices called this testimony “bizarre,” “objectionable,” and “offensive.”¹⁶⁰ Nonetheless, these same Justices agreed for procedural reasons that the denial of certiorari was proper.¹⁶¹ Justices Sonia Sotomayor and Elena Kagan dissented, asserting that the “relevant testimony was inappropriately race-charged” and that further review was warranted.¹⁶² These opinions suggest that at least five Justices seem poised to invalidate the race-based statistics in sentencing if the proper case reaches the Court.¹⁶³

Outside the Supreme Court, legal scholars have come to divergent, and largely incorrect, positions on whether risk-assessment tools that include suspect characteristics are consistent with the Equal Protection Clause. It has been suggested that predictive tools that include a suspect characteristic “likely would be upheld,” citing two cases in which the Supreme Court allowed the government to use ethnicity in its formal decision-making.¹⁶⁴

But, the cases cited for this proposition involve border agents using ethnicity to identify undocumented immigrants at the border or a border checkpoint. Yet the issue of the border brings a unique set of circumstances that place these cases in a different category altogether. Indeed, in one of the cases, the Court clarified that, “Our decision in this case takes into account the special function of the Border Patrol”¹⁶⁵ As such, border searches in the immigration context cannot be expanded to encompass the use of race in risk predictions in ordinary settings.

It has been similarly argued that race-conscious risk-assessment tools survive constitutional scrutiny in light of affirmative action principles.¹⁶⁶ Just as the United States Supreme Court in 2003 in *Grutter v. Bollinger* allowed colleges and universities to use race as one factor among many in furtherance of

¹⁵⁹ *Id.*

¹⁶⁰ *Id.* at 33–35.

¹⁶¹ *See id.* at 35.

¹⁶² *Id.* at 38 (Sotomayor, J., dissenting from denial of certiorari). Justice Sotomayor also pointed out that, in a similar case, the state had conceded error, admitting that “it is inappropriate to allow race to be considered as a factor in our criminal justice system.” *Id.* at 36 (internal quotes and citation omitted). It is because of that concession that the Supreme Court vacated and remanded a case to the state court. *See generally* Saldano v. Texas, 530 U.S. 1212 (2000) (vacating a lower court judgment in light of the “confession of error” by the Texas Solicitor General).

¹⁶³ These views suggest that it is of no constitutional significance that the risk-assessment may be driven by statistical evidence. *See generally* Katzenbach v. McClung, 379 U.S. 294 (1964) (holding that a civil rights statute was properly applied to a restaurant that did not serve African-Americans inside, even where the restaurant had evidence that it would lose business if it served African-American customers inside). Accordingly, any basis in data for the risk-assessment does not insulate the government from judicial review, nor does it soften the searching nature of strict scrutiny. *See id.*

¹⁶⁴ Tony, *supra* note 92, at 169 (citing *United States v. Brignoni-Ponce*, 422 U.S. 873, 873 (1975), and *United States v. Martinez-Fuerte*, 428 U.S. 543, 543 (1976)).

¹⁶⁵ *Brignoni-Ponce*, 422 U.S. at 883.

¹⁶⁶ Oleson, *supra* note 134, at 1382–87.

the objective of promoting a diverse student body, it is argued that sentencers may use race and other suspect characteristics as a factor in risk predictions.¹⁶⁷ This view acknowledges that *Grutter* involved the higher education context,¹⁶⁸ but asserts nonetheless that sentencers could surmount strict scrutiny because the Supreme Court has stated that “the legitimate and compelling state interest in protecting the community from crime cannot be doubted.”¹⁶⁹

But the case from which this quote comes, *Schall v. Martin*, concerned whether a juvenile could be subject to pretrial detention where the juvenile posed a “serious risk” of committing a crime before his or her return date.¹⁷⁰ The case therefore exemplifies an exigent public safety exception to the general rule prohibiting the use of race.¹⁷¹ Indeed, the named plaintiff in the case was detained a total of fifteen days,¹⁷² meaning that the detention was justified on the basis of the belief that the plaintiff would have committed a crime within fifteen days. Further, the Court explained that the pretrial detention was regulatory, not punitive,¹⁷³ which makes the case less applicable to the sentences that can be facilitated by race-conscious risk-assessment tools. As the case concerns imminent public safety threats and is not punitive in nature, it is readily distinguishable from the general criminal risk-assessment context.¹⁷⁴

Risk-assessment tools, academics have noted, amount to impermissible generalizations about individuals that cannot be cured by highlighting the assessments’ statistical nature.¹⁷⁵

In short, race-conscious risk-assessments are at odds with the Equal Protection Clause as interpreted by the Supreme Court.¹⁷⁶ The same goes for risk-

¹⁶⁷ See *id.* at 1377 (“[S]uspect 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 in a diverse student body.”) (internal citations omitted).

¹⁶⁸ See *id.* at 1382.

¹⁶⁹ *Id.* at 1385 (quoting *Schall*, 467 U.S. at 264) (alterations and internal quotes omitted).

¹⁷⁰ *Schall*, 467 U.S. at 255.

¹⁷¹ See *United States v. Salerno*, 481 U.S. 739, 749 (1987) (holding that a preventative, regulatory detention supported by prediction is constitutional only in “special circumstances”).

¹⁷² See *Schall*, 467 U.S. at 258–59.

¹⁷³ See *id.* at 271–74.

¹⁷⁴ Oleson also cites *Terry v. Ohio*, 392 U.S. 1, 22 (1968), and *De Veau v. Braisted*, 363 U.S. 144, 155 (1960), for the proposition that crime prevention is a compelling state interest. See Oleson, *supra* note 134, at 1385. In *Terry*, however, the Supreme Court only said that “effective crime prevention and detection” is a “legitimate” state interest. 392 U.S. at 22. And in *De Veau*, the Court did identify a “legitimate and compelling state interest, namely, the interest in combatting local crime *infesting a particular industry*.” 363 U.S. at 155 (emphasis added). That “particular industry” was unions. See *id.* at 145 (describing the provision of the Waterfront Commission Act at issue, which regulated labor organization activities).

¹⁷⁵ See Starr, *supra* note 18, at 823–827. Part II.B. of this Article asserts that risk-assessment tools are not narrowly tailored.

assessments that include classifications on the basis of national origin or religion. The Court has stated unambiguously that race and religion are “factors that are constitutionally impermissible or totally irrelevant to the sentencing process.”¹⁷⁷ This should put to rest any suggestion that these traits are constitutionally appropriate in risk-assessments. To be sure, risk-assessment tools that do not include suspect characteristics on their face would survive a constitutional challenge even if the application of the tools has a disproportionate effect on certain races, national origins, or religions.¹⁷⁸ To find that a facially neutral statute violates the Equal Protection Clause, the statute must be motivated by an impermissible purpose.¹⁷⁹ Here, there is no indication that risk-assessment tools are driven by animus or any other illegitimate reason. Rather, these instruments are clearly used to control crime. As a result, facially neutral risk-assessments would likely survive a constitutional attack.

b. Sex

Beyond the suspect classes of race, religion, and national origin, the Supreme Court has held that classifications of individuals based on sex must satisfy intermediate scrutiny in order to comport with the Equal Protection Clause. This standard requires that the sex-based classification serve an “important” governmental interest and the means chosen be “substantially” related to the further-

¹⁷⁶ In defense of risk-assessment tools, Judge Kopf writes, “if we believe that public safety is or should be a central goal of our criminal justice system we ought not to ignore the truth—certain characteristics that we have shied away from in the past because we worried too much about vague notions of ‘equality’ or ‘fairness’ tell us a lot about future danger.” See Kopf, *supra* note 135. This Article’s objection to risk-assessment tools is not based on these terms, but on constitutional and statutory law as well as notions of individual autonomy.

¹⁷⁷ *Zant v. Stephens*, 462 U.S. 862, 885 (1983).

¹⁷⁸ Others have nonetheless criticized risk-assessment tools’ disparate impact on racial minorities. See, e.g., HARCOURT, *supra* note 22, at 145–72; Jessica M. Eaglin, *Against Neorehabilitation*, 66 SMU L. REV. 189, 215 (2013) (“Actuarial tools potentially exacerbate racial disparities because the typical risk factors used to screen offenders for rehabilitative programming are often proxies for structural inequities disproportionately plaguing historically disadvantaged populations.”); Bernard Harcourt, *Risk as Proxy for Race*, CRIMINOLOGY & PUB. POL’Y (forthcoming) (manuscript at 2), available at http://www.ssrn.com/abstract_id=1677654, archived at <http://perma.cc/8RQM-JLUW> (rejecting the notion that risk-assessments should be used to reduce the prison population, as their use will only exacerbate existing racial disparities in our criminal justice system); Holder Remarks, *supra* note 28 (expressing concern that risk-assessment tools on the front-end may “exacerbate unwarranted and unjust disparities . . . in our criminal justice system and in our society”). For a response, see Shima Baradaran, *Race, Prediction, and Discretion*, 81 GEO. WASH. L. REV. 157, 192 (2013) (“prediction is not necessarily discriminatory”); see also *id.* at 206 (“[F]ind[ing] little support that judges use prior record as a proxy for race.”); *id.* at 207 (“[W]hile race and prior record are clearly correlated, it may be that judges are using race as a proxy for risk rather than risk as a proxy for race.”).

¹⁷⁹ See *Washington v. Davis*, 426 U.S. 229, 242 (1976). It is for this reason that one Note has said, correctly, that “selective incapacitation schemes are probably immune to attack on equal protection grounds as long as they do not utilize suspect classifications as predictive criteria.” Note, *supra* note 82, at 519.

ance of that interest.¹⁸⁰ With respect to the first prong of this test, the Court requires “a party seeking to uphold a statute that expressly discriminates on the basis of sex to advance an ‘exceedingly persuasive justification’ for the challenged classification.”¹⁸¹

In addition to the three “compelling” interests discussed above that are included *a fortiori* in this more relaxed standard, the Court has recognized that a public employer may engage in sex-conscious hiring practices in order to address general gender discrimination in society, not just gender discrimination for which the employer is responsible.¹⁸² A risk-assessment, however, cannot be subsumed under this employer-specific justification for sex-based classifications, and thus would fail intermediate scrutiny.

The United States Supreme Court’s 1962 ruling in *Robinson v. California*¹⁸³ reinforces the impermissibility of including race, national origin, and sex in risk-assessments. In *Robinson*, the Court invalidated a state law that subjected an individual to criminal punishment for being a drug addict.¹⁸⁴ The Court held that the mere status of being a drug addict, where the addiction may have been obtained “innocently or involuntarily,” could not serve as a constitutional basis for punishment.¹⁸⁵ By the same token, an individual’s status as a member of a particular race, birth in a specific country, or membership to a given sex, is wholly involuntarily and thus cannot inform the length or type of punishment. As race, national origin, and gender receive heightened attention compared to substance abuse in our constitutional system, sentencing practices that factor race, national origin, or sex arguably are even more problematic than the law at issue in *Robinson*.

c. Socio-Economic Status

Whereas classifications based on race, national origin, religion, and sex are presumptively unconstitutional,¹⁸⁶ different treatment premised on socio-economic status enjoys a presumption of constitutionality.¹⁸⁷ Classifications

¹⁸⁰ See *Kirchberg v. Feenstra*, 450 U.S. 455, 461 (1981).

¹⁸¹ *Id.* (citations omitted).

¹⁸² See *Califano v. Webster*, 430 U.S. 313, 317 (1977) (per curiam) (“Reduction of the disparity in economic condition between men and women caused by the long history of discrimination” constitutes “an important governmental objective.”) (citations omitted).

¹⁸³ See 370 U.S. 660, 667 (1962).

¹⁸⁴ See *id.* at 667.

¹⁸⁵ *Id.*

¹⁸⁶ See *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 152 (1994) (Kennedy, J., concurring) (“[O]ur case law does reveal a strong presumption that gender classifications are invalid.”); *Pers. Adm’r of Mass. v. Feeney*, 442 U.S. 256, 272 (1979) (“Certain classifications . . . in themselves supply a reason to infer antipathy. Race is the paradigm. A racial classification . . . is presumptively invalid and can be upheld only upon an extraordinary justification.”).

¹⁸⁷ See *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 61–62 (1972) (Stewart, J., concurring).

based on wealth or poverty are subject to rational basis review, which requires the government to prove only that the purpose for the classification is “legitimate” and that the means used is “rationally related” to the purpose.¹⁸⁸

Here, risk-assessment tools would be justified on public safety grounds, a legitimate governmental interest.¹⁸⁹ The utilization of statistical averages that the poor recidivate at higher levels, and thus present a higher risk of re-offending, is rationally related to public safety.¹⁹⁰ Accordingly, socio-economic status does not seem to offend the constitutional guarantee of Equal Protection, despite the fact that the SRA bans the use of socio-economic status as a factor in determining sentencing.

* * *

In sum, Congress, pursuant to the SRA, has forbidden the use of race, sex, national origin, religion, and socio-economic status in federal sentencing. This ban covers risk-assessments utilized in sentencing in the federal system. Equal Protection analysis provides another, independently-sufficient basis for prohibiting the use of race, national origin, religion, and sex in federal and state risk-assessments. The result is that five of the seventeen factors analyzed in this Article should be deemed off-limits in any federal risk-assessment and four of seventeen in any state risk-assessment (socio-economic status would likely pass constitutional muster in a state system).

B. Risk-Assessments Ignore Individual Action

This section introduces an additional argument that, if considered, would call for the removal of these and other factors from predictions of risk in sentencing. This argument has two components. First, it is inappropriate to tie punishment to group identity and group membership rather than individual conduct. Second, it is inappropriate to punish the individual for that over which the individual has no meaningful control. Risk-assessment tools directly conflict with these dual concepts.

1. Punishment and Individual Action

The principle against individual punishment for group identity is itself the product of four subsidiary points. First, risk-assessments expressly premise punishment on group identity rather than individual conduct. This creates problems

¹⁸⁸ See *Heller v. Doe*, 509 U.S. 312, 319–320 (1993).

¹⁸⁹ See *Smith v. Doe*, 538 U.S. 84, 102–13 (2003).

¹⁹⁰ It should be noted that rational basis is a very forgiving standard. See *Heller*, 509 U.S. at 319–20 (a classification subject to rational basis review “is accorded a strong presumption of validity” and “must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification”) (citations and internal quotes omitted).

by grounding punishment in something other than the purposes of punishment described in Part I. Second, risk-assessments, which ascribe a blanket risk profile to all individuals in a group may not capture the actual, diverse risk profiles of individuals within the group. Troublingly, all members of a group are branded with a monolithic risk score. Third, certain factors may be relevant or irrelevant as a general matter in sentencing, but the risk-assessment tools treat each factor as categorically relevant because of statistical correlation despite the particularized circumstances of an offender's situation. Thus, the system fails to distinguish when a trait is actually relevant in an individual case. Fourth, certain other factors are not premised on conduct—an essential requirement in criminal law—but rather on the viewpoints or attitudes of the individual, which should not ordinarily give rise to punishment in the absence of action. This creates problems by punishing an individual's thoughts and feelings, and not his or her external conduct. Taken together, these issues raise enormous concerns, both constitutional and otherwise.

a. Personal Conduct

To begin, the law requires that the state must inflict punishment on an individual because of the individual's conduct, and not group membership. "In our jurisprudence guilt is personal,"¹⁹¹ held the Supreme Court; "guilt by association remains a thoroughly discredited doctrine . . ." ¹⁹² Similarly, Justice Robert H. Jackson wrote, "if any fundamental assumption underlies our system, it is that guilt is personal," and not associational.¹⁹³

Even conspiracy doctrine,¹⁹⁴ which allows individuals to be punished for knowing participation in certain group behavior, highlights the importance of guilt attaching to personal conduct and not the disconnected behavior of others. Justice Jackson, acknowledging that "guilt is personal" and admonishing against resorting to "guilt by association," wrote that for purposes of conspiracy "personal guilt may be incurred by *joining* a conspiracy" and that the personal "*act of association makes one responsible for the acts of others commit-*

¹⁹¹ *Scales v. United States*, 367 U.S. 203, 224–25 (1961).

¹⁹² *Uphaus v. Wyman*, 360 U.S. 72, 79 (1959).

¹⁹³ *Korematsu*, 323 U.S. at 243 (Jackson, J., dissenting). He said this in the context of the government's forced exclusion and displacement of individuals of Japanese ancestry in the wake of the Japanese attack on Pearl Harbor, where liberty was restricted because of ancestry alone, not individual action. *See id.* If this principle should not apply when the state interests are ostensibly at their maximum, it cannot apply *a fortiori* to ordinary criminal situations.

¹⁹⁴ The Model Penal Code defines conspiracy as follows: "A person is guilty of conspiracy with another person or persons to commit a crime if with the purpose of promoting or facilitating its commission he (a) agrees with such other person or persons that they or one or more of them will engage in conduct that constitutes such crime or an attempt or solicitation to commit such crime; or (b) agrees to aid such other person or persons in the planning or commission of such crime or of an attempt or solicitation to commit such crime." MODEL PENAL CODE § 5.03(1) (1985).

ted in pursuance of the association.”¹⁹⁵ The law punishes the *act* of joining, not the mere association with a criminal group. Accordingly, the predicate for punishing an individual for the actions of a group is the individual decision to be part of the group and specifically a common enterprise.

Risk-assessment tools sever the critical link between personal action and personal punishment, subjecting the individual to punishment solely for the group’s propensity to recidivate.¹⁹⁶ As Justice Hugo Black noted, “the fundamental requirement that some action be proved is solidly established even for offenses most heavily based on propensity, such as attempt, conspiracy, and recidivist crimes.”¹⁹⁷

b. Blanket Treatment

Worse, risk-assessment tools treat individuals as monolithic members of a group who pose an identical threat to public safety regardless of their particular or actual danger to society.¹⁹⁸ Indeed, assessors take averages as predictive measures and then assign these averages to each member of the group.¹⁹⁹

Ascribing the same trait or characteristic to all individuals within a group offends common sense and creates grave constitutional problems. Take, for example, the monolithic treatment of a group based on racial characteristics. The Supreme Court, in one instance, struck down planned voting districts that “reinforce[d] the perception that members of the same racial group—regardless of their age, education, economic status, or the community in which they live—think alike, share the same political interests, and will prefer the same candidates

¹⁹⁵ *Am. Commc’ns Ass’n v. Douds*, 339 U.S. 382, 433 (1950) (Jackson, J., concurring in part and dissenting in part) (emphases added).

¹⁹⁶ See Sonja Starr, *Sentencing, by the Numbers*, N.Y. TIMES, Aug. 10, 2014, at A17 (“The basic problem is that the risk scores are not based on the defendant’s crime. They are primarily or wholly based on prior characteristics: criminal history (a legitimate criterion), but also factors unrelated to conduct.”).

¹⁹⁷ *Powell v. Texas*, 392 U.S. 514, 543 (1968) (Black, J., concurring). This concern touches all of the factors that are used in risk-assessments, because the nature of those assessments is to predict *future* criminal behavior in light of present and past conduct; that future crime may never occur. Accordingly, there may not be any legitimate predicate for punishment, other than theoretical chances of future criminal conduct. It is problematic to premise punishment on numbers and possibility, rather than action. See *id.* This concern is particularly heightened where, as here, the factor implicates what someone thinks or how someone views the world around him.

¹⁹⁸ See Daniel S. Goodman, Note, *Demographic Evidence in Capital Sentencing*, 39 STAN. L. REV. 499, 522–23 (1987) (objecting to demographic generalization in the capital context that “classifies defendants on the basis of their affiliation with broad social groups, disregarding the fact that individual behavior may deviate substantially from average group behavior”).

¹⁹⁹ See Jessica Pishko, *Punished for Being Poor: The Problem with Using Big Data in the Justice System*, PAC. STANDARD MAG. (Aug. 18, 2014), <http://www.psmag.com/navigation/politics-and-law/punished-poor-problem-using-big-data-justice-system-88651/>, archived at <https://perma.cc/6GP8-RQ57?type=pdf> (“Data always relies on averages. As a result, some people are bound to behave differently than the data predicts . . .”).

at the polls.”²⁰⁰ “[S]uch perceptions,” the Court declared, must be rejected “as impermissible racial stereotypes.”²⁰¹ Similarly, the Court admonished, “racial bloc voting and minority-group political cohesion never can be assumed”²⁰² The Court emphasized that, “the individual is important, not his race, his creed, or his color.”²⁰³ Accordingly, if it is impermissible to assume that individuals of the same race think or vote alike, the assertion that individuals of the same race will act alike should be condemned as well. Indeed, in another redistricting case, the Court stated, “[t]he idea is a simple one: At the heart of the Constitution’s guarantee of equal protection lies the simple command that the Government must treat citizens as individuals, not as simply components of a racial, religious, sexual or national class.”²⁰⁴

These cases support the principle that group membership by itself cannot be used as a proxy for behavior applicable to all members of the group; individuals within the group are not fungible, undifferentiated parts of a whole. These cases also point to the need for decision-makers in the criminal justice system to focus not on group identity but individual behavior.²⁰⁵

Each of the seventeen major characteristics used in risk-assessment tools would fall short of the low standard that punishment track particularized conduct. This is because actuarial data, by their nature, are averages—and are not based on the individualized behavior of those within the group.

c. Automatic Relevance

In an actuarial approach, all the factors in an offender’s risk profile are considered automatically relevant in determining his or her sentence. This approach is problematic in that the individual circumstances of the offender may justify the consideration of only some factors that may otherwise correlate with recidivism. Risk-assessment tools do not contemplate such individualization.

²⁰⁰ *Shaw v. Reno*, 509 U.S. 630, 647 (1993).

²⁰¹ *Id.*

²⁰² *Id.* at 653. *But see* Lani Guinier, *No Two Seats: The Elusive Quest for Political Equality*, 77 VA. L. REV. 1413, 1468 (1991) (“The assumption that blacks, wherever they reside, tend to be politically cohesive is supported both anecdotally and empirically.”).

²⁰³ *Shaw*, 509 U.S. at 648 (internal quotes and citation omitted).

²⁰⁴ *Miller v. Johnson*, 515 U.S. 900, 911 (1995) (quoting *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 602 (1990) (O’Connor, J., dissenting)) (internal quotes and citations omitted); *see also* *Powers v. Ohio*, 499 U.S. 400, 415 (1991) (“where racial bias is likely to influence a jury, an inquiry must be made into such bias,” rather than presumed solely from the racial identity of the prospective juror); *Batson v. Kentucky*, 476 U.S. 79, 104 (1986) (Marshall, J., concurring) (holding that the state may not “tak[e] any action based on crude, inaccurate racial stereotypes,” such as the stereotype that jurors would be sympathetic to defendants of the same race).

²⁰⁵ *Roberts v. U.S. Jaycees*, 468 U.S. 609, 625 (1984) (concluding that such group-assigned traits “force[] individuals to labor under stereotypical notions that often bear no relationship to their actual abilities”).

In the SRA, Congress stated that four factors—i.e., education and vocational skills, employment record, family ties and responsibility, and community ties—are “generally inappropriate” as to recommending a term or length of imprisonment.²⁰⁶ That is, according to the SRA, these factors generally should not be relevant in sentencing, but may be relevant in “exceptional cases.”²⁰⁷ While Congress takes these four factors almost off the table, risk-assessment tools construe them (and all other factors) as categorically relevant predictors of risk because of their correlation with recidivism.

Similarly, Congress directed the Commission to determine whether and to what degree several offender characteristics are “relevant” to sentencing.²⁰⁸ In response, the Commission found that most of the factors—known as Section 5H factors in reference to a section of the Guidelines Manual—such as age, mental and emotional condition, physical condition (including drug or alcohol abuse), and the defendant’s criminal history, are relevant for sentencing.²⁰⁹ Other Section 5H factors, such as education and vocational skills, family ties and responsibilities, are “not ordinarily relevant” in sentencing,²¹⁰ though they may be relevant in “exceptional cases.”²¹¹ By contrast, risk-assessment tools would dictate that all these factors are categorically relevant because they correlate with possible future recidivating.

The Supreme Court’s discussion of Section 5H factors further undercuts the risk-assessment tools’ one-size-fits-all approach to offender characteristics. In *Koon v. United States*, the United States Supreme Court stated that in the “heartland” of cases, the generally “discouraged” Section 5H factors may not be relevant in sentencing. Indeed, these factors may be relevant “only if the factor is present to an exceptional degree or in some other way makes the case different from the ordinary case where the factor is present.”²¹² Again, risk-assessment tools lack this nuance, would eliminate the heartland/exceptional framework, and reduce a factor to a single landscape of actuarial relevance.

²⁰⁶ 28 U.S.C. § 994(e) (2012). The statute lists education and vocational skills as separate characteristics, though for present purposes these two characteristics are consolidated. *See id.*

²⁰⁷ *See* GUIDELINES MANUAL, *supra* note 57, § 5K2.0, cmt. n. 3(c).

²⁰⁸ *See* 28 U.S.C. § 994(d) (the characteristics are: age; education; vocational skills; 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; physical condition, including drug dependence; previous employment record; family ties and responsibilities; community ties; role in the offense; criminal history; and degree of dependence upon criminal activity for a livelihood).

²⁰⁹ *See* GUIDELINES MANUAL, *supra* note 57, § 5H1.4–.5 (adding that “[s]ubstance abuse is highly correlated to an increased propensity to commit crime,” and clarifying that employment record “may be relevant in determining the conditions of probation or supervised release,” but is “not ordinarily relevant in determining whether a departure is warranted”).

²¹⁰ *See id.* § 5H1.6 (clarifying that family responsibilities “that are complied with may be relevant to the determination of the amount of restitution or fine”).

²¹¹ *See id.* § 5K2.0, cmt. n. 3(c).

²¹² *Koon v. United States*, 518 U.S. 81, 96 (1996).

In short, the value of risk-assessment tools is confined to separating groups from one another; learning, for example, that one group on average is more likely to recidivate than another group. This crude, blunt measure says very little, however, about how individuals within the groups will perform and how decision-makers should respond to such unrefined predictions of performance.

d. Absence of Conduct

Risk-assessments may also subject individuals to higher punishment simply because the individual may think in anti-social ways. But one who has not acted in breach of the criminal law should not be subject to criminal punishment at all, even if one has thoughts or perspectives that are hostile to others or to society. Criminal laws generally have two constituent components: an evil mind and an evil hand.²¹³ To be punished, an individual's evil mind must manifest itself through evil action of some kind. Punishing an individual for possessing an evil mind alone—that is, views or attitudes seen as aggressive or hostile—would collapse the twin requirements of criminal law and eliminate the essential requirement that the evil mind induce some kind of evil action.²¹⁴ Justice Black, for one, decried this treatment as “obnoxious,” noting in *Powell v. Texas* that the “mental element is not simply one part of the crime but may constitute all of it”—a situation that is “universally sought to be avoided in our criminal law.”²¹⁵

Moreover, our tradition of individual freedom in America allows a person to select from the vast universe of ideas or attitudes and act on these ideas without government interference, provided that he or she stays within the limits of the law.²¹⁶ Relatedly, unorthodox views or perspectives should be valued

²¹³ *Morissette v. United States*, 342 U.S. 246, 251–52 (1952).

²¹⁴ One may suggest that hate crimes are a category of criminal laws that prohibit “evil mind,” that is, selecting a victim on the basis of the victim’s disfavored traits. *See, e.g.*, *Wisconsin v. Mitchell*, 508 U.S. 476, 489–90 (1993) (upholding a hate crimes statute despite its First Amendment implications); *R.A.V. v. City of St. Paul*, 505 U.S. 377, 377 (1992) (invalidating a hate crimes statute on First Amendment grounds). But valid hate crimes statutes are still predicated on action, though the victim may have been selected for the action on the basis of a protected characteristic. The Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act, for example, makes it unlawful for anyone to “willfully cause[] bodily injury” or “attempt to cause bodily injury to any person,” because of an individual’s race, color, religion or national origin. 18 U.S.C. § 249(a)(1) (2012).

²¹⁵ *Powell*, 392 U.S. at 543 (Black, J., concurring); *see also Williamson v. United States*, 184 F.2d 280, 282 (2d Cir. 1950) (“[I]t is . . . difficult to reconcile with traditional American law the jailing of persons by the courts because of anticipated but as yet uncommitted crimes. Imprisonment to protect society from predicted but uncommitted offenses is so unprecedented in this country and so fraught with danger of excesses and injustice that I am loath to resort to it”); Holder Remarks, *supra* note 28 (“[C]riminal sentencing should *not* be based on . . . the possibility of a future crime that has not taken place”).

²¹⁶ *See* Barbara D. Underwood, *Law and the Crystal Ball: Predicting Behavior with Statistical Inference and Individualized Judgment*, 88 *YALE L.J.* 1408, 1437 (1979) (objecting to the functional

in a democratic society that depends on competing viewpoints and ways of life, subject again to the same criminal boundaries. Different views enrich and deepen our society. Accordingly, an anti-social lens through which the individual sees the world should not inform an individual's sentence.

* * *

These arguments challenge the centerpiece of risk-assessment tools: the fact that risk predictions—and the possibility of enhanced punishment—are premised on the basis of an individual's group identity or membership. There are ample reasons, grounded in the SRA, Commission conclusions, Court pronouncements, and the utilitarian purposes of punishment, to doubt whether such group-based determinations are a valid means by which to justify custodial decisions for the individual.²¹⁷

2. Punishment and Control

Risk-assessment tools raise additional concerns because individuals may be a member of a group for no fault of their own and may be unable to change whether or not to be in the group. In this respect, the tools may demand punishment for a group identity over which the individual has no meaningful control.²¹⁸

Both retributionists and utilitarians believe punishment should be imposed on the guilty. Rawls explains that “retributionists . . . insist[] . . . that no man can be punished unless he is guilty, that is, unless he has broken the law.”²¹⁹ Rawls adds that “utilitarians agree that punishment is to be inflicted only for the violation of law.”²²⁰ It is important to emphasize that “guilt” in this

inducement of punishment where “the induced behavior falls in a zone in which there is a strong social commitment to protecting an individual's private and personal choices”).

²¹⁷ One may claim that this subsection is, at bottom, a complaint that risk-assessments involve group-based, rather than individual-based, statistics, and that this concern dissipates if and when risk-assessments include more refined, intra-group data. The following argument would apply to risk-assessments even if the data were specified for each individual offender. *See* Coffee, *supra* note 23, at 1008 (commenting on “the jurisprudential issues that will remain even if the methodology employed is as precise and narrow as possible”).

²¹⁸ This point was raised recently by Attorney General Holder. *See* Holder Remarks, *supra* note 28 (“[Criminal sentencing] should *not* be based on unchangeable factors that a person cannot control . . .”).

²¹⁹ Rawls, *supra* note 31, at 7.

²²⁰ *Id.* Some posit that utilitarianism would justify the punishment of the innocent. *See, e.g.,* MOORE, *supra* note 31, at 93 (“The main problem with the pure utilitarian theory of punishment is that it potentially sacrifices the innocent in order to achieve a collective good.”). But at least some utilitarians have disavowed this charge. *See, e.g.,* Binder & Smith, *supra* note 70, at 118–19 (acknowledging that policies justifying punishment of the innocent “follow logically from the premises of utilitarianism,” but clarifying that “utilitarian penology cannot endorse punishment of the innocent”). As this Article addresses itself to the use of risk-assessments for purposes of determining whether imprisonment is an appropriate sanction and ascertaining the proper length of imprisonment,

sense is the technical breach of the law, or a descriptive fact. It is not necessarily a value judgment as to the qualitative nature of the breach, which words associated with retribution, such as “blameworthiness,” “desert,” and “moral responsibility,” tend to conjure up. Accordingly, both theories share the belief that punishment must follow guilt.

But not all who technically violate the law are punished. A hallmark of any legitimate legal system is that government may punish only decisions over which an individual can exercise sufficient agency.²²¹ As the Supreme Court has recognized, “It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil.”²²² Justice Byron White explained that, “The criminal law proceeds on the theory that defendants have a will and are responsible for their actions” and that individuals who “have chosen to engage in conduct so reprehensible and injurious to others . . . must be punished”²²³ In other words, the criminal law punishes an individual for choices—not thoughts—that undermine and impose harm on the public order.²²⁴

Our criminal law punishes only those individuals who choose to violate the law. It does not, therefore, punish those who cannot make moral choices for themselves, such as children, the intellectually disabled, or the insane. These individuals are considered categorically ineligible for criminal sanction because they cannot be “blameworthy in mind”; they lack the requisite mental capacity to meaningfully choose between good and evil.²²⁵ Children, for example, “are exempted from criminal liability to the extent that they have not yet developed into autonomous adults, and therefore lack the cognitive, emotional, and practical capacity to make rational decisions for which they are morally accountable.”²²⁶ The intellectually disabled “do not act with the level

this Article assumes that the offender is guilty. It therefore avoids any dispute regarding whether utilitarianism would subject the innocent to criminal sanction.

²²¹ See LON L. FULLER, *THE MORALITY OF LAW* 33, 39 (1969) (explaining that “rules that require conduct beyond the powers of the affected party” not only “result in a bad system of law,” but also “result[] in something that is not properly called a system of law at all” and, further stating, “a law which a man cannot obey, nor act according to it, is void and no law”); see also *California v. Brown*, 479 U.S. 538, 545 (1987) (O’Connor, J., concurring) (“[An] emphasis on culpability in sentencing decisions has long been reflected in Anglo-American jurisprudence.”).

²²² *Morissette*, 342 U.S. at 250.

²²³ *McKeiver v. Pennsylvania*, 403 U.S. 528, 551 (1971) (White, J., concurring); see also *Booth v. Maryland*, 482 U.S. 496, 502 (1987) (suggesting that a sentencer cannot consider that which has no “bearing on the defendant’s personal responsibility and moral guilt”) (internal quotation marks and citation omitted).

²²⁴ See 3 BLACKSTONE, *supra* note 37, at *2 (describing criminal violations as “public wrongs,” “which affect the whole community, considered as a community”) (emphases omitted).

²²⁵ *Morissette*, 342 U.S. at 252.

²²⁶ Sarah Abramowicz, *Rethinking Parental Incarceration*, 82 U. COLO. L. REV. 793, 848–49 (2011); see also *Roper v. Simmons*, 543 U.S. 551, 571 (2005) (recognizing the “diminished culpabil-

of moral culpability that characterizes the most serious adult criminal conduct.”²²⁷ And the insane, who “may not be regarded as moral agents, that is, persons . . . are incapable of making choices that count as such because of impaired reasoning and judgment.”²²⁸

In short, “It is generally agreed ‘that punishment should be directly related to the personal culpability of the criminal defendant.’”²²⁹ As the aforementioned examples show, certain individuals lack “personal culpability” and therefore should not be criminally sanctioned.

In contrast to this bedrock principle, risk-assessment instruments call for punishment without the individual choice that is ordinarily a prerequisite to criminal punishment.²³⁰ Indeed, risk-assessment tools subject a defendant to increased punishment because of immutable attributes, including race, sex, and national origin,²³¹ traits over which the defendant has no control and possesses by pure accident of birth.

The utilitarian theories of punishment generally do not support basing sentencing decisions on such factors. Deterrence theory holds that the offender and others in society should be incentivized to conform his or her behavior to the law. The incentive is meaningless if it is applied to a factor that the indi-

ity of juveniles” in finding unconstitutional the imposition of capital punishment on individuals who were under eighteen at the time of offense); *Thompson v. Oklahoma*, 487 U.S. 815, 835 (1988) (stating that “less culpability should attach to a crime committed by a juvenile than to a comparable crime committed by an adult,” and further stating that “[the] irresponsible conduct [of a juvenile] is not as morally reprehensible as that of an adult”); *Eddings v. Oklahoma*, 455 U.S. 104, 115–16 (1982) (“Our history is replete with laws and judicial recognition that minors, especially in their earlier years, generally are less mature and responsible than adults.”).

²²⁷ *Atkins v. Virginia*, 536 U.S. 304, 306, 316 (2002) (“[O]ur society views mentally retarded offenders as categorically less culpable than the average criminal.”). While the cases in this and the previous footnote arose in the context of capital sentences, they nonetheless stand for the unassailable proposition that diminished mental capacity diminishes culpability. *See id.*; *supra* note 226.

²²⁸ Sanford H. Kadish, *Excusing Crime*, 75 CAL. L. REV. 257, 262–63 (1987) (discussing individuals who possess “inadequate capacities for making judgments and exercising choice”); *see also* Francis Bowes Sayre, *Mens Rea*, 45 HARV. L. REV. 974, 1004 (1932) (“Insanity, which robs one of the power to make intelligent choice between good and evil, must negative criminal responsibility if criminality rests upon moral blameworthiness.”). Relatedly, Christopher Slobogin argues that individuals who experience “imperviousness” to criminal punishment—that is, who cannot be deterred from breaching the criminal law—may be subject to preventative civil detention. Christopher Slobogin, *A Jurisprudence of Dangerousness*, 98 NW. U. L. REV. 1, 4 (2003); *see Kansas v. Hendricks*, 521 U.S. 346, 358 (1997) (explaining that civil confinement is permissible for “those suffer from a volitional impairment rendering them dangerous beyond their control”).

²²⁹ *Thompson*, 487 U.S. at 834 (quoting *Brown*, 479 U.S. at 545 (O’Connor, J., concurring)).

²³⁰ *See Goodman*, *supra* note 200, at 521 (“To allow a criminal defendant’s sentence to be determined to any degree by his unchosen membership in a given race or class denies the very premise of self-determination upon which our criminal justice system is built. It raises the threat that defendants will be sentenced not on the basis of their personal merit or conduct, but on the basis of their ‘status.’”).

²³¹ *See Craig v. Boren*, 429 U.S. 190, 212 (1976) (Stevens, J., concurring) (noting race, national origin, and sex are immutable characteristics).

vidual has no actual or meaningful ability to change. That is, incentivizing conduct “depends on the mutability of the characteristic that forms the basis of classification.”²³² Where a trait is immutable—unchangeable—it obviously cannot be influenced to change by the criminal law. The deterrence rationale thus cannot justify punishment for those factors that the individual cannot effectively change.

A similar analysis follows under a rehabilitation model of criminal punishment. Rehabilitation serves as an opportunity for the offender to change his or her path such that he or she may be less likely to re-offend. Rehabilitative programs and activities must be directed towards that which the individual can improve. But there are some characteristics that rehabilitative efforts cannot affect because they are not susceptible to individual control. For example, an offender will still possess the same race and national origin no matter what programs he or she completes. As with deterrence, rehabilitation jurisprudence rejects sentencing based on these immutable factors.

By contrast, the incapacitation rationale would appear to cut the other way and would not be vulnerable to any such control-based limitations. Under pure incapacitation theory, individuals could be isolated from society if they presented a higher risk of re-offending, regardless of the individuals’ ability to change the grounds for the higher risk profile. For example, for a proponent of incapacitation, it is irrelevant whether an African-American cannot change his or her race; what matters instead is whether public safety would be served by punishment. Accordingly, the principal point of this subsection—that risk-assessment tools include only those characteristics over which the offender has meaningful control—would seemingly have no purchase in a purely incapacitatory sentencing regime.

But, as the categorical exclusion of some individuals demonstrates, our criminal justice system demands that criminal punishment be premised on those individuals who have the capacity of choice.

The constitutional requirement of proportional sentencing reinforces the concept that criminal punishment cannot roam beyond that for which the individual is responsible. As the Supreme Court said over a century ago, “it is a precept of justice that punishment for crime should be graduated and proportioned to offense.”²³³ To the extent that the incapacitation of an individual ven-

²³² JOHN HART ELY, *DEMOCRACY AND DISTRUST* 154–55 (1980) (“[C]lassifications geared to characteristics it is not within the power of the individual to change will not be amenable to immediate and innocent explanation in terms of altering the classifying characteristic’s incidence.”); Samuel A. Marcossou, *Constructive Immutability*, 3 U. PA. J. CONST. L. 646, 670 (2001) (“It is doubtful that classifications based on immutable characteristics can or will often be relevant to government classifications as to which deterrence is the underlying goal.”).

²³³ *Weems v. United States*, 217 U.S. 349, 367 (1910); *see also Rhodes v. Chapman*, 452 U.S. 337, 377 (1981) (Marshall, J., dissenting) (“A society must punish those who transgress its rules. When the offense is severe, the punishment should be of proportionate severity.”).

tures into such territory, the sanction would lose its character as a criminal one and could only be supported as a civil one.²³⁴ In short, while incapacitation, on its own, may allow for punishment without regard to volitional capacity, the Constitution and Supreme Court both suggest that, in our system, such capacity is necessary for criminal sanction.

C. Risk-Assessments Undermine Individual Autonomy

The first section in this Part addressed the mismatch between risk-assessment tools and individual conduct, and the second the mismatch between risk-assessment tools and that which the individual can control. The focus of this section is the mismatch between risk-assessment tools and the capacity of individuals to change over time. It establishes the role of individual autonomy in utilitarian penology, and then argues how risk-assessment tools fail to account for individual autonomy.

1. Individual Autonomy and Utilitarianism

Though an individual may change in some respects from one time to the next, the criminal law presupposes the continuity of an individual's identity, such that it would be appropriate to hold the individual responsible at a second moment for actions taken at a prior moment. As law professor Joel Feinberg writes, "All of our ordinary notions of responsibility . . . presuppose a relation of personal identity between earlier and later stages of the same self."²³⁵ Philosopher John Locke similarly noted that individual consciousness "extends itself beyond present existence to what is past" and thus may be held "accountable" for actions both past and present.²³⁶ Because of this unity of past and present, Locke asserts that "a sentence shall be justified by the consciousness all persons shall have, that they themselves, in what bodies soever they appear"²³⁷

In criminal law, individual identity must be seen as constant for the threshold question of who to punish, as this question is interested in attribution or traceability of actions and related harms.²³⁸ Indeed, offenders must bear re-

²³⁴ See *Kansas v. Crane*, 534 U.S. 407 (2002) (holding that civil commitment cannot be made without some inquiry into the individual's lack of control); *Kansas v. Hendricks*, 521 U.S. 346 (1997) (categorizing as civil, and upholding, a state statute authorizing the commitment of a sex offender who could not control his dangerousness).

²³⁵ Joel Feinberg, *Autonomy, Sovereignty, and Privacy: Moral Ideals in the Constitution?*, 58 NOTRE DAME L. REV. 445, 478 (1983).

²³⁶ JOHN LOCKE, AN ESSAY CONCERNING HUMAN UNDERSTANDING, bk. II, ch. xxvii, § 26, at 276 (Peter H. Nidditch ed., Oxford Univ. Press 1975) (1689).

²³⁷ *Id.*

²³⁸ This first question corresponds with the first question and answer posed by Rawls in his seminal discussion of rules: "Why was *J* put in jail yesterday?" Rawls, *supra* note 31, at 5. Answer: "Be-

sponsibility for their previous criminal actions and any resultant public harm—no one else should be forced to bear it for them. Moreover, the criminal law would unravel if an individual could avoid responsibility simply by claiming that he or she was sufficiently changed.

But individual identity can change. And in determining an appropriate punishment, the criminal law may consider these changes in the individual. Indeed, the utilitarian theories of punishment all assume that the individual identity can change with time and support the flexibility of punishment in light of these changes.

In particular, specific deterrence—incentivizing the offender to not recidivate—suggests that an individual who is sentenced, at time-*x*, for a criminal act will be able to determine, at time-*y*, that the consequences of the criminal action are not worth whatever profits it obtained. If the individual did not have the capacity to deliberate and engage in this cost-benefit analysis, and if the individual was unable to arrive at a different conclusion than the initial decision, specific deterrence would be meaningless. This is why Plato suggested that “rational punishment . . . is desirous that the man who is punished, and he who sees him punished, may be deterred from doing wrong again,” “thereby clearly implying that virtue is capable of being taught.”²³⁹ Deterrence theory thus presupposes that an individual can acquire “virtue”—here, acting lawfully.²⁴⁰ In short, an individual can change, and change for the better.

Under an incapacitation rationale, incarceration is legitimate only insofar as, and only for long as, the individual must be segregated from society. After that point, incarceration cannot be justified for incapacitation reasons. In other words, the incapacitation theory assumes that the offender is able to become less of a threat to society such that custodial detention is no longer appropriate.

In utilitarian jurisprudence, rehabilitation most strongly supports the idea that individuals can change. Rehabilitation rests on the promise that an individual’s ability to live lawfully will be heightened over time by programs and treatment. It presumes that the individual is capable of making progress over time.

In other words, utilitarian theories of punishment all suggest that people are capable of some internal shift, and may exercise choice in achieving this progress. Our current sentencing regime recognizes this as well. Two examples: first, inmates in the federal system may obtain an earlier release by earn-

cause he robbed the bank at *B*.” *Id.* In other words, “a particular man is punished, rather than some other man, because he is guilty, and he is guilty because he broke the law . . .” *Id.* at 6.

²³⁹ PLATO, APOLOGUE OF PROTAGORAS, in 1 THE DIALOGUES OF PLATO 145 (B. Jowett trans., New York, Oxford Univ. Press 3d ed. 1892) (c. 380 B.C.E.).

²⁴⁰ The punishment imposed on the individual may also impress upon members of the public, with greater force, that the costs of the crime are not worth its benefits, where this enhanced message again is suggestive of dynamism.

ing “good time” credits.²⁴¹ These credits encourage positive behavior; by offering them, the federal criminal justice system demonstrates that it understands that inmates may take the carrot and exhibit favored behavior.²⁴² Second, in the federal system, 97.2% of inmates are sentenced for less than life terms, meaning that this percentage of inmates will be eligible for release back into their communities.²⁴³ These sentences indicate that virtually all inmates, despite initially needing punishment, will at some point be deemed able to live in society without being a threat to public safety, and able to display the skills and tools necessary to stay within legal boundaries.

In sum, ideals of utilitarianism and individual autonomy support the notion that individuals may change and make positive choices. Individuals can and do change.

2. Individual Autonomy and Risk-Assessments

Predictions of future criminal behavior also have a temporal component: they consist of attempts to forecast, at sentencing, the future dangerousness of the individual at release. But risk-assessment tools discount the potential of the individual to develop over time, undermining the individual’s autonomy. That is, risk-assessment tools are stuck at sentencing: they assess an individual’s likelihood of future dangerousness by examining various characteristics that might change over time.

This creates undeniable tension between actuarial techniques and individual autonomy. This conflict has been highlighted: “To imprison a person because of the crimes he is expected to commit denies him the opportunity to choose to avoid those crimes”²⁴⁴ “[R]espect for individual autonomy,” it is added, “requires recognition of the possibility that an individual can choose to refute any prediction about himself.”²⁴⁵ In a similar point, it is argued that a restraint on liberty that is based on prediction “precludes the individual from taking steps to defeat the prediction and make the ‘right’ moral choice,” “assume[s] a fixed future,” and “destroy[s] the opportunity for individual self-determination—precluding the possibility that individuals can demonstrate

²⁴¹ 18 U.S.C. § 3624(b)(1) (2012) (allowing for 54 days of “good time” credit per year, for inmates with sentences of at least one year).

²⁴² *Barber v. Thomas*, 560 U.S. 474, 482 (2010) (explaining that the credits offer an “incentive” for inmates to comply with prison rules and that the credits “reward[] and reinforce[] a readily identifiable period of good behavior”).

²⁴³ Sentences Imposed, FED. BUREAU OF PRISONS, http://www.bop.gov/about/statistics/statistics_inmate_sentences.jsp, archived at <https://perma.cc/GNK6-UKJD?type=image> (last updated Jan. 24, 2015) (providing federal prison statistics based on data from December, 2014).

²⁴⁴ Underwood, *supra* note 218, at 1414.

²⁴⁵ *Id.*

their moral goodness and choose a course of action that differs from the prediction.²⁴⁶

In our system, to assign criminal responsibility, individual identity must remain constant; yet as noted above, individuals may change over time. This reality complicates the business of risk prediction. A law professor notes that, “[a]s time passes, increasingly weak psychological connections might exist with the past dangerous criminal,” which may “result in needlessly confining a presently nondangerous person.”²⁴⁷ From this perspective, “The accuracy of dangerousness predictions has an inverse relationship to the length of commitment or confinement.”²⁴⁸ In other words, recidivism can decline with time.²⁴⁹

The recent 2011 United States Supreme Court case of *Pepper v. United States* illustrates these principles.²⁵⁰ James Pepper was convicted of violating a federal drug conspiracy statute, 21 U.S.C. § 846, and sentenced to twenty-four months in prison.²⁵¹ The Supreme Court recounted that, “At the time of his initial sentencing in 2004, Pepper was a 25-year-old drug addict who was unemployed, estranged from his family, and had recently sold drugs as part of a methamphetamine conspiracy”²⁵² But, when Pepper had been resentenced in 2009, the Court observed, “Pepper had been drug-free for nearly five years, had attended college and achieved high grades, was a top employee at his job and slated for a promotion, had re-established a relationship with his father, and was married and supporting his wife’s daughter.”²⁵³

Pepper’s “exemplary”²⁵⁴ post-sentence conduct shows individual autonomy in action. Importantly, the Court noted that Pepper’s transformation “sheds light on the likelihood that he will engage in future criminal conduct

²⁴⁶ Jennifer C. Daskal, *Pre-Crime Restraints: The Explosion of Targeted, Noncustodial Prevention*, 99 CORNELL L. REV. 327, 364 (2014). As Daskal makes this argument in the context of noncustodial restraints on liberty, the force of this point is heightened with respect to the custodial restraints, such as pre-trial detention or post-conviction imprisonment, that are the subject of this Article. *See id.*

²⁴⁷ Rebecca Dresser, *Personal Identity and Punishment*, 70 B.U. L. REV. 395, 423, 443 (1990) (“[I]f the person subject to punishment has enough in common with the offender . . . then a plausible moral foundation exists for the later person’s punishment.”). *See generally* Steven Mazie, *The Waiting Game*, ECONOMIST (May 29, 2014), <http://www.economist.com/blogs/democracyinamerica/2014/05/death-row>, archived at <http://perma.cc/W4PE-PYUA> (discussing the disconnect between the individual and the “past self” in the context of sentencing).

²⁴⁸ Meghan Shapiro, *An Overdose of Dangerousness: How “Future Dangerousness” Catches the Least Culpable Capital Defendants and Undermines the Rationale for the Executions It Supports*, 35 AM. J. CRIM. L. 145, 152 (2008).

²⁴⁹ *See* Lahny R. Silva, *Clean Slate: Expanding Expungements and Pardons for Non-Violent Federal Offenders*, 79 U. CIN. L. REV. 155, 199 (2010) (“[R]ecidivism rates among non-violent offenders decline with the passage of time.”).

²⁵⁰ 131 S.Ct. 1229 (2011).

²⁵¹ *Id.* at 1236.

²⁵² *Id.* at 1242.

²⁵³ *Id.*

²⁵⁴ *Id.*

... ”²⁵⁵ For the Court, the defendant’s behavioral progress over time informed the prediction of future criminality.

Risk-assessment tools, however, would have instructed a court to sentence Pepper more harshly (e.g., imprisonment or a longer term of imprisonment) because of his younger age, substance abuse, unemployment, and weak family ties—which all indicate a higher risk of recidivating.²⁵⁶ It is true that a new risk profile may be calculated at different stages of the criminal justice process, such as bail-setting to sentencing, and thus changes in the individual may be reflected in newer risk profile. But, as Pepper’s situation shows, certain traits are fixed and even revised risk scores will build-in the higher risk predictions called for by these traits and thereby point to a greater form and/or length of sanction. The individual’s ability to advance is held back at each stage, a Zeno’s paradox in which the individual’s ability to reach a sufficient point of personal development is continuously frustrated.

Prison, unfortunately, is a difficult place that compromises this personal transformation. Indeed, Congress itself has expressed that the penal environment is not conducive to rehabilitation. The SRA flatly states that “imprisonment is not an appropriate means of promoting correction and rehabilitation.”²⁵⁷ Yet risk-assessments tools often call for an offender to be detained—sometimes for lengthy periods—because he or she risks recidivating. “Risk-assessment tools that support custodial detention could not only impede the individual’s development, but could even send him or her in the opposite direction. Empirical evidence bears this out. For example, when low-risk defendants are “detained pretrial, they are more likely to commit new crimes both in the near and long term,” and that this cycle “carries enormous costs—both human and financial.”²⁵⁸

The individual’s subsequent failure to reform—arguably facilitated by sentences supported by risk-assessment tools—would be a self-fulfilling prophecy. Furthermore, that assisted failure would in turn validate risk-assessments for being “right” about the analyzed individual. Risk-assessments minimize the criminal justice system’s interest in investing in an offender deemed statistically high-risk.²⁵⁹ The sentencer not only actively impairs the

²⁵⁵ *Id.*

²⁵⁶ See Oleson, *supra* note 134, at 1351.

²⁵⁷ 18 U.S.C. § 3582(a) (2012).

²⁵⁸ LAURA & JOHN ARNOLD FOUND., RESEARCH SUMMARY, DEVELOPING A NATIONAL MODEL FOR PRETRIAL RISK ASSESSMENT 2 (Nov. 2013), available at http://arnoldfoundation.org/sites/default/files/pdf/LJAF-research-summary_PSA-Court_4_1.pdf, archived at <http://perma.cc/5TMA-583F>.

²⁵⁹ See Underwood, *supra* note 218, at 1417 (“[T]he decisionmaker [is] discouraged from acting to improve the chances of the people identified as bad risks. A decisionmaker who selects and excludes individuals on the basis of their predicted behavior tends to view the prediction as a fixed attribute of the applicant, and tends not to consider ways of intervening to change the situation.”).

offender's prospects for development by choosing to detain him or her, but then neglects his or her development because the offender is too risky and thus "not worth it." Risk-assessments can thus "track"—grouping individuals based on lower expectations of future performance, and providing diminished support in light of those expectations—criminal defendants under the cover of statistical rationality.²⁶⁰

In acknowledging that numbers accurately capture individuals' rates of recidivism, it must be cautioned that numbers don't tell the whole story:

[T]he system spews out on the back-end of convictions nothing better than what's taken in on the front end. It would clearly suggest that people of color are more prone to be criminals in the first place, and more prone to recidivism afterward. That's the story the numbers tell. But the numbers are only as good as the input.

More young black men are recidivists because more black men are arrested, even though there is evidence that they don't commit more crimes than white men. They just get arrested more, because they are who the police spend their time arresting. This gives rise to an internal community spiral, missing fathers (because they're in prison), poor education, poor job prospects, etc. Toss in a criminal conviction and ask empiricism why they aren't being hired for well-paying jobs at IBM.²⁶¹

Individuals can beat the odds, averages notwithstanding, as the *Pepper* case illustrates. Moreover, we should want individuals to beat the odds.²⁶² We should want individuals to be productive. We should seek to help facilitate the development of the individual such that he or she can be part of mainstream society upon release.²⁶³ In fact, this is imperative because almost all offenders will be released back into our communities.²⁶⁴

²⁶⁰ See Daniel J. Losen, *Silent Segregation in our Nation's Schools*, 34 HARV. C.R.-C.L. L. REV. 517, 518–20 (1999) (discussing similar problems with school segregation); Angelia Dickens, Note, *Revisiting Brown v. Board of Education: How Tracking Has Resegregated America's Public Schools*, 29 COLUM. J.L. & SOC. PROBS. 469, 475–78 (1996) (commenting on the lower opportunities and resources for and lower expectations of tracked students).

²⁶¹ Scott H. Greenfield, *Numbers Don't Lie (But People Do)*, SIMPLE JUSTICE (Aug. 11, 2014, 1:05 PM), <http://blog.simplejustice.us/2014/08/11/numbers-dont-lie-but-people-do/>, archived at <http://perma.cc/GZL8-N8V4>.

²⁶² See Wolff, *supra* note 91, at 1416 ("For any sentence shorter than life imprisonment, from the day an offender enters prison, the system should be preparing for his or her release by developing a reentry plan that will put that person back in the community with enough support to reduce the chances of reoffending.").

²⁶³ See Dawinder Sidhu, *We Don't Need a 'Right to Be Forgotten.' We Need a Right to Evolve.*, NEW REPUBLIC (Nov. 7, 2014), <http://www.newrepublic.com/article/120181/america-shouldnt-even-need-right-be-forgotten>, archived at <http://perma.cc/HDG6-HRCC> ("Social support can enhance a

It is true that, as a general matter, individual development, typified by rehabilitation, has fallen out of favor in American sentencing.²⁶⁵ But Congress codified rehabilitation as a purpose of sentencing in the SRA²⁶⁶ and as such indicated that transformative considerations should inform, at least to some degree, sentencing in the federal courts. That is, individual progress over time may no longer be a dominant goal of punishment, but it cannot be disregarded wholesale. The Supreme Court has recognized, for example, juveniles' "heightened capacity for change," a capacity that exists, albeit perhaps not to the same degree, for adults.²⁶⁷ Given this, the possibility that risk-assessment tools might stunt the capacity for exercising choice is troubling, and should perhaps temper their use.

This section's argument is of course utilitarian in nature. It need not recruit retribution as a side constraint on utilitarianism. This is because the utilitarian theory recognizes changeover time and it is the offender's change in threat to public safety that marks the beginning and end of the applicable timeframe. He or she is a sufficient danger to public safety at time-x, warranting punishment, but his or her threat-level is diminished at time-y, such that punishment is no longer warranted and release is appropriate. That change is in—and can only be attributed to—the offender.

* * *

In summary, risk-assessment tools that predict recidivism through group characteristics are problematic for three independent reasons: first, the Equal Protection Clause would prohibit, and the SRA expressly forbids, certain factors from use in sentencing. Second, even if these factors are not prohibited on constitutional or statutory grounds, risk-assessment tools premise sentencing decisions on group identity rather than on individual action or that which the individual can meaningfully control. Third, risk-assessment tools require that the individual be construed as a static entity predisposed to re-offend, without regard to the individual's prospects for change, and with the effect of making the individual's development a more distant possibility.

person's prospects for employment and contributions to their families, their communities, and the workforce.").

²⁶⁴ See Sentences Imposed, *supra* note 251 (noting that 97.2% of inmates are eligible for release).

²⁶⁵ See *Tapia v. United States*, 131 S.Ct. 2382, 2387 (2011).

²⁶⁶ 18 U.S.C. § 3553(a)(2)(D) (2012). Outside of Congress, the model is still viable. See Editorial, *Writing Off Lives*, N.Y. TIMES, Sept. 30, 2013, at A24 (suggesting that long-term imprisonment for low-level drug offenses "ignores the potential for rehabilitation").

²⁶⁷ See *Miller v. Alabama*, 132 S. Ct. 2455, 2469 (2012).

IV. APPLYING LIMITS TO RISK-ASSESSMENT TRAITS

This Part applies the three principles enumerated in Part III to the major factors used in risk-assessment tools. Section A analyzes seventeen major risk-assessment factors and argues that each of these traits should be off-limits for risk-assessment purposes. Section B responds to potential criticisms to this argument.

A. Analyzing Risk-Assessment Factors

1. Traits Prohibited by Law

The first step is rather straightforward: it is impermissible under the Equal Protection Clause to use race, sex, national origin, or religion as a factor in risk-assessment tools. The use of these traits is presumptively unconstitutional, and the limited permissible purposes carved out by the Supreme Court, including responding to imminent public safety emergencies, cannot be read to encompass a general public safety goal.²⁶⁸ In addition, the SRA, by its own terms, states that the federal sentencing policy shall be “entirely neutral” as to these four factors as well as to socio-economic status.²⁶⁹ Five of the seventeen may therefore be comfortably removed from consideration in predictive instruments.

2. Traits Outside Individual Conduct and Control

Risk-assessment tools rely on data that specific groups recidivate at certain rates and assign the same risk profile to each member of the group. But as discussed above, this approach raises significant concerns by treating each individual in a group as a monolithic entity. These concerns apply to each of the seventeen factors, which are all premised on averages and do not take into account individualized variations within a group.

In addition to a prediction of recidivism, risk assessment tools assign a future dangerousness score to an individual solely because the individual has a characteristic that is shared with others in the group. But as discussed above, the individual may not have any control over the characteristics that form the basis for the group membership. Subjecting an individual to punishment for immutable traits severs the fundamental link between punishment and individual conduct that the criminal law demands.

Race, sex, national origin, and age. Traits that the individual cannot control include race, sex, national origin, and age. The inability of the individual to control his or her race, sex, national origin, or age requires no elaboration.

²⁶⁸ See *supra* notes 202–206 and accompanying text.

²⁶⁹ 28 U.S.C. § 994(d) (2012).

Criminal behavior of family members, family rearing practices, family structure. Offenders also cannot control traits relating to family: the criminality of family members, family rearing practices (i.e., “lack of supervision and affection, abuse”),²⁷⁰ and family structure (i.e., “separation from parents, broken home, foster parents”).²⁷¹ Individuals cannot, of course, choose their family members (outside of marriage and children). Assigning blame, therefore, because of the conduct of a family member is fundamentally improper—and our law recognizes this. For example, the Supreme Court has admonished that punishing a child for the actions of his or her parents is “illogical,” “unjust,” and “contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing.”²⁷² Accordingly, individuals should not be punished for the actions, moral failures, or the abuse or neglect visited upon them by others, since the individual cannot control others’ actions or the existence of the family relationship with these others. True, an individual may be able to control entry of some individuals, namely spouses and children, into the family. But risk-assessment tools do not hold individuals accountable for the actions of only these family members, but does so for all family members including those whose family membership is beyond the individual’s control.

Pre-adult criminal behavior, mental illness, and substance abuse. Forbidden traits also should include pre-adult criminality. The Supreme Court has held that criminal responsibility attaches when the defendant can meaningfully exercise choice. According to the Court, the diminished capacity of children undermines the penological value of a defendant’s pre-adult actions.²⁷³ Relatedly, the Supreme Court has instructed that a defendant’s mental illness or substance abuse may diminish the defendant’s culpability, though these factors indicate a higher likelihood of recidivating.²⁷⁴ (Though the Court, in the same breath, has cautioned that such illness or abuse may also lead jurors to believe that such a defendant poses a heightened risk to public safety and therefore requires even greater penal attention).²⁷⁵ While these factors are a double-edge

²⁷⁰ Paul Gendreau et al., *A Meta-Analysis of the Predictors of Adult Offender Recidivism: What Works!*, 34 CRIMINOLOGY 575, 597 (1996).

²⁷¹ *Id.*

²⁷² *Plyler v. Doe*, 457 U.S. 202, 220 (1982).

²⁷³ See *Roper v. Simmons*, 543 U.S. 551, 551 (2005); *Thompson v. Oklahoma*, 487 U.S. 815, 835 (1988); *Eddings v. Oklahoma*, 455 U.S. 104, 115–16 (1982).

²⁷⁴ See Gendreau et al., *supra* note 278, at 583; Oleson, *supra* note 134, at 1362–63; see also GUIDELINES MANUAL, *supra* note 57, § 5H1.4 (“Substance abuse is highly correlated to an increased propensity to commit crime.”).

²⁷⁵ See *Cullen v. Pinholster*, 131 S.Ct. 1388, 1410 (2011) (evidence about mental illness and substance abuse is not “clearly mitigating” because a jury may conclude that the defendant “was simply beyond rehabilitation,” suggesting further that such evidence can be a “two-edged sword”) (internal quotes and citation omitted); *Brewer v. Quarterman*, 550 U.S. 286, 293 (2007) (mitigating evidence

sword in terms of culpability and future dangerousness, risk-assessment tools seek to have it only one way, treating the factors as categorically aggravating. To make either of these traits *per se* aggravating, despite the fact that they may cut either way, essentially eliminates individualized determinations as to the appropriateness of criminal sanction.

Socio-economic status. Individuals are not able to glide at will through different socio-economic classes. In fact, the reality of economic stagnation and impoverishment signal the exact opposite: many individuals are effectively stuck in their social situations and physical locations.²⁷⁶ For example, sociological analyses show that individuals in areas of concentrated urban poverty have great difficulty achieving social mobility.²⁷⁷ Despite the fact that individuals may not be able to meaningfully control their socio-economic status, risk-assessments treat this status as categorically relevant because of its high correlation with recidivism. As this factor would subject the individual to higher punishment on the basis of conditions the individual cannot meaningfully control, the factor must be disregarded in risk-assessments, regardless of its statistical validity.

Criminal companions. The “criminal companions” factor is also related to socio-economic status. Some individuals, because of their depressed economic state, may not have the ability or resources to “extricate themselves from a criminogenic setting.”²⁷⁸ Indeed, the salience of having criminal companions, another major factor that correlates with future dangerousness, is questionable for two reasons. First, as the conspiracy doctrine makes clear, whether an individual’s companions engage (or don’t engage) in criminal action means little for legal purposes, unless the individual himself or herself signs on to the criminal enterprise. To the extent that an individual may be held accountable for the criminality of others, it is because the individual has exercised choice in whether or not to join the conspiracy. An individual may not, without more, be subject to punishment merely on the basis of associating with others.²⁷⁹ It was

that included evidence that the defendant had depression and abused drugs “tended to confirm the State’s evidence of future dangerousness as well as lessen his culpability for the crime”).

²⁷⁶ See Fareed Zakaria, *The Downward Path of Upward Mobility*, WASH. POST (Nov. 9, 2011), http://www.washingtonpost.com/opinions/the-downward-path-of-upward-mobility/2011/11/09/gIQAegpS6M_story.html, archived at <https://perma.cc/AQ39-GTZX?type=pdf> (“[O]ver the past decade, growing evidence shows pretty conclusively that social mobility has stalled in this country.”).

²⁷⁷ See Dawinder S. Sidhu, *The Unconstitutionality of Urban Poverty*, 62 DEPAUL L. REV. 1, 23–27 (2012) (discussing the limited physical and social mobility of individuals living in areas of concentrated urban poverty).

²⁷⁸ *Roper*, 543 U.S. at 569 (internal quotes and citations omitted).

²⁷⁹ It is true that a standard condition of supervised release is a restriction on associational rights. See 28 C.F.R. § 2.204(a)(5)(v) (2014) (“The releasee shall not associate with a person who has a criminal record without permission from the supervision officer.”). It should be noted, however, that this qualified right of association is connected to, and justified on the basis of, an individual’s instant of-

Tocqueville who recognized that “[t]he right of association . . . appears . . . almost as inalienable in its nature as the right of personal liberty. No legislator can attack it without impairing the foundations of society.”²⁸⁰

Second, individuals who live in areas of concentrated poverty unjustifiably face the prospect of an adverse risk profile—and the harsher punishment that typically follows. These individuals, due to their limited physical mobility, may be stuck—they have little choice but to associate with individuals around them, even those who are criminals. But risk-assessment tools fail to recognize these problems and would ensnare anyone in or around an area with criminals. This remains true even for individuals who do not engage in the critical step of affirmatively supporting the criminal activity or inclinations of others.

Education and vocational skills, employment record, and community ties. In the SRA, Congress declared that the following factors are generally inappropriate in determining whether and how long to imprison an offender: “education, vocational skills, employment record, family ties and responsibilities, and community ties”²⁸¹ There may be special circumstances in which the general rule does not govern and these factors do become relevant in sentencing, as the Supreme Court stated in *Koon*.²⁸² But risk-assessment tools would make these factors categorically relevant in sentencing irrespective of the circumstances of the individual, thus offending both Congress’s statutory determination and the Court’s ruling in *Koon*.

Religion and anti-social attitudes and personality. Similarly, risk-assessment tools should not rely on religion or anti-social attitudes or personality. Criminal responsibility cannot exist when an individual does not act, and as a result cannot be based on what or how someone thinks. Religious views and anti-social sentiments are intrinsically internal in nature and should remain immune from criminal punishment, unless those thoughts indicate an actual or imminent threat to public safety.²⁸³ Moreover, an individual’s ideology, attitude, and life decisions, such as whether to get married or pursue higher education, are the type of “personal and private choices” that are reserved for the individual.²⁸⁴ Choices that reflect an individual’s autonomy should not open up the individual to punishment, provided that the decisions remain within the bounds of the law.

Adult criminal history. The final characteristic of the seventeen is adult criminal history. It is true that adult criminal history, as with all other factors, is

fense. An individual is not in the first instance punished because of whom he or she associates with in the absence of criminal wrongdoing.

²⁸⁰ ALEXIS DE TOCQUEVILLE, 2 DEMOCRACY IN AMERICA 203 (Bradley ed., Vintage 1954) (1840).

²⁸¹ 28 U.S.C. § 994(e) (2012).

²⁸² See *Koon v. United States*, 518 U.S. 81, 96 (1996).

²⁸³ See *Schall v. Martin*, 467 U.S. 253, 255–59 (1984).

²⁸⁴ Underwood, *supra* note 218, at 1437.

vulnerable to the charge that risk-assessments designate a blanket risk profile to all members of a group and fail to identify the risk of recidivism for individuals within a group. Other considerations, however, mitigate these concerns and would allow risk-assessments to make use of adult criminal history. First, adult criminal history most reflects individual choice and what the individual can control, as adult criminal history is based on criminal violations committed with sufficient mental maturity. Second, individuals who have failed to bring their conduct within the bounds of the law, despite past corrective action taken by the criminal justice system, reveal themselves as particularly in need of additional help to make lawful choices.²⁸⁵ Accordingly, adult criminal history may be appropriately used for predictive purposes without punishing offenders for traits outside of their control.

3. Traits That Undermine Individual Autonomy

The last overarching concern with risk-assessment tools is that they undermine the ability of individuals to exercise autonomy and develop over time. Risk-assessments are in tension with individual autonomy for two reasons: first, risk-assessments do not contemplate the ability of the individual to exercise choice and defeat his or her recidivism prediction; second, and arguably worse, risk-assessments may authorize greater punishment and in doing so make it less likely that the individual will be able to progress from the time of sentence to the time of release. Indeed, Congress has recognized that the more an individual is punished, the less likely the individual will rehabilitate.²⁸⁶ Accordingly, in supporting more stringent punishment, and thereby moving the rehabilitative goalposts further out from the individual, risk-assessments may actually facilitate the recidivism of the individual and simultaneously reinforce the validity of recidivism statistics. This general concern does not depend on the particular risk factor at issue and therefore applies to risk-based assessments as a whole.

As adult criminal history is the only factor that survives the previous analyses, this Article addresses here only whether this factor adequately recognizes individual autonomy. People change over time—that much is undisputed. As *Pepper* makes clear, an individual at release may be materially different from that same person at sentencing. An individual who commits a crime at age eighteen may be the same person in body and name at age thirty, forty, or fifty, but may be someone else entirely in other respects.

²⁸⁵ See *Rummel v. Estelle*, 445 U.S. 263, 276 (1980) (the state has a legitimate interest “in dealing in a harsher manner with those who by repeated criminal acts have shown that they are simply incapable of conforming to the norms of society as established by its criminal law”).

²⁸⁶ See 28 U.S.C. § 994(k).

Criminal law reflects this potential for internal development. Take the Sentencing Guidelines' chapter on criminal history as an example. Pursuant to this chapter, criminal sentences exceeding one year and one day that are more than fifteen years old are not added to an offender's criminal history points for Guidelines calculation purposes.²⁸⁷ Nor are criminal sentences of at least sixty days if those sentences are more than ten years old.²⁸⁸ Other criminal sentences not covered by these two exclusions are not counted if they are more than ten years old.²⁸⁹ The reasons why these outdated sentences are not counted is rather simple: they do not accurately capture the individual's current threat to society, and an individual's "desert" for prior crimes has grown stale. In other words, the older sentences may not be indicative of the internal progress that the offender has made over time.

Conduct that may have happened many years ago may be relevant if it is similar to the type of conduct presently at issue. The Sentencing Guidelines, for example, enable a judge to count these older sentences towards the offender's criminal history if the older conviction is "similar" to the current offense.²⁹⁰ The courts have taken an identical approach. In *United States v. Lucero*, for example, a federal appeals court recognized that a defendant's admission that he sexually touched his eight or ten year old nieces over thirty-five years ago was relevant for purposes of sentencing for his child pornography convictions, despite the significant time that had passed.²⁹¹

But risk-assessment tools using adult criminal history may not make use of these critical temporal and qualitative limitations. Take, as an example, a widely-discussed November 2013 study. The study suggests that a risk-assessment instrument consisting of factors related only to criminal history is an accurate predictor of future criminal activity.²⁹² In the study, four statistically significant factors related to criminal history were used: 1) does the defendant have prior misdemeanor convictions, 2) does the defendant have prior felony convictions, 3) does the defendant have prior violent crime convictions, and 4) is the defendant currently on probation/parole from a felony conviction?²⁹³

This predictive tool, however, does not confine the adult criminal history to convictions that are relevant either in time or type. For the usage of adult criminal history to avoid encroaching on individual autonomy, risk-assessment

²⁸⁷ See GUIDELINES MANUAL, *supra* note 57, § 4A1.1.

²⁸⁸ *Mistretta v. United States*, 488 U.S. 361, 370–71 (1989).

²⁸⁹ *Id.*

²⁹⁰ *Id.* at 373–74.

²⁹¹ 747 F.3d 1242, 1248–49 (10th Cir. 2014).

²⁹² MARIE VAN NOSTRAND & CHRISTOPHER T. LOWENKAMP, ASSESSING PRETRIAL RISK WITH A DEFENDANT INTERVIEW 12, 13, 16, 20 (2013).

²⁹³ *Id.* at 13 (showing a table of risk factors).

tools may use adult criminal history only if there are temporal and qualitative limitations akin to those found in the Sentencing Guidelines. The unqualified use of adult criminal history does not contemplate the possibility that individuals may change over time and potentially reduce their threat to the public and their need for moral “desert.” To punish individuals for their past actions, without the requisite meaningful connection to those incidents, would have the consequence of needlessly placing the offender in Zeno’s paradox and rendering his or her internal progress a more distant prospect.

Where does this analysis lead us? On the one hand, a judge can take into account any and all factors in order to develop a sense of an individual’s future dangerousness and determine whether and how long the individual should be sentenced to prison or sent to a diversion program. On the other hand, a judge can make these decisions according to the underlying offense for which the individual was arrested or convicted, without regard to the offender’s characteristics.

In fact, neither of these extreme positions is viable. The former, judge-centric approach would invite the sort of subjectivity that facilitates sentencing disparities and impressions of unfairness in sentencing.²⁹⁴ The latter, offense-centric approach would be consistent with sentencing at the time of the founding, but would be inconsistent with modern sentencing’s preference for punishment to be tailored to the particularized circumstances at hand.²⁹⁵ This reality highlights the inherent tension between uniformity and individualization. The proper balance must be found in the middle ground between the opposite ends of the spectrum.

In an effort to find this middle ground, predictions of risk should include only those factors over which the individual has actual or meaningful control, and that reflect the possibility that the individual may change over time. Applied to seventeen major characteristics, all seventeen are problematic—yet adult criminal history may be used with the proper temporal and qualitative limitations. Utilitarian considerations, Supreme Court opinions, the SRA, and Sentencing Guidelines all support these restrictions on actuarial predictive instruments.

²⁹⁴ See Robinson, *supra* note 78, at 20–21 (suggesting that the absence of any unifying principle among the theories of punishment enables judges to cherry-pick theories that support a desired sentencing outcome).

²⁹⁵ See *Williams v. New York*, 337 U.S. 241, 247 (1949) (“[T]he punishment should fit the offender and not merely the crime”); *cf. Koon*, 518 U.S. at 113 (“It has been *uniform and constant* in the federal judicial tradition for the sentencing judge to consider every convicted person as an individual and every case as a unique study in the human failings that sometimes mitigate, sometimes magnify, the crime and the punishment to ensue.”) (emphasis added).

B. Responses to Potential Counter-Arguments

This argument may provoke several critical responses, which this Article will attempt to anticipate and mollify.

First, empiricists may argue that risk-assessment tools are a mechanism by which to improve sentencing by replacing clinical or judicial intuition with objective statistical data, allowing courts to reliably differentiate between low-risk and high-risk offenders and allocate limited resources towards those who need them most. Similarly, they may claim that the factors that this Article has brushed aside are not only useful in this risk-prediction enterprise, but their predictive value only enhances when the factors are used in the aggregate and interact with one another.²⁹⁶

To this, this Article would remind the reader that the statistical superiority of risk-assessment tools has been assumed here. Others already have praised factors that this Article has discarded.²⁹⁷ That is to say, this Article acknowledges that the factors reliably track risk, yet nonetheless diagnoses principled problems with these factors, whether used in isolation or in some combination. The statistical significance of the factors cannot be viewed in a vacuum—there are legal and theoretical considerations that also must be taken into account.²⁹⁸ Put directly, the use of risk-assessment instruments in the criminal justice system must arise from the theories of punishment and the law, not simply be spit out by a printer or entered on a database. This Article suggests that jurisprudential and legal considerations trump whatever statistical advantages may be derived from the use of the problematic factors.

Second, some concerned with the “positive” promise of risk-based assessments—that they help the sentencer identify low-risk offenders who should not be in prison, who should be in a prison for a shorter term, or who should be sent to a diversion program—may argue that, under this Article’s proposal, individuals will not be able to benefit from risk-assessment tools, and instead will needlessly languish in prison without presenting any real risk of recidivating, and that taxpayer dollars will be misallocated as a result. According to these critics, for every factor that is excluded, individuals who would be high risk under that factor may be saved from the adverse consequences, but individuals who may be low risk according to that same factor would lose out

²⁹⁶ See Coffee, *supra* note 23, at 1022–23 (“[W]e should look not at the isolated impact of a single criterion, but at the aggregate efficiency of all the criteria.”); see also Slobogin, *supra* note 26, at 125 (“[S]tatistical inference is individualized, or case-specific, in the sense that it predicts the chances that a certain individual, because of particular traits she possesses, will act out violently in the future.”).

²⁹⁷ See Oleson, *supra* note 134, at 1356–59 (highlighting race as a “robust predictor of re-arrest in modern America”).

²⁹⁸ See Coffee, *supra* note 23, at 1013 (“Followed blindly, the goal of efficiency seems likely to conflict eventually with the moral underpinnings of our criminal justice system.”).

on favorable consequences stemming from the low risk score. They also would observe that, in general, this Article has focused on the “negative” side of the use of risk-assessment tools: their use to justify increased punishment, as opposed to their use to minimize punishment.

This Article accepts the charge as to the “negative” orientation of this Article. Some have stated already that predictive techniques should be used only to reduce punishment and not enhance it.²⁹⁹ Judge Wolff writes that “the severity of a punishment should not be based on a risk-assessment prediction.”³⁰⁰ Another scholar writes that “actuarial tools are on firmer legal ground when used as shields rather than as swords.”³⁰¹ The commentary to the draft revisions to the Model Penal Code similarly counsels “skepticism and restraint” with respect to “the use of high-risk predictions as a basis of elongated prison terms,” and endorses “the use of low-risk predictions as grounds for diverting otherwise prison-bound offenders to less onerous penalties.”³⁰² In reality, however, risk-assessments are not limited to sentence reduction; they remain open to use for sentence enhancement.³⁰³ As a result, the understandable preference for the positive use of actuarial instruments does not eliminate the very real possibility that these instruments may be used in both directions.³⁰⁴

Moreover, considerations of individual control and social equity demand a negative-centric approach. Whereas risk-assessment tools, left untouched, would ostensibly enhance punishment for some and minimize punishment for others, this Article suggests that only factors that reflect individual control and choice should be included in risk assessment. If only those factors are included, all individuals would have a similar starting point in their risk score, and any deviation from that starting point could be fairly attributed only to the meaningful choices of the individual. In practical terms, it is true that this proposal would mean that a white, rich, educated person would not get the benefit of the application of unmodified risk-assessment tools, which may, for example, counsel against pre-trial detention, for diversion programs, or for less prison time. It would mean, however, that a poor black person would not face pre-trial detention, imprisonment, or a longer term of imprisonment due to irrele-

²⁹⁹ See David E. Patton, *Guns, Crime Control, and a Systemic Approach to Federal Sentencing*, 32 CARDOZO L. REV. 1427, 1456 (2011).

³⁰⁰ Wolff, *supra* note 91, at 1405.

³⁰¹ Patton, *supra* note 299, at 1456 (quoting Margaret Etienne, *Legal and Practical Implications of Evidence-Based Sentencing by Judges*, 1 CHAP. J. CRIM. JUST. 43, 51 (2009)).

³⁰² MODEL PENAL CODE: SENTENCING § 6B.09, 54 (tentative draft No. 2, Mar. 25, 2011).

³⁰³ Starr, *supra* note 91, at 816 (“[T]he actual content of [the Model Penal Code’s proposed risk-assessment provision] endorses incorporation of risk assessment procedures into sentencing guidelines, including for the purpose of increasing sentences.”).

³⁰⁴ Judge Wolff notes that the draft Model Penal Code “encourages the use of risk-assessment instruments, especially” — but not exclusively — “to identify low-risk offenders who should be diverted from prison.” Wolff, *supra* note 91, at 1406 (emphasis added).

vant racial and wealth characteristics.³⁰⁵ In the end, this proposal means that, for both of these people, their sentences would be adjusted on the basis of what they have done (the instant offense) and what they have done in the past (their relevant adult criminal history), not on characteristics unconnected to their actions.³⁰⁶ In this sense, the values of individual choice in criminal law and equity are better served.³⁰⁷

Third, some may react to the concern that risk-assessment tools ascribe a monolithic risk profile to individuals in a group by recommending a blended approach that combines the actuarial and clinical models. Under this approach, “Actuarial data could establish a ‘base rate’ for violent behavior for a population with given characteristics” and then clinical assessments would “discern whether a member of this particular group diverged from the group norm because of characteristics not included in the statistical survey.”³⁰⁸ This creative approach is intuitively appealing, though it could only be applied to characteristics that are amenable to divergence (e.g., not race, national origin, sex, age). Yet more fundamentally, this combined strategy seems to expose the unneeded nature of risk-assessments: why not probe individual action directly instead of determining whether the individual departs from the group? Moreover, even those characteristics that can be changed in theory may still be problematic, as adult criminal history unlimited by time shows.

Fourth, proponents of data-driven sentencing schemes may lament the fact that copious statistical information would have little place in sentencing under this Article’s proposal. That is not true. This Article suggests that the use of actuarial instruments should be significantly circumscribed for purposes of assessing risk and informing sentencing decisions on imprisonment. It would allow, however, the use of predictive data to identify offenders’ needs and to determine thereby what programs should be afforded to offenders to facilitate their rehabilitation and reduce the likelihood that they will re-offend.³⁰⁹ For example, Attorney General Holder stated that “[d]ata can also help design paths for federal inmates to lower [their] risk assessments, and earn their way

³⁰⁵ See Holder Remarks, *supra* note 28 (expressing concern that risk-assessment tools “may exacerbate unwarranted and unjust disparities that are already far too common in our criminal justice system and in our society”).

³⁰⁶ Accordingly, to the extent that the controversy over actuarial risk-assessments is a proxy for broader debates about whether liberty or equality should be the dominant objective in sentencing, this Article does not select between the two, but pays tribute to both virtues.

³⁰⁷ See Eaglin, *supra* note 180, at 212 (suggesting that actuarial tools perpetuate a “misguided focus” on only “low-level, low-risk offenders”).

³⁰⁸ Slobogin, *supra* note 26, at 110.

³⁰⁹ See MODEL PENAL CODE: SENTENCING § 6B.09 reporter’s n.(a) (tentative draft No. 2, Mar. 25, 2011) (contrasting risk assessments, which “may be defined as predicting who will or will not behave criminally in the future,” with needs assessments, which “may be defined as using predictive methods to attempt a reduction in criminality through assignment to different treatments”) (citation and internal citation marks omitted).

towards a reduced sentence, based on participation in programs that research shows can dramatically improve the odds of successful reentry.”³¹⁰ These approaches, he continued, “hold the potential to revolutionize community corrections and make our system far more effective than it is today,” including “by better matching services with needs”³¹¹ Two other senior government officials observed recently, “With today’s sophisticated assessment tools, we can better sort offenders and match them with the levels of treatment and community supervision that offer the best chance for them to stay crime free,”³¹² a call whose language corresponds with needs assessment.

Kansas offers a concrete example of how data may be re-purposed. Recidivism rates in the state dropped dramatically from fifty-seven percent in 2000 to thirty-three percent in 2013, in large part because Kansas has adopted a mentoring program: the state uses data to identify offenders at risk for recidivism and then “matches community volunteers with prisoners who are within a few months of getting out”³¹³ These mentors “help new parolees get mental health appointments, find work and ‘guidance to get through rough times,’” according to the Kansas Department of Corrections Secretary.³¹⁴

Fifth, and relatedly, some may worry that this Article spells the return of a rehabilitation-centric system in which indeterminate sentencing will be the norm. These critics may recall that disparities in sentencing were a by-product of a discretionary sentencing system.³¹⁵ Granted, this Article joins Congress in advocating rehabilitation as a legitimate part of sentencing in the criminal justice system. Its approach would not, however, trigger unjustified disparities because modern, rehabilitation-oriented sentencing would be guided by the actual conduct of the individual.

Sixth, some may point to other risk-prediction innovations that do not rely on such factors and ask what room there may be for these technological ad-

³¹⁰ Holder Remarks, *supra* note 28.

³¹¹ *Id.*

³¹² Ken Cuccinelli & Deborah Daniels, *Less Incarceration Could Lead to Less Crime*, WASH. POST (June 19, 2014), http://www.washingtonpost.com/opinions/less-incarceration-could-lead-to-less-crime/2014/06/19/03f0e296-ef0e-11e3-bf76-447a5df6411f_story.html, archived at <https://perma.cc/2SC7-C92Y?type=pdf>.

³¹³ Jennifer Brown & Karen E. Crummy, *Technology, Quick-Reaction Programs Guiding Parole Reform in Other States*, DENVER POST (Sept. 23, 2013, 12:01 AM), http://www.denverpost.com/parole/ci_24152942/technology-quick-reaction-programs-guiding-reform-other-states, archived at <https://perma.cc/8H4K-6277?type=pdf>.

³¹⁴ *Id.* Similarly, the U.S. Attorney for South Carolina has implemented a Drug Market Intervention designed to help low-level drug offenders “find legitimate jobs and offer them help with drug treatment, education and transportation” based on the “hope is that it provides them with the support and the motivation they need to turn their lives around.” Ryan J. Reilly, *Federal Prosecutor Tries a Radical Tactic in The Drug War: Not Throwing People in Prison*, HUFFINGTON POST (Feb. 27, 2014, 10:12 PM), http://www.huffingtonpost.com/2014/02/27/south-carolina-drug-war_n_4809299.html, archived at <http://perma.cc/HP2W-3Q4H> (last updated Apr. 25, 2014, 3:59 PM).

³¹⁵ See *Mistretta*, 488 U.S. at 363–66.

vancements under this Article's rubric. For example, a recent study suggests that brain scans can accurately predict recidivism.³¹⁶ This Article would assert that the use of these "biomarkers" in risk-assessments would be inappropriate as they are not predicated on individual action, potentially punish the individual for that which the offender cannot meaningfully control, and presume that the individual cannot act other than how his or her scans dictate. Otherwise, sentencing would venture into "pre-crime" territory,³¹⁷ would break the link between crime and action, and would undermine the autonomy of the individual. As Daskal suggests, these "restraints can only be justified by a purely deterministic view of individual action or a decision that respect for moral autonomy needs to give way to a different set of interests, such as protection of the nation's or community's safety."³¹⁸

Finally, actuarial tools have been quite helpful outside of the sentencing arena, for example in detecting who may be prone to certain diseases and thus take preventative health measures.³¹⁹ Some may ask whether the arguments in this Article would question the use of actuarial tools for non-sentencing purposes.³²⁰ The short response is "no." This Article's arguments regarding the legality and propriety of actuarial tools are limited to the sentencing context. Sentencing can be distinguished from other areas in which actuarial tools may be applied because the use of actuarial tools here implicates whether the government may restrict the liberty of the individual.³²¹ In other words, the application of actuarial methods in sentencing is qualitatively different than its use in other aspects of society. Its collateral consequences, on employment and potentially initiating a cycle of interacting with the criminal justice system, are unique and especially debilitating as well.³²²

³¹⁶ See Eyal Aharoni et al., *Neuroprediction of Future Rearrest*, 110 PROC. OF THE NAT'L ACAD. OF SCI. 6223, 6223–24 (2013), available at <http://www.pnas.org/content/110/15/6223.full?sid=0b841d49-4192-4f06-af9b-7a054d75ca95>, archived at <https://perma.cc/WLF6-X2J5?type=pdf>.

³¹⁷ See PHILIP K. DICK, THE MINORITY REPORT (1956); MINORITY REPORT (DreamWorks 2002);

³¹⁸ Daskal, *supra* note 254, at 364.

³¹⁹ See Hyatt et al., *supra* note 129, at 725 ("Predictions are relied upon in many areas, from medicine to nuclear power . . ."); Underwood, *supra* note 218, at 1408 ("Important benefits and burdens are distributed in American society on the basis of predictions about individual behavior," including, beyond the criminal context, "places in schools, jobs, and retail credit . . ."); Holder Remarks, *supra* note 28 (noting the "increased reliance on empirical data" in "fields ranging from professional sports, to marketing, to medicine; from genomics to agriculture; from banking to criminal justice").

³²⁰ See *Barefoot v. Estelle*, 463 U.S. 880, 898 (1983) (addressing the "position that expert testimony about future dangerousness is far too unreliable to be admissible," which "would immediately call into question those other contexts in which predictions of future behavior are constantly made").

³²¹ Indeed, this Article is concerned with one of the most serious and profound actions by government: punishment, or the power of the state, on behalf of the people, to intentionally deprive the physical liberty of another.

³²² See MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS 94 (2012) (discussing the profound effects of incarceration on black men in particular).

CONCLUSION

Just as the Oakland Athletics were motivated by modest salary capabilities, the criminal justice community has recognized that its prisons are too costly and crowded. Just as the A's had little room for error and sought to minimize risk in its personnel decisions, the criminal justice community is interested in allocating its scarce resources efficiently and minimizing risk in who it releases to the public. Just as the A's needed to identify the potential stars (whom the A's would select or sign) from the potential duds (whom the A's would pass over), the criminal justice community needs to distinguish between those individuals who pose a higher likelihood of recidivating (whom the system will assign greater attention) and individuals who present a smaller likelihood of re-offending (who would give the system less concern). Just as the A's turned to statistical evidence of past performance as the basis for projecting which players would perform well in the future, the criminal justice system has seized on actuarial methods for predicting which individuals may return to criminal activity later on. Just as major league teams have incorporated statistical analyses in their personnel decision-making, states and scholars are embracing evidence-based sentencing practices.

At bottom, this Article has explored what happens when the starting point for an analysis of risk prediction moves from the risk principle to the theories of punishment. The risk principle, as noted by proponents of actuarial risk-assessments, is the belief that "the level of correctional intervention should match the client's risk of recidivism."³²³ The theories of punishment, by contrast, suggest that the level of correctional intervention should flow from the reasons why the state may legitimately impose punishment on an individual. Those reasons dictate an alternative set of values that are in tension with the pragmatic benefits of risk-assessment tools. To paraphrase *The Wire's* Lester Freamon,³²⁴ you follow the risk principle, you get efficiency and empirical support. But you follow the theories of punishment, and you get individual action and agency.

This Article acknowledges the temptation to switch from a predictive system characterized as subjective and impressionistic to one that is purportedly objective and evidence-based. Several states and the ALI are on board with this transition. As the attraction of these tools increases, so does their reach over criminal defendants, which numbered over twenty million in 2013 alone.³²⁵

³²³ PCRA OVERVIEW, *supra* note 115, at 3.

³²⁴ "You follow drugs, you get drug addicts and drug dealers. But you start to follow the money, and you don't know where the fuck it's going to take you." *The Wire: Gameday* (HBO television broadcast Aug. 4, 2002).

³²⁵ See *Criminal Caseloads Continue to Decline*, COURT STATISTICS PROJECT, <http://www.courtstatistics.org/Criminal/20121Criminal.aspx>, archived at <http://perma.cc/8V3B-VVUN> (last visited Mar. 11, 2015); see also *Table D-1, U.S. District Courts—Criminal Defendants Commenced, Ter-*

For these offenders, their families, and their communities, the salience of these tools matters in real terms because they can influence pivotal sentencing outcomes.

An excitement over the objective, evidence-based benefits of risk-assessment tools may cause us to neglect whatever may tend to dampen the legal viability of promising innovations. When those overlooked concepts are of a fundamental order, and are in particular the very reasons why the state may punish the individual, it is critical to restate their existence and revive their consideration. This Article may help ensure that the stated benefits of evidence-based practices flourish, but, as they must, do so within bedrock legal and principled limits.

minated, and Pending (Including Transfers), During the 12-Month Period Ending September 30, 2013, ADMIN. OFFICE OF THE U.S. COURTS, <http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2013/appendices/D01DSep13.pdf>, archived at <http://perma.cc/Y6XF-PENN> (displaying a table revealing that for a recent twelve month period, there were 134,941 total criminal cases in U.S. District Courts).

