Punishing Risk

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Actuarial recidivism risk assessments—statistical predictions of the likelihood of future criminal behavior—drive a number of core criminal justice decisions, including where to police, whom to release on bail, and how to manage correctional institutions. Recently, this predictive approach to criminal justice entered a new arena: sentencing. Actuarial sentencing has quickly gained a number of prominent supporters and is being implemented across the country. This enthusiasm is understandable. Its proponents promise that actuarial data will refine sentencing decisions, increase rehabilitation, and reduce reliance on incarceration.

Yet, in the rush to embrace actuarial sentencing, scholars and policy makers have overlooked a crucial point: actuarial risk assessment tools are not intended for use at sentencing. In fact, their creators explicitly warn that these tools were not designed to aid decisions about the length of a sentence or whether to incarcerate someone. Nevertheless, that is precisely how those who endorse actuarial sentencing—including the American Law Institute in the recently revised Model Penal Code for Sentencing—suggest they should be used.

Actuarial sentencing is, in short, an unintended, "off-label" application of actuarial risk information. This Article reexamines the promises of actuarial sentencing in light of this observation and argues that it may cause a number of equally unintended and detrimental consequences. Specifically, it contends that this practice distorts, rather than refines, sentencing decisions. Moreover, it may increase reliance on incarceration—and it may do so for reasons that undermine the fairness and integrity of the criminal justice system.

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INTRODUCTION

Predictive data about future criminal activity increasingly determine an individual's fate within the criminal justice system. Data may determine if a person is arrested and charged. If he is, that data will influence whether he is released on bail. And if he is then convicted and incarcerated, data may determine where he is housed, what programs he must complete, and whether he is eventually released on parole. And now, as a result of a practice that is gaining popularity, predictive data may even determine the length of his sentence and whether he serves that sentence in his own home or in prison.

Actuarial sentencing, also called "evidence-based sentencing,"[1] is the practice of using actuarial risk assessment tools to guide sentencing decisions. Actuarial risk assessment tools seek to predict the likelihood an individual will commit crimes in the future based on the presence or absence of factors that statistically correlate with recidivism.[2] Proponents claim that judges are already making these predictions, and actuarial tools simply help them do it better.[3] In other words, they imply that this use of risk assessment information refines and enhances an established, normatively sound practice but does not fundamentally change the role of risk prediction at sentencing.

Actuarial sentencing is part of a larger movement that aims to be smart, rather than tough, on crime.[4] This movement embraces data-driven practices to ensure that prison is reserved for those who represent a true danger to the public.[5] Proponents promise that actuarial sentencing and other evidence-based practices will help us reorient the criminal justice system away from backward-looking, retributivist considerations and toward the future, with greater emphasis on increasing public safety through rehabilitation.[6] In theory, at least, this new "brand" of criminal justice uses data to help identify who can serve their sentence

1. *See* Jessica M. Eaglin, *Constructing Recidivism Risk*, 67 EMORY L.J. 59, 61–62 (2017); Sonja B. Starr, *Evidence-Based Sentencing and the Scientific Rationalization of Discrimination*, 66 STAN. L. REV. 803, 809 (2014) (describing "evidence-based sentencing"); *see also* NAT'L CTR. FOR STATE COURTS, NCSC FACT SHEET: EVIDENCE-BASED SENTENCING 1 (Aug. 2014), http://www.ncsc.org/~/media/Microsites/Files/CSI/EBS%20Fact%20Sheet%208-27-14.ashx [https://perma.cc/3L6N-DQX6] (same). Other scholars have called this practice "risk-based sentencing."

2. *See* MODEL PENAL CODE: SENTENCING § 6B.09 rptrs. note a (AM. LAW INST., Proposed Final Draft 2017).

3. *See, e.g.*, Jordan M. Hyatt et al., *Follow the Evidence: Integrate Risk Assessment into Sentencing*, 23 FED. SENT'G REP. 266, 266 (2011) (arguing that introducing risk assessment information into sentencing "would hardly represent a sea change" because "[w]ith varying degrees of formality, judges already consider risk at sentencing"); Richard P. Kern & Mark H. Bergstrom, *A View from the Field: Practitioners' Response to Actuarial Sentencing: An "Unsettled" Proposition*, 25 FED. SENT'G REP. 185, 185 (2013) ("[R]isk has and will continue to be used by courts at sentencing, whether formally or informally.").

4. *See generally* J.C. Oleson, *Risk in Sentencing: Constitutionally Suspect Variables and Evidence-Based Sentencing*, 64 SMU L. REV. 1329, 1336–37 (2011) (identifying the interest in actuarial sentencing as part of the call to "sentence 'smarter'"); TRACY W. PETERS & ROGER K. WARREN, NAT'L CTR. FOR STATE COURTS, GETTING SMARTER ABOUT SENTENCING: NCSC'S SENTENCING REFORM SURVEY (2006), http://www.ncsc.org/~/media/ Microsites/Files/CSI/GettingSmarter_SentencingReformSurvey_FinalPub.ashx [https://perma.cc/4XDW-AWCV] (identifying evidence-based practices as a "smart" sentencing reform).

5. *See, e.g.*, Hon. Michael Marcus, *Smarter Sentencing: On the Need to Consider Crime Reduction as a Goal*, 40 CT. REV. 16, 22 (2004).

6. *See, e.g.*, Kern & Bergstrom, *supra* note 3, at 185 ("[T]he consideration of risk does represent a shift in the purposes of sentencing, moving from backward-looking retributive approach with a focus on uniformity, proportionality, and reduction of unwarranted disparity to a forward-looking utilitarian approach with a focus on public safety and crime reduction."); *see also* Peggy McGarry, *Introduction* to RAM SUBRAMANIAN ET AL., VERA INST. OF JUSTICE CTR. ON SENTENCING & CORR., RECALIBRATING JUSTICE: A REVIEW OF 2013 STATE SENTENCING AND CORRECTIONS TRENDS 2 (2014), https://www.vera.org/publications/state-sentencing-and-corrections-trends-2013 [https://perma.cc/N2DC-DQ6L] ("From appalling incarceration numbers, budgetary crises, and greater public knowledge, this momentum for reform has redirected the discussion on crime away from the question of how best to punish to how best to achieve long-term public safety.").

in the community without threatening the public and, in so doing, conserves expensive incarceratory resources for those who cannot.[7]

In light of these promises, it is unsurprising that actuarial sentencing has been met with great acclaim. It has been embraced by the National Center for State Courts[8] and the Conference of Chief Justices and the Conference of State Court Administrators.[9] Present and former state sentencing commissioners have endorsed it,[10] and policymakers have called it the "most promising way forward" and "the new frontier in sentencing policy and practice."[11] Actuarial sentencing is currently practiced in more than twenty jurisdictions,[12] and its popularity is likely to grow in light of a recent notable development: the American Law Institute adopted the practice in its 2017 revision of the Model Penal Code for Sentencing.[13]

Recently, however, some scholars have begun to caution against this practice. They have argued that the risk tools incorporate certain characteristics—such as gender and socioeconomic status—that raise constitutional concerns.[14] They have questioned the tools' accuracy[15] and their purported objectivity.[16] And they have highlighted that this practice, which involves making predictions based on group data, undermines the principle that sentences should be

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7. *See* WILLIAM R. KELLY WITH ROBERT PITMAN & WILLIAM STREUSAND, FROM RETRIBUTION TO PUBLIC SAFETY: DISRUPTIVE INNOVATION OF AMERICAN CRIMINAL JUSTICE 177 (2017) (calling for a new "brand" of the criminal justice system that "involves problem solving and recidivism reduction").

8. *See* PAMELA M. CASEY ET AL., NAT'L CTR. FOR STATE COURTS, USING OFFENDER RISK AND NEEDS ASSESSMENT AT SENTENCING: GUIDANCE FOR COURTS FROM A NATIONAL WORKING GROUP 7 (2011), http://www.ncsc.org/~/media/microsites/files/csi/rna%20guide%20final.ashx [https://perma.cc/W9QC-LHCD].

9. *See* CONFERENCE OF CHIEF JUSTICES & CONFERENCE OF STATE COURT ADM'RS, RESOLUTION 7: IN SUPPORT OF THE GUIDING PRINCIPLES ON USING RISK AND NEEDS ASSESSMENT INFORMATION IN THE SENTENCING PROCESS (2011), http://www.ncsc.org/~/media/Microsites/Files/CSI/RNA%202015/Support%20Guiding%20Principles%20Using%20RNAs.ashx [https://perma.cc/NC86-3YD7].

10. *See* Kern & Bergstrom, *supra* note 3, at 185. Richard Kern was the Director of the Virginia Criminal Sentencing Commission and Mark Bergstrom is the Executive Director of the Pennsylvania Commission on Sentencing.

11. *See* Roger K. Warren, *Evidence-Based Sentencing: Are We Up to the Task?*, 23 FED. SENT'G REP. 153, 153, 157 nn.1 & 3 (2010).

12. *See* Starr, *supra* note 1, at 809.

13. MODEL PENAL CODE: SENTENCING § 6B.09 (AM. LAW INST., Proposed Final Draft 2017) (the section is entitled Evidence-Based Sentencing; Offender Treatment Needs and Risk of Reoffending). The Model Penal Code is highly influential upon state practices and its "code and its commentaries have been the intellectual focus of much American criminal law scholarship." Paul H. Robinson & Markus D. Dubber, *The American Model Penal Code: A Brief Overview*, 10 NEW CRIM. L. REV. 319, 320 (2007).

14. *See* Starr, *supra* 1, at 806.

15. For example, computer scientists recently examined the reliability of a popular risk assessment tool and found that it "is no more accurate or fair than the predictions of people with little to no criminal justice expertise." Julia Dressel & Hany Farid, *The Accuracy, Fairness, and Limits of Predicting Recidivism*, 4 SCI. ADVANCES 1, 3 (2018); *see also* Brian Netter, *Using Group Statistics to Sentence Individual Criminals: An Ethical and Statistical Critique of the Virginia Risk Assessment Program*, 97 J. CRIM. L. & CRIMINOLOGY 699, 712 (2007).

16. *See* Eaglin, *supra* note 1, at 64 (arguing that "actuarial risk tools, while 'scientific' in the sense that developers use technology to assess risk, reflect normative judgments familiar to sentencing law and policy debates").

individualized.[17] However, even the scholars who have begun to critically scrutinize actuarial sentencing have focused primarily on issues with the actuarial method of assessment. Existing scholarship has thus failed to ask a critical question: is the risk inquiry these tools advance normatively sound?[18]

As a result, these conversations about the promises and perils of actuarial sentencing have overlooked an important point: actuarial risk assessment tools are not intended for use in sentencing.[19] Rather, they were developed to guide decisions of correctional authorities—such as how to efficiently and effectively rehabilitate inmates during their incarceration—*after* a judge has announced a sentence.[20] In other words, such tools were created to guide decisions about how to administer punishment, not about how much punishment is due. In fact, the social scientists who developed the tools that are being incorporated into sentencing decisions expressly disavow their use to "assist in establishing the just penalty," specifically in decisions about whether to incarcerate and the length of the sentence.[21] And yet, that is precisely how they are being used. Actuarial sentencing is, in short, an "off label" application of these predictive tools.[22]

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17. *See* Dawinder S. Sidhu, *Moneyball Sentencing*, 56 B.C. L. REV. 671, 702–04 (2015).

18. *See, e.g.*, Starr, *supra* note 1, at 872 (concluding that "[r]isk prediction is here to stay as part of sentencing, and perhaps actuarial instruments can play a legitimate role," but suggesting these instruments "should not include demographic and socioeconomic variables"); *see also* Sidhu, *supra* note 17, at 687 (noting that "forecasting the risk of recidivism is an important function in the criminal justice system").

19. *See* BERNARD E. HARCOURT, AGAINST PREDICTION: PROFILING, POLICING, AND PUNISHING IN AN ACTUARIAL AGE 188 (2007) (noting that actuarial prediction instruments "were generated, created, driven by sociology and criminology. . . . They had no root, nor any relation to the jurisprudential theories of just punishment"). One exception to this general oversight is a recent white paper that notes the possibility that judges may use a risk tool that was "designed for a correctional—not a sentencing—population." Jordan M. Hyatt & Steven L. Chanenson, *The Use of Risk Assessment at Sentencing: Implications for Research and Policy* 8 (Villanova Law Sch. Pub. Law & Legal Theory Working Paper Series, Working Paper No. 2017–1040, 2016), https://digitalcommons.law.villanova.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=1201&context=wps [https://perma.cc/SXW5-QZQ5].

20. HARCOURT, *supra* note 19, at 187–88.

21. *See* Malenchik v. State, 928 N.E.2d 564, 567, 572 (Ind. 2010) (quoting D.A. ANDREWS & JAMES L. BONTA, THE LEVEL OF SERVICE INVENTORY-REVISED USER'S MANUAL 1 (2001)).

22. I have adopted the term "off label" from the medical context, in which it is used to describe the practice of prescribing a medication to treat a condition other than the condition for which it has gained FDA approval. *See* U.S. FOOD & DRUG ADMIN., *Understanding Unapproved Use of Approved Drugs "Off Label,"* https://www.fda.gov/ForPatients/Other/ OffLabel/ucm20041767.htm [https://perma.cc/5EDC-HN5T] (defining "off-label"). *See generally* Christopher M. Wittich et al., *Ten Common Questions (and Their Answers) About Off-Label Drug Use*, 87 MAYO CLINIC PROC. 982 (2012) (describing the practice of prescribing medicine in "off-label" ways); *see also* Sandra Mayson, Off-Label Law Enforcement 1 (2018) (unpublished manuscript) (on file with author) (work-in-progress using the term 'off label' to describe the use of coercive force for a purpose "other than [the one] it was ostensibly designed to serve"). In their recent white paper, Hyatt and Chanenson offer a typology of ways jurisdictions use risk assessment tools at sentencing and characterize certain uses as "off label." *See* Hyatt & Chanenson, *supra* note 19, at 7–8 (distinguishing between jurisdictions that systemically integrate risk assessment information from those that use the information in "off label" ways). In contrast to Hyatt and Chanenson, however, this Article contends that *all* uses of actuarial risk assessment methods at sentencing are "off label" uses.

This Article reexamines the practice and promises of actuarial sentencing in light of this observation. It scrutinizes the meaning of "risk" in the correctional and sentencing contexts, the different mechanisms available for responding to risk in these distinct contexts, and the consequences of those decisions. This analysis reveals that integrating actuarial risk assessment tools into sentencing decisions departs from their original design and purpose. It identifies three points of departure: the decisions actuarial risk assessment tools are used to support, the punishment theories that support those decisions, and the consequences of those decisions.

Ultimately, the Article contends that the application of actuarial risk assessment information to sentencing decisions is neither a simple matter of "follow[ing] the evidence"[23] to smarter sentencing decisions, nor is it inconsequential. Rather, this "off label" use can lead to negative, unintended consequences: it can justify an increase—rather than a decrease—in our use of incarceration, and in a way that undermines the fairness and integrity of our criminal justice system.

The Article proceeds as follows. Part I describes the practice and promises of actuarial sentencing. It identifies the recent emergence of two sentencing-specific applications of actuarial risk information and explores why this practice has gained such enthusiastic support. Part II identifies an as-yet unexamined reason to question the laudatory claims of actuarial sentencing proponents: these tools are not designed for use in the sentencing context. To bring this critique into focus, Part II offers a historical account of the origins of actuarial risk prediction that explores the differences between how and why these tools emerged, and how and why they are integrated into sentencing. Finally, Part II reveals that this repurposing of actuarial information leads to an unintended—or at least unacknowledged—punishment consequence, which is antithetical to the tools' rehabilitative origins.

Part III identifies the "off label," unintended consequences of incorporating actuarial information into sentencing decisions. Specifically, Part III contends that actuarial sentencing can lead to more—not less—reliance on incarceration. This counterintuitive possibility results from the way actuarial tools define and measure risk. They define risk broadly, as the likelihood that an individual will commit, or be arrested for, an offense of unspecified severity, and measure it based on a range of characteristics—such as gender and educational history—that are anathema to a just sentencing inquiry. Perhaps this prediction mechanism is acceptable, or at least understandable, when the tools are used for their intended

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Recently—in another arguably "off-label" application—actuarial risk information has been used to guide bail decisions. That use has been the subject of increasing scholarly scrutiny. *See, e.g.*, Lauryn P. Gouldin, *Defining Flight Risk*, 85 U. CHI. L. REV. 677 (2018); Sandra G. Mayson, *Dangerous Defendants*, 127 YALE L.J. 490 (2018). This paper focuses exclusively on the issues that arise when risk assessment is used for punishment purposes. As the bail/pre-trial detention decision is not considered punishment, see U.S. v. Salerno, 481 U.S. 739, 748 (1987), it involves a risk inquiry that is distinct from sentencing. Therefore, it is beyond the scope of this paper.

23. *See* Hyatt et al., *supra* note 3, at 267 (urging the United States Sentencing Commission to "follow the evidence" by integrating risk assessment into sentencing).

purpose—to administer punishment in a way that reduces an individual's risk of recidivism. But when this mechanism is applied at sentencing, it imposes an underappreciated systemic risk that cannot be countenanced: that we will incarcerate someone who poses no risk to public safety because of non-culpable, personal characteristics.

I. THE RISE OF ACTUARIAL SENTENCING

Around 2000, a handful of jurisdictions began providing risk assessment information to judges in advance of sentencing.[24] Over the last decade, and particularly over the last few years, actuarial sentencing has gained the support of a number of influential organizations and policymakers, including the American Law Institute,[25] the National Center for State Courts (NCSC),[26] the Conference of Chief Justices and the Conference of State Court Administrators,[27] and current and former state sentencing commissioners.[28] This Part seeks to explain this enthusiastic embrace of actuarial sentencing before turning, in Parts II and III, to an analysis of why this enthusiasm is unwarranted.

This Part begins by providing an overview of the practice of actuarial sentencing. This overview first explains what actuarial tools are and how they are used, and then describes how these tools are used in the sentencing context. It identifies two sentencing-specific applications of actuarial risk information: decisions about sentence length and determinations of sentence location. The Part then surveys the literature supporting this new practice to identify the purported promises of actuarial sentencing.

A. THE PRACTICE OF ACTUARIAL SENTENCING

Actuarial sentencing is the practice of using actuarial risk assessment tools to guide sentencing decisions. It consists of two components: the actuarial assessment of risk and the integration of that assessment into sentencing decisions. This section describes each of these components in turn.

1. Actuarial Risk Assessment

Actuarial risk assessment tools are surveys that guide the inquirer through a series of questions about the presence or absence of recidivism risk factors in the subject.[29] The inquirer allocates the subject a certain number of points for each factor, each of which is weighted according to the strength of its correlation with

24. *See* Warren, *supra* note 11, at 157 (noting Iowa has included risk assessment information in presentence reports since 2000 and Missouri began sending such information to judges in 2005). As will be discussed in further detail below, Virginia was an early adopter of actuarial risk assessment sentencing, initiating a pilot program in 1994 to use risk information to change an offender's sentence. *See infra* notes 71–74 and accompanying text.

25. *See* MODEL PENAL CODE: SENTENCING § 6B.09 (AM. LAW INST., Proposed Final Draft 2017).

26. *See* CASEY ET AL., *supra* note 8, at 7.

27. *See* CONFERENCE OF CHIEF JUSTICES & CONFERENCE OF STATE COURT ADM'RS, *supra* note 9.

28. *See supra* note 10.

29. *See, e.g.*, 42 PA. CONS. STAT. § 2154.7(e) (2010) (defining "risk assessment instrument" as "an empirically based worksheet which uses factors that are relevant in predicting recidivism").

recidivism.[30] Based on the total score, the subject is identified as having a "low," "moderate," or "high" risk of recidivism.[31] Thus, in the context of the criminal justice system, actuarial risk assessment is the process of using characteristics that statistically correlate with recidivism ("recidivism risk factors") to predict "'who will or will not behave criminally' in the future."[32]

Actuarial risk assessment tools vary in the number and type of recidivism risk factors they consider.[33] Despite the existence of a variety of tools, however, each tool considers criminal history[34] and other factors. Their algorithm can thus be distilled down to "criminal history plus" other characteristics, and the plus varies from tool to tool. Some of these plus factors are "static," which means they are statistically "related to recidivism but cannot be altered through the delivery of services," such as age at first offense, gender, and family criminality.[35] Others are "dynamic," or can change through the passage of time or intervention, such as current age, employment status, antisocial attitude, and substance addiction.[36]

Although all of the tools aim to measure the individual's risk of recidivism, there is some variance in how they define recidivism. Some tools, for example, define recidivism to include rearrest for an offense of any severity, regardless of whether the arrest leads to filing of criminal charges or a conviction.[37] Those tools, therefore, predict the likelihood someone with the defendant's characteristics will be rearrested

30. *See* NATHAN JAMES, CONG. RESEARCH SERV., R44087, RISK AND NEEDS ASSESSMENT IN THE CRIMINAL JUSTICE SYSTEM 2 (2015) (describing an overview of the risk assessment process); Edward J. Latessa & Brian Lovins, *The Role of Offender Risk Assessment: A Policy Maker Guide*, 5 VICTIMS & OFFENDERS 203, 206, 210–12 (2010) (same). For some instruments, the weight of the particular factor is apparent from the face of the tool or survey. *See id.* at 210–11. Some instruments, such as COMPAS, use a proprietary algorithm, and the accounting mechanism is not publicly available. *See* State v. Loomis, 881 N.W.2d 749, 761 (Wis. 2016) (explaining that the company that developed the COMPAS instrument "considers COMPAS a proprietary instrument and a trade secret" and therefore the company "does not disclose how the risk scores are determined or how the factors are weighed").

31. JAMES, *supra* note 30, at 2.

32. MODEL PENAL CODE: SENTENCING § 6B.09 rptrs. note a (AM. LAW INST., Proposed Final Draft 2017) (quoting Stephen D. Gottfredson & Laura J. Moriarty, *Statistical Risk Assessment: Old Problems and New Applications*, 52 CRIME & DELINQ. 178, 192 (2006)).

33. See Eaglin, *supra* note 1, at 81 (describing different tools).

34. JULIAN V. ROBERTS, PUNISHING PERSISTENT OFFENDERS: EXPLORING COMMUNITY AND OFFENDER PERSPECTIVES 22 (2008) (identifying criminal history as a "central component of the most common" risk assessment tools, such as the LSI–R or the salient Factor Score); John Monahan & Jennifer L. Skeem, *Risk Assessment in Criminal Sentencing*, 12 ANN. REV. CLINICAL PSYCHOL. 489, 503 (2016) (noting that "[i]t has long been axiomatic in the field of risk assessment that past crime is the best predictor of future crime" and therefore, "[a]ll actuarial risk assessment instruments reflect this empirical truism. The empirically derived California Static Risk Assessment Instrument, for example, contains 22 risk factors for criminal recidivism, fully 20 of which—all but gender and age—are indices of past crime").

35. JENNIFER K. ELEK ET AL., NAT'L CTR. FOR STATE COURTS, USING RISK AND NEEDS ASSESSMENT INFORMATION AT SENTENCING: OBSERVATIONS FROM TEN JURISDICTIONS 1 (2015); *see also* Latessa & Lovins, *supra* note 30, at 208–09.

36. *See* Latessa & Lovins, *supra* note 30, at 209; *see also* ELEK ET AL., *supra* note 35, at 46.

37. *See* Nancy J. King, *Sentencing and Prior Convictions: The Past, the Future, and the End of the Prior-Conviction Exception to* Apprendi, 97 MARQ. L. REV. 523, 544 (2014) (noting that recidivism measures may "include any subsequent violent crime, felony arrest, felony conviction, conviction for any crime including a misdemeanor, or violation of a condition of supervised release"). For a critique of

within the specified time frame, without reference to actual culpability. Others define recidivism as reconviction for a new offense, but there is variation even among this subset of tools. Some define recidivism as reconviction for any offense, including a violation of probation; others define recidivism more narrowly as only reconviction for a felony.[38]

Regardless of how any particular tool defines recidivism, a few common principles unite all of them. First, the prediction remains actuarial.[39] The risk assessment process is "about predicting group behavior (identifying groups of higher risk offenders). It is not about prediction at the individual level."[40] That is, risk assessment tools identify groups of high-risk offenders, not a particular high-risk individual.[41] The risk score indicates the likelihood someone who shares an individual's characteristics will recidivate, not the likelihood that particular a individual will recidivate.

Second, the risk score indicates the likelihood of *whether* someone with the offender's characteristics will recidivate, not *how* they are likely to recidivate. Indeed, most tools do not distinguish between the likelihood the offender will recidivate by committing a serious offense or a low-level drug or property crime, but rather provide only a general prediction of the likelihood of recidivism.[42] One exception is the Correctional Offender Management Profiling for Alternative Sanctions (COMPAS) tool, which distinguishes between "General Recidivism Risk" and "Violent Recidivism Risk."[43]

Finally, the risk score indicates only the likelihood of *future* behavior; it does not indicate the relative severity of the crime the subject has most recently

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defining recidivism to include arrest, see Anna Roberts, Arrests as Guilt (May 17, 2018) (unpublished manuscript) (on file with author).

38. *See* Kelly Hannah-Moffat, *Actuarial Sentencing: An "Unsettled" Proposition*, 30 JUST. Q. 270, 278–79 (2013) ("Among the available risk tools, recidivism is variably defined as re-arrest, reconviction, or re-incarceration . . . . Many actuarial risk instruments do not differentiate between types of recidivism."); *see also* King, *supra* note 37, at 544 n.109 (citing additional sources).

The definition of recidivism may even vary within a particular jurisdiction. Virginia, for example, uses actuarial risk assessment information to guide decisions about whether to divert low-level offenders from prison and increase the sentencing guidelines recommendation for certain sex offenders. The diversionary risk assessment tool defines recidivism as a subsequent conviction for a felony offense within three years. *See* VA. CRIMINAL SENTENCING COMM'N, 2014 ANNUAL REPORT 94 (2014). The sex offender risk assessment tool, by contrast, defines recidivism as rearrest "for a new sex offense or other crime against a person." *See id*. at 39.

39. *See* CHRISTOPHER SLOBOGIN, PROVING THE UNPROVABLE: THE ROLE OF LAW, SCIENCE, AND SPECULATION IN ADJUDICATING CULPABILITY AND DANGEROUSNESS 101 (2007) ("An *actuarial* approach relies, as insurance actuaries do, on a finite number of preidentified variables that statistically correlate to risk and that produce a definitive probability or probability range of risk.").

40. WIS. DEP'T OF CORR., ELECTRONIC CASE REFERENCE MANUAL: COMPAS ASSESSMENT FREQUENTLY ASKED QUESTIONS, https://doc.helpdocsonline.com/dcc-business-process [https://perma.cc/NYA3-2ZZ8].

41. *Id*.

42. *See* Hannah-Moffat, *supra* note 38, at 278–79 (noting that "[m]any actuarial risk instruments do not differentiate between types of recidivism").

43. *See* NORTHPOINTE, PRACTITIONERS GUIDE TO COMPAS 1 (2012), http://www.northpointeinc.com/files/technical_documents/FieldGuide2_081412.pdf [https://perma.cc/K9H6-N29S] (describing the COMPAS risk assessment tool).

committed. As Latessa and Lovins explain, "though a felon has been convicted of a more serious offense than a misdemeanant, their relative risk of reoffending may have nothing to do with the seriousness of the crime."[44] In fact, most risk assessment instruments do not incorporate the crime of conviction into the prediction inquiry,[45] as that factor has not been found to be predictive of recidivism.[46]

2. Sentencing Actuarially

Surprisingly, most jurisdictions that encourage or require actuarial sentencing do not restrict how judges may use this information at sentencing. Instead, they simply direct the department responsible for preparing the presentence report to conduct a risk assessment and provide it to the judge, without guidance as to the purposes for which it may be used.[47] It appears that, until recently, judges who were authorized to consider risk information were doing so to identify and impose conditions of probation.[48]

An analysis of the Model Penal Code's new section on evidence-based sentencing,[49] along with state case law and sentencing guidelines, reveals that two sentencing-specific actuarial practices have emerged: determinations about sentence length and determinations about sentence location. Each will be explored below.

These applications are *sentencing-specific* because only a sentencing judge is empowered to make these decisions. The power to determine the severity of a sentence—to determine how much punishment is due a particular offender for a particular offense—is a core judicial function.[50] After the judge imposes a sentence, the responsibility to execute that sentence then shifts to the executive branch, specifically correctional authorities and parole boards (if the jurisdiction allows for parole).[51] Neither of these institutional actors, however, can reverse or

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44. Latessa & Lovins, *supra* note 30, at 205–06.

45. *See* Starr, *supra* note 1, at 811 (noting that "almost none" of the actuarial risk instruments she studied "include the crime for which the defendant was convicted in the case at hand").

46. *See* JAMES, *supra* note 30, at 7 ("The seriousness of the current offense is *not* a risk factor.").

47. *See, e.g.*, WASH. REV. CODE § 9.94A.500(1) (2014); *see also* Starr, *supra* note 1, at 839–40 (noting that "[g]enerally . . . risk predictions are simply provided to sentencing judges and parole boards").

48. *See* Warren, *supra* note 11, at 157 (finding that the ten jurisdictions that had incorporated risk assessment into sentencing by 2010 used it "primarily for the purpose of determining the conditions of probation supervision").

49. MODEL PENAL CODE: SENTENCING § 6B.09 (AM. LAW INST., Proposed Final Draft 2017).

50. Commonwealth v. Cole, 10 N.E.3d 1081, 1089 (Mass. 2014) ("At the core of the judicial function is the power to impose a sentence."); Commonwealth v. Rodriguez, 962 N.E.2d 711, 718 (Mass. 2012) (describing the power to sentence as "a quintessential judicial power").

51. *Cole*, 10 N.E.3d at 1089 ("Once a sentence is imposed, the executive branch holds the power and responsibility of executing it."). Jurisdictions differ as to whether probation authorities are judicial or executive branch actors. *See* NAT'L CTR. FOR STATE COURTS, CCJ AND COSCA SURVEY OF EVIDENCE-BASED PRACTICES IN SENTENCING AND PROBATION: BRANCH RESPONSIBLE FOR PROBATION 1 (2012), http://www.ncsc.org/~/media/microsites/files/csi/branch-responsible-for-probation.ashx [https://perma.cc/8UBS-NE8V] (finding that in some jurisdictions probation is a function of the executive branch, in some it is a judicial branch function, and in others it is a mixed function).

modify the judge's sentencing decision. Even when a parole board decides to release a defendant from incarceration before the expiration of his sentence, for example, that decision does not and cannot change the sentencing judge's decision about the length of his sentence. The defendant must complete her sentence, albeit under community rather than institutional supervision.[52]

a. Sentence Length Decisions

The length of a defendant's sentence—how long he or she will be under the supervision and control of state correctional authorities—is a paradigmatic sentencing decision. This decision is entrusted solely to the sentencing judge, subject to the parameters set by the state or federal legislature and recommendations of any relevant sentencing commission.[53]

The recently approved Model Penal Code endorses the use of risk assessment information to inform this key sentencing decision. Model Penal Code § 6B.09(2) orders a sentencing commission to develop actuarial instruments that "estimate the relative risks that individual offenders pose to public safety through their future criminal conduct" and "incorporate [this information] into the sentencing guidelines."[54] The commentary clarifies that this provision "would permit the use of actuarial offender risk assessments as a basis for punishments more severe than offenders would otherwise have received."[55] Meanwhile, § 6B.09(3) directs that "unusually low-risk" offenders should be sentenced to community sanction or a "shorter prison term" than otherwise required by the statute or guidelines.[56]

Virginia, an early adopter of actuarial sentencing practices, was the first to employ actuarial risk assessment to sentence length decisions.[57] Since 2001, it has authorized the use of actuarial information to increase sentencing exposure for adults who are convicted of certain sex offenses and predicted to pose a high risk of recidivism.[58] Recently, other jurisdictions have begun to follow suit. In July 2017, for example, Kansas began using risk assessment results to set the sentencing parameters for juvenile offenders. Juveniles convicted of a felony who score as a low or moderate risk may be sentenced to up to fifteen months, whereas

52. As the Supreme Judicial Court of Massachusetts recently explained, the parole board's authority is "limited to the release from custody of a defendant *within* the maximum term of imprisonment imposed by the sentencing judge." *Cole*, 10 N.E.3d at 1087. It "has the power only to permit a defendant to serve the balance of his term of imprisonment outside the prison walls, . . . and the power to revoke the parole permit and return the defendant to prison or jail for the balance of his term of imprisonment." *Id.*

53. *See supra* note 50.

54. MODEL PENAL CODE: SENTENCING § 6B.09(2) (AM. LAW INST., Proposed Final Draft 2017).

55. *Id.* § 6B.09 cmt. e.

56. *Id.* § 6B.09(3).

57. *See* Jonathan Simon, *Reversal of Fortune: The Resurgence of Individual Risk Assessment in Criminal Justice*, 1 ANN. REV. L. & SOC. SCI. 397, 407 (2005) (noting in 2005 that Virginia was the only state to use actuarial risk assessment to identify "high rate" offenders).

58. VA. CRIMINAL SENTENCING COMM'N, *supra* note 38, at 39. Virginia began using risk prediction to authorize an increase in sentencing exposure for sex offenders deemed to be a high risk of recidivism in 2001. *Id.*

those who score as a high risk may be sentenced up to eighteen months.[59]

As mentioned above, however, most jurisdictions that authorize actuarial sentencing simply direct that the risk information be provided to a judge in advance of sentencing without any guidance on how it should—or should not—be used.[60] Washington State, for example, simply advises that a sentencing court "may order the department [of probation] to compete a risk assessment report," and that if that report is "available before sentencing, the report shall be provided to the court."[61] Apparently, then, judges in these jurisdictions may use the results for any purpose they deem appropriate, including to inform their decision about the appropriate length of a sentence (subject to any applicable statutory and constitutional constraints). Cognitive behavioral research into the anchoring effect[62] suggests judges who receive predictive risk information may modify their sentence in the direction of the risk prediction.[63] A few empirical studies support this inference.[64]

This common-sense inference about the influential power of risk assessment information has been demonstrated in at least one actual case. In Wisconsin, risk assessment predictions are provided to the judge along with the presentence investigation report.[65] In 2013, Paul Zilly pled guilty to stealing a lawnmower in Wisconsin, and the prosecutor recommended one year in jail followed by supervision. [66] At sentencing, however, after noting Mr. Zilly scored as high-risk for violent recidivism and medium-risk for general recidivism, which the judge

59. *See* KAN. SENTENCING COMM'N, KANSAS SENTENCING GUIDELINES DESK REFERENCE MANUAL 7 (2016) (describing changes to the law regarding case length limits, effective July 1, 2017). The court may also use the risk information to set the juvenile's term of probation, and may extend the term of a high-risk juvenile's term of probation by up to six months "if a juvenile needs time to complete an evidence-based program determined to be necessary based on the results of a validated risk and needs assessment." *Id*. at 9–10.

60. *See supra* notes 47–48 and accompanying text.

61. WASH. REV. CODE § 9.94A.500(1) (2014).

62. *See* Fritz Strack & Thomas Mussweiler, *Explaining the Enigmatic Anchoring Effect: Mechanisms of Selective Accessibility*, 73 J. PERSONALITY & SOC. PSYCHOL. 437, 437 (1997) (defining the "*anchoring effect*" as "a biased estimate toward an arbitrary value considered by judges before making a numerical estimate").

63. *See* Starr, *supra* note 1, at 867 ("Even if a particular judge does not really trust the instrument, its prediction might influence her thinking through anchoring.").

64. For example, Professor Sonja Starr conducted an informal study with eighty-three criminal law students and found, similarly, that prediction information influenced participants' decisions about an appropriate sentence for a hypothetical case. *See id*. at 867–69 (describing the study). A study conducted by the Pennsylvania Sentencing Commission also suggests that judges, probation officers, and criminal law practitioners are influenced by exposure to risk assessment information. *See* PA. COMM'N ON SENTENCING, RISK/NEEDS ASSESSMENT PROJECT, INTERIM REPORT 8: COMMUNICATING RISK AT SENTENCING 1, 6–11 (2014), http://www.hominid.psu.edu/specialty_programs/pacs/publications-and-research/risk-assessment/phase-i-reports/interim-report-8-communicating-risk-at-sentencing/view [https://perma.cc/NY63-TK3Q] (describing the study and its findings).

65. *See* State v. Loomis, 881 N.W.2d 749, 754 (Wis. 2016).

66. *See* Julia Angwin et al., *Machine Bias: There's Software Used Across the Country to Predict Future Criminals. And It's Biased Against Blacks*., PROPUBLICA (May 23, 2016), https://www.propublica.org/article/machine-bias-risk-assessments-in-criminal-sentencing [https://perma.cc/RA73-X8SW] (discussing the Zilly case).

characterized as "about as bad as it could be," the judge rejected the plea deal and instead imposed a sentence of two years in prison followed by three years of supervision.[67] After Mr. Zilly appealed, the court reduced his sentence to eighteen months, admitting, "Had I not had the [risk assessment information], I believe it would likely be that I would have given one year, six months."[68]

b. Sentence Location Decisions

A second paradigmatic sentencing decision is the determination of where the defendant will serve his sentence: in institutional confinement (prison or jail), under community supervision (probation), or a combination of the two. This is a sentencing-specific decision because only the sentencing judge is empowered to determine the initial, default location of a defendant's sentence.[69] Certainly, corrections officials can alter this location, based on developments that occur after the sentence is determined. A defendant sentenced to community supervision who does not comply with the terms of probation may be incarcerated, in some instances without judicial intervention,[70] and a defendant sentenced to incarceration may be released into the community to serve the remainder of her sentence on parole, again without the approval of a judge.[71] Significantly, however, all of these decisions are made after sentence has been announced, and, absent subsequent intervening developments, the defendant will serve her sentence in the location set by the judge.

In contrast to the sentence-length use discussed above, which remains somewhat uncommon, the use of actuarial risk information to inform sentencing-location decisions is fairly prevalent. Jurisdictions have integrated risk predictions into at least three different sentence-location decisions: (1) whether to sentence a defendant to probation or incarceration, (2) whether to divert otherwise prison-bound offenders to jail or probation, and (3) whether to suspend part or all of a prison sentence for one spent in the community.

First, some jurisdictions use actuarial information to determine whether a defendant who is eligible to serve his sentence in the community or at an institution should be sentenced to probation or incarceration.[72] The 2016 Wisconsin case of *State v. Loomis* illustrates this approach.[73] Eric Loomis was arrested in Wisconsin while driving a stolen car. The state alleged he was the driver in a drive-by shooting; however, Mr. Loomis denied involvement in the shooting and maintained he

67. *Id.*

68. *Id.*

69. Again, as with the length of the defendant's sentence, this decision is restrained by any relevant sentencing statutes or guidelines.

70. *See* Fiona Doherty, *Obey All Laws and Be Good: Probation and the Meaning of Recidivism*, 104 GEO. L.J. 291, 326 (2016) (noting that some states "have allowed probation officers to impose short jail or prison sentences as administrative sanctions without specific court approval" and providing examples).

71. *See* Commonwealth v. Cole, 10 N.E.3d 1081, 1089 (Mass. 2014) (noting that "the judiciary may not interfere" with parole decisions).

72. *See, e.g.*, State v. Loomis, 881 N.W.2d 749 (Wis. 2016).

73. *Id.*

drove the car only after the shooting occurred. He ultimately pleaded guilty to operating a motor vehicle without consent and to eluding a police officer.[74]

The presentence investigation report submitted to the judge included a Correctional Offender Profiling for Alternative Sanctions (COMPAS) risk assessment, which indicated Mr. Loomis presented a high risk of pretrial, general, and violent recidivism.[75] In ruling out probation—that is, in deciding to incarcerate Mr. Loomis instead of sentencing him to a community-based sentence—the circuit court noted that Mr. Loomis had been "identified, through the COMPAS assessment, as an individual who is at high risk to the community," and that one reason it was ruling out probation was that "the risk assessment tools that have been utilized, suggest that you're extremely high risk to re-offend."[76]

In jurisdictions that follow this first approach, actuarial information can weigh in favor of either a community-based (probation) or institutional (prison or jail) sentence—risk prediction may lead to either a better or worse outcome for the defendant. Under a second approach, however, actuarial risk predictions can lead only to a better location decision for the defendant. This diversionary approach uses actuarial information to identify low-risk, prison-bound defendants and sentence them to community supervision or jail (meaning a sentence less than twelve months) in lieu of prison.[77] Defendants in these jurisdictions would, absent consideration of risk assessment information, be sentenced to prison.[78] The Model Penal Code, for example, instructs the sentencing commission to "develop actuarial instruments or processes to identify offenders who . . . are subject to a presumptive or mandatory sentence of imprisonment" but present an "unusually low risk to public safety," and recommends that the sentencing judge have discretion to sentence such offenders to a "community sanction rather than a prison term."[79]

Virginia employs risk information in precisely this way.[80] It uses a "nonviolent offender risk assessment instrument" to actuarially predict the recidivism risk of defendants who have been convicted of specified nonviolent felonies and who, according to state sentencing guidelines, are recommended for a prison

74. *Id*. at 754.

75. *Id*. at 754–55.

76. *Id*. at 755 (quoting the circuit court at sentencing).

77. *See, e.g*., VA. CRIMINAL SENTENCING COMM'N, *supra* note 38, at 36 ("The goal of the nonviolent risk assessment instrument is to divert low-risk offenders who are recommended for incarceration on the guidelines to an alternative sanction other than prison or jail. Therefore, nonviolent offenders who are recommended for probation/no incarceration on the guidelines are not eligible for the assessment.").

78. *See id*.

79. MODEL PENAL CODE: SENTENCING § 6B.09(3) (AM. LAW INST., Proposed Final Draft 2017). And, as discussed above, the Model Penal Code also authorizes imposing shorter sentences on these "unusually low-risk" offenders. *Id*.; *see supra* note 56 and accompanying text.

80. Virginia was a very early adopter of actuarial sentencing practices. *See* MODEL PENAL CODE: SENTENCING § 6B.09 rptrs. note d (AM. LAW INST., Proposed Final Draft 2017) (describing Virginia as "the first state to develop an actuarial risk-assessment tool to be used at sentencing for purposes of diverting low-risk offenders otherwise bound for prison into community sanctions"). Virginia has incorporated risk assessment into incarceration decisions statewide since 2002. VA. CRIMINAL SENTENCING COMM'N, *supra* note 38, at 86.

sentence.[81] This tool differs from the sex offender risk assessment tool discussed above.[82] Virginia's current nonviolent drug offender risk assessment tool considers a handful of factors deemed statistically significant to recidivism prediction, including: the defendant's gender and age at the time of the offense; prior juvenile adjudications or adult felony convictions; and whether the defendant was arrested or confined within the twelve months leading up to the offense.[83] And until 2013, the tool also considered marital status and employment status.[84]

Offenders who score below a certain threshold are recommended for an alternative sentence.[85] Under this regime, an alternative sentence includes "anything short of an actual state prison sentence," such as probation supervision, community service, day or evening reporting, drug treatment programs, and incarceration at a local correctional facility.[86] Notably, a defendant is considered "diverted" if the guidelines recommended prison and she is sentenced instead to jail.[87] Indeed, in Virginia, 2011, one of the most common "alternative punishments" meted under this program was a jail sentence instead of a prison sentence.[88] Two important observations flow from this insight. First, the "alternative" sentence was a diversion from prison, but not from incarceration. Those who were diverted to a jail sentence were nevertheless incarcerated, albeit at a local facility instead of a state facility. Second, this practice demonstrates that there can be overlap between sentence-location and sentence-length decisions. By deciding to divert a defendant to jail instead of prison, Virginia judges routinely decided to impose a shorter sentence than they would have without the risk assessment information.

A third method of integrating actuarial information into sentence-location decisions is to use it to decide whether to suspend part of a defendant's

81. VA. CRIMINAL SENTENCING COMM'N, *supra* note 38, at 86*; see also* Brian J. Ostrom & Neal B. Kauder, *The Evolution of Offender Risk Assessment in Virginia*, 25 FED. SENT'G REP. 161, 166 (2013).

Certain individuals within these offense categories are categorically excluded from consideration for risk-based diversion. For example, individuals with a prior felony conviction for a violent offense or those convicted of selling one ounce or more of cocaine may not be considered for risk assessment diversion. VA. CRIMINAL SENTENCING COMM'N, *supra* note 38, at 86.

82. *See supra* note 58 and accompanying text.

83. *See* VA. CRIMINAL SENTENCING COMM'N, SENTENCING GUIDELINES COVERSHEET & WORKSHEET: DRUG/OTHER, SECTION D (2017), http://www.vcsc.virginia.gov/worksheets_2017/DRG_othws.pdf; *see also* BRIAN J. OSTROM ET AL., OFFENDER RISK ASSESSMENT IN VIRGINIA: A THREE-STAGE EVALUATION 12 (2002), http://www.vcsc.virginia.gov/risk_off_rpt.pdf. This tool was designed precisely for this purpose and engages only in risk identification. In designing the tool, the Virginia Criminal Sentencing Commission decided that "needs assessment"—or what I have above characterized as risk intervention—was the work of probation officers and the Department of Corrections, not judges, and therefore was not encompassed in the risk tool. Ostrom & Kauder, *supra* note 81, at 166.

84. *See* OSTROM ET AL., *supra* note 83, at 12, 27; *see also* Ostrom & Kauder, *supra* note 81, at 167 n.4.

85. VA. CRIMINAL SENTENCING COMM'N, *supra* note 38, at 87. In fiscal year 2014, 47.5% of those assessed were recommended for an alternative sanction and almost 38% of those who were recommended received an alternative sentence. *Id.*

86. Ostrom & Kauder, *supra* note 81, at 162–63.

87. *Id.*

88. *Id.* at 165.

incarceratory sentence and replace that suspended portion with community supervision. California recently adopted this approach. Since 2015, California Rules of Court have allowed courts to consider risk assessment information in determining the length and conditions of an individual's period of mandatory supervision.[89] Mandatory supervision, like probation, is a period of supervised release in the community.[90] However, "[m]andatory supervision . . . is not probation."[91] Whereas probation is a period of community supervision that replaces a period of incarceration, mandatory supervision is a period of community supervision that follows incarceration. When sentencing individuals convicted of specified low-level crimes, California courts "must suspend execution of a concluding portion" of the sentence "as a period of mandatory supervision."[92] Notably, however, California judges do not consider imposing a split sentence until they have already ruled out a sentence of probation.[93]

B. THE PROMISES OF ACTUARIAL SENTENCING

Proponents of actuarial sentencing make three primary claims about the benefits of actuarial sentencing. First, they package actuarial sentencing as part of a systemic reorientation of the criminal justice system that will increase public safety by reducing recidivism.[94] Second, they claim it simply increases the accuracy of decisions judges are already making.[95] Finally, they emphasize the beneficiaries of this innovation: the public, who save money while avoiding future victimization and the defendants who avoid incarceration.[96] This section identifies and explores each of these promises.

1. Reducing Recidivism Through Rehabilitation

Many criminal justice reform advocates, including many actuarial sentencing proponents, identify the systemic embrace of retributivism, and the concomitant rise of a tough-on-crime ethos and harsh sentencing practices as the source of our current systemic dysfunction.[97] As a result, they claim, we have a criminal justice

89. CAL. R. CT. 4.415(c).

90. *See* Chief Prob. Officers of Cal., *Mandatory Supervision: The Benefits of Evidence Based Supervision Under Public Safety Realignmnet*, 1 CPOC ISSUE BRIEF 1, 1 (2012) (defining mandatory supervision as "a court ordered period of time in the community under the supervision of the county probation department").

91. RICHARD COUZENS ET AL., CRIMINAL JUSTICE REALIGNMENT FREQUENTLY ASKED QUESTIONS 5 (2014), http://www.courts.ca.gov/partners/documents/cjr_faq.pdf ("Mandatory supervision [under California's criminal justice realignment] is not probation. Mandatory supervision may not be used until the judge denies probation and imposes a split sentence. The supervision is part of the sentence imposed by the court.").

92. CAL. R. CT. 4.415(a).

93. *See* COUZENS ET AL., *supra* note 91.

94. *See infra* Section I.B.1.

95. *See infra* Section I.B.2.

96. *See infra* Section I.B.3.

97. *See*, *e.g.*, Hon. William Ray Price Jr., Chief Justice of the Supreme Court of Mo., State of the Judiciary Address (Feb. 3, 2010), http://www.courts.mo.gov/page.jsp?id=36875 [https://perma.cc/GM5M-WG3G] (critiquing "tough on crime" policies and arguing in favor of actuarial sentencing). *See*

system that resorts quickly to incarceration and, consequently, is struggling under the weight of mass incarceration. As retributivism is understood to be a contributing cause of mass incarceration, reformers contend that we need a new "brand" of criminal justice that focuses on public safety instead of punishing past behavior.[98]

Actuarial sentencing is marketed as an important component of this new brand of public-safety focused criminal justice. For example, in 2011, Kentucky enacted a Public Safety and Offender Accountability Act that declared that the state's "primary objective of sentencing" is to "maintain public safety and hold offenders accountable while reducing recidivism and criminal behavior and improving outcomes for those offenders who are sentenced."[99] In that same Act, Kentucky legislators declared that sentencing judges "shall consider . . . the results of a defendant's risk and needs assessment included in the presentence investigation."[100] The Conference of Chief Justices and the Conference of State Court Administrators similarly linked actuarial sentencing to a new era of public-safety-focused sentencing law and policy. In their 2007 Resolution in support of actuarial sentencing practices, they "elevated recidivism reduction as an important consideration in the sentencing process" and stressed the importance of using risk assessment tools to reduce recidivism.[101] And the NCSC's National Working Group on Using Risk and Needs Assessment Information at Sentencing identified the first benefit of actuarial sentencing as "[c]ontributing to public safety/avoiding further victimization by reducing recidivism."[102]

Actuarial sentencing proponents specify that this practice will actualize its recidivism reduction goal *through rehabilitation*. For example, the Indiana Court Times, a publication of the Indiana State Court system, claims that the use of risk assessment tools at sentencing will "enhance efforts to rehabilitate offenders, reduce recidivism, and increase public safety."[103] And in his 2010 State of the Judiciary Address, Missouri Chief Justice William Ray Price Jr. called for a movement away from "anger-based sentencing that ignores cost and effectiveness" toward actuarial sentencing, which "assesses each offender's risk and then fits that offender with the cheapest and most effective rehabilitation that he or she needs."[104] The NCSC's model curriculum for teaching judges about actuarial

generally Erin R. Collins, *Status Courts*, 105 GEO. L.J. 1481, 1513–17 (2017) (discussing the connection between retributivist policies and mass incarceration).

98. *See* KELLY ET AL., *supra* note 7, at 177.

99. KY. REV. STAT. ANN. § 532.007(1) (West 2011).

100. *Id*. § 532.007(3)(a); *see also* COUNCIL OF STATE GOV'TS, LESSONS FROM THE STATES: REDUCING RECIDIVISM AND CURBING CORRECTIONS COSTS THROUGH JUSTICE REINVESTMENT 4 (2013), https://csgjusticecenter.org/wp-content/uploads/2013/04/FINAL_State_Lessons_mbedit.pdf (noting that "many states fail to focus their incarceration . . . on the people most likely to commit future crimes" and advocating for the use of risk assessment instruments).

101. CASEY ET AL., *supra* note 8, at 3.

102. *Id*. at 7.

103. *Indiana's New Risk Assessment Tools: What You Should Know*, IND. CT. TIMES (Apr. 13, 2011), http://indianacourts.us/times/2011/04/risk-assessment/ [https://perma.cc/U375-W8ZW].

104. Price, *supra* note 97. Chief Judge Price also emphasized that actuarial sentencing would lead to diversion of some offenders from prison, and "remov[al of] others from prison more quickly—after they have learned their lesson, but before they are ruined by worse offenders." *Id*.

sentencing defines the practice as one that is "based on 'corrections' principles . . . used to reduce recidivism."[105] The NCSC's National Working Group similarly links actuarial sentencing to rehabilitation. The Group dedicates five pages of its guide to why and how jurisdictions should implement actuarial sentencing to explicating the Risk-Needs-Responsivity (RNR) principle.[106] As will be discussed in greater detail in Part II, a core tenet of the RNR principle is that recidivism risk should be identified so that it can be reduced through appropriate and effective rehabilitative programming.

Thus, one marketing promise of actuarial sentencing is that it is one of many reforms that will help increase public safety by reducing recidivism. Its proponents contend that actuarial tools improve sentencing by shifting the emphasis from retribution to rehabilitation—from extracting punishment for past bad behavior to increasing public safety by reforming offenders.

2. Refining Risk Prediction

A related, but somewhat conflicting, claim offered in favor of actuarial sentencing is that it simply enhances, but does not fundamentally change, the risk inquiry judges are and should be making at sentencing. From this perspective, actuarial sentencing appears to be a simple matter of "follow[ing] the evidence" to a better sentencing decision.[107] Its defense generally consists of three cumulative assertions: (1) that risk prediction is a normatively sound sentencing function; (2) that these tools enhance the accuracy of this established prediction; and (3) that its use therefore enhances sentencing decisions.

First, and often with a reference to *Jurek v. Texas*,[108] actuarial sentencing proponents emphasize that prediction of future behavior is an established component of sentencing decisions.[109] As the Supreme Court noted in *Jurek*, "any sentencing authority must predict a convicted person's probable future conduct when it engages in the process of determining what punishment to impose."[110] Accordingly, the Model Penal Code reporters comment that adopting actuarial sentencing practices "recognizes that American sentencing systems will and should take account of an offender's future behavior, including the offender's amenability to rehabilitation and propensity to recidivate, when assigning penalties."[111] Richard Kern, former

105. *See* NAT'L CTR. FOR STATE COURTS, EVIDENCE-BASED SENTENCING TO IMPROVE PUBLIC SAFETY & REDUCE RECIDIVISM: A MODEL CURRICULUM FOR JUDGES 10 (2009), http://www.ncsc.org/~/media/Microsites/Files/CSI/Education/Faculty_Handbook.ashx [https://perma.cc/GPA7-3GZ6].

106. *See* CASEY ET AL., *supra* note 8, at 4–8.

107. Hyatt et al., *supra* note 3, at 267.

108. 428 U.S. 262 (1976).

109. *See, e.g.*, Christopher Slobogin, *Risk Assessment*, *in* THE OXFORD HANDBOOK OF SENTENCING AND CORRECTIONS 196, 203–05 (Joan Petersilia & Kevin R. Reitz eds., 2012) ("The Supreme Court, however, does not believe that risk assessment is antithetical to criminal justice. It has even approved death sentences based on dangerousness determinations (*Jurek v. Texas* 1976, 275–276).").

110. 428 U.S. at 274–76.

111. MODEL PENAL CODE: SENTENCING § 6B.09 cmt. a (AM. LAW INST., Proposed Final Draft 2017); *see also id.* § 6B.09 cmt. e ("Judgments—or guesses—about offenders' future criminality have long been integral to American criminal-justice systems at the judicial sentencing stage.").

Director of the Virginia Criminal Sentencing Commission, and Mark Bergstrom, Executive Director of the Pennsylvania Commission on Sentencing, similarly argue in their defense of actuarial sentencing that risk prediction is inherent to sentencing and "has and will continue to be used by courts at sentencing, whether formally or informally."[112] Thus, a starting premise in the defense of actuarial sentencing is that there is simply nothing new about predicting risk at sentencing.

Second, proponents claim that actuarial risk assessment tools simply help judges make these normatively sound predictions more accurately. In support of such arguments, proponents emphasize research demonstrating that actuarial tools help judges predict recidivism more accurately than they could "clinically," without the assistance of actuarial predictions.[113] A "clinical" prediction is one made based on "experience, skills, and judgment"[114] or simply "gut-level feelings."[115] Again, the Model Penal Code commentary is illustrative. The reporters note that actuarial risk predictions "have been found superior to clinical predictions built on the professional training, experience, and judgment of the persons making predictions."[116]

Finally, proponents conclude that, because actuarial tools increase the accuracy of clinical recidivism predictions, actuarial sentencing simply brings "the best available information" to the task of predicting future behavior.[117] Actuarial sentencing is thus portrayed as a practice that applies data gleaned in one area of the criminal justice system to another, a simple matter of "follow[ing] the evidence" to enhance the accuracy of decisions judges would—and should—be making anyway.[118] In other words, actuarial sentencing does not change what judges are doing at sentencing; it simply enhances it. From this perspective, as the prediction of future behavior is a normatively sound sentencing consideration, and because

112. Kern & Bergstrom, *supra* note 3, at 185; *see also* Richard Berk & Jordan Hyatt, *Machine Learning Forecasts of Risk to Inform Sentencing Decisions*, 27 FED. SENT'G REP. 222, 222 (2015) ("Forecasting has been an integral part of the criminal justice system in the United States since its inception. Judges, as well as law enforcement and correctional personnel, have long used projections of relative and absolute risk to help inform their decisions." (footnotes omitted)); Hyatt et al., *supra* note 3, at 266 ("With varying degrees of formality, judges already consider risk at sentencing. The judiciary thinks about, and is concerned with, the relative danger of recidivism for each offender sentenced.").

113. *See, e.g.*, Stephen D. Gottfredson & Laura J. Moriarty, *Statistical Risk Assessment: Old Problems and New Applications*, 52 CRIME & DELINQ. 178, 180 (2006) ("There are generally two types of risk and/or needs assessment instruments: those based on clinical judgment and those based on actuarial practice. Clinical methods, also referred to as . . . subjective assessments . . . [or] intuition . . . rely on professionals asking offenders a series of questions that most typically are not standardized. . . . In virtually all decision-making situations, it has been found that actuarially developed predictions outperform human judgments." (citations omitted)); Starr, *supra* note 1, at 851–52 (describing the assumption that actuarial predictions outperform clinical predictions as "virtually gospel" in actuarial sentencing literature).

114. Latessa & Lovins, *supra* note 30, at 210.

115. Gottfredson & Moriarty, *supra* note 113, at 180.

116. MODEL PENAL CODE: SENTENCING § 6B.09 cmt. a (AM. LAW INST., Proposed Final Draft 2017).

117. *Id.*

118. Hyatt et al., *supra* note 3, at 267; *see also* Hyatt & Chanenson, *supra* note 19, at 10 (describing responses to a judicial attitudes survey, which revealed that "[a]t-sentencing risk assessment is perceived to be relatively commonplace by [the] group of judges" surveyed).

these tools purport to predict future behavior more accurately, "judges who eschew risk assessment instruments do so to their detriment."[119]

Together, the complimentary but somewhat contradictory claims outlined above—that actuarial sentencing is part of a new era of criminal justice but, at the same time, is simply an enhanced version of "business-as-usual"—allay concerns that might otherwise arise from the application of actuarial risk information to sentencing decisions. It therefore appears that actuarial sentencing helps judges make accurate predictions about future behavior so that they can sentence a defendant in a way that advances rehabilitative goals.

3. Increasing Efficiency

Additionally, proponents promise that actuarial sentencing will deliver much-needed cost savings. They claim actuarial sentencing saves money that would otherwise be expended on incarceratory resources for those who would, without actuarial sentencing, be sent to prison but who would not reoffend.[120] Moreover, proponents contend, public safety increases in the long run because people are rehabilitated, so they do not recidivate and return to the criminal justice system.[121] Of course, there are "human costs" that are avoided through this practice—families are not torn apart, people are not unnecessarily confined—but proponents tend to acknowledge those benefits are secondary to the monetary savings.[122]

From this laudatory perspective, actuarial sentencing seems to be a benevolent reform that carries no downsides. Its proponents promote it as a reform measure that benefits both society, which saves money and is protected from future crime, and defendants, who are rehabilitated and avoid incarceration.[123] Through risk assessment, as the American Law Institute promises, we can distinguish the "most dangerous" from the "low-risk" offenders; we will reserve "scarce prison resources" for the former and divert and rehabilitate the rest.[124]

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119. Oleson, *supra* note 4, at 1340.

120. *See*, *e.g.*, MODEL PENAL CODE: SENTENCING § 6B.09 cmt. h (AM. LAW INST., Proposed Final Draft 2017) ("Particularly with respect to the identification of low-risk offenders, substantial monetary savings may result from the diversion of offenders who otherwise would have been incarcerated. With respect to the extended confinement of high-risk offenders, the avoidance of future serious victimizations . . . carries significant economic and intangible benefits."); Nicholas Scurich & John Monahan, *Evidence-Based Sentencing: Public Openness and Opposition to Using Gender, Age, and Race as Risk Factors for Recidivism*, 40 L. & HUM. BEHAV. 36, 36 (2016) ("Within ranges set by statute, [evidence-based sentencing] would reduce the prison population by sentencing offenders assessed as at lower risk of recidivism to shorter prison terms than offenders assessed as at higher risk of recidivism.").

121. *See supra* Section I.B.1.

122. The Model Penal Code reporters note, for example, that when actuarial tools are used to "encourage sentencing judges to divert low-risk offenders from prisons to community sanctions, risk assessments conserve scarce prison resources for the most dangerous offenders, reduce the overall costs of the corrections system, and avoid the human costs of unneeded confinement to offenders, offenders' families, and communities." MODEL PENAL CODE: SENTENCING § 6B.09 cmt. d (AM. LAW INST., Proposed Final Draft 2017).

123. *See* Starr, *supra* note 1, at 816 (noting that "[m]ost advocates of [actuarial sentencing] frame it as a strategy for reducing incarceration and the resulting budgetary costs and social harms").

124. MODEL PENAL CODE: SENTENCING § 6B.09 cmt. d (AM. LAW INST., Proposed Final Draft 2017).

Recently, scholars have begun to offer critiques of actuarial sentencing that temper its widespread appeal. For example, some have argued that incorporating certain characteristics into the actuarial risk assessment algorithm, such as gender, socioeconomic status, and characteristics that correlate with race, violates Equal Protection.[125] Others have questioned whether actuarial risk assessment is actually more accurate than clinical predictions.[126] The following discussion identifies another reason to be cautious: these tools were not designed for sentencing purposes. This observation not only casts doubt on the laudatory descriptive claims of actuarial sentencing proponents, but also reveals new normative concerns about this increasingly popular practice.

II. THE CORRECTIONAL ORIGINS OF ACTUARIAL SENTENCING

In some ways, the widespread enthusiasm for actuarial sentencing is unsurprising. As recounted in Part I, it emerges at a moment in U.S. criminal justice policy when reformers are seeking to create smart, data-driven solutions to seemingly intractable problems. And yet, for reasons this Part explores, such enthusiasm is actually quite surprising because the actuarial tools at the center of this innovation were designed for use at a different moment in the punishment process—they were developed as guides for how to administer punishment *after* the terms of the sentence had been established—and their creators explicitly warned they were not intended for use at sentencing.

To bring this insight into focus, this Part begins with a genealogy of actuarial risk assessment practices. It reveals that these tools emerged and evolved to address a specific problem: how to administer punishment efficiently and effectively. It then demonstrates that these same tools are now being asked to serve a different purpose, and one that their creator specifically warned against—to determine how much punishment is due.[127] It contends that this off-label application of actuarial risk assessment information to sentencing decisions triggers an equally unintended, off-label theoretical justification. Whereas the tools advance rehabilitation when used as directed in the correctional context, in the sentencing context, the same tools are used to justify decisions that embrace incapacitation.

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125. *See* Starr, *supra* note 1, at 821–41 (arguing, *inter alia*, that the practice violates the Equal Protection Clause; *see also* Melissa Hamilton, *Risk-Needs Assessment: Constitutional and Ethical Challenges*, 52 AM. CRIM. L. REV. 231, 242 (2015) ("Risk-needs instruments utilize a plethora of factors and characteristics to justify criminal justice decisions that may infringe upon fundamental rights or that differentiate between various groups with respect to benefits or burdens. Both results implicate equal protection issues.").

126. *See supra* note 15 and accompanying text.

127. A separate and distinct development in the evolution of actuarial risk assessment is its incorporation into bail decisions. *See, e.g.*, Mayson, *supra* note 22, at 507–08 (describing the adoption of actuarial risk assessment as the newest and "third wave of bail reform"). See *supra* note 22 for an explanation of why that development will not be addressed here.

A. CORRECTIONAL RISK ASSESSMENT: ASSESSING RISK TO ADMINISTER PUNISHMENT

Although sentencing authority is entrusted solely to judges,[128] only correctional authorities, including parole boards, are empowered to administer that sentence. As the Supreme Court has recognized, courts are "ill equipped" to deal with issues of prison administration.[129] "Running a prison is an inordinately difficult undertaking that requires expertise, planning, and the commitment of resources, all of which are peculiarly within the province of the legislative and executive branches of government."[130] Thus, "separation of powers concerns counsel a policy of judicial restraint" in interfering with how corrections departments administer punishment.[131] For these reasons, after a judge imposes a sentence, power and discretion shifts to the correctional agency to determine the conditions of the defendant's confinement, such as where the defendant will be imprisoned and what treatment programs (if any) to assign to the defendant.[132] Although a sentencing court may make recommendations as to how punishment is administered, "decisionmaking authority rests with the [Bureau of Prisons]."[133] Nor may a sentencing court review the decisions of parole boards.[134]

As this section establishes, actuarial risk assessment tools were developed to guide these post-sentencing, punishment-administration decisions. They first emerged for the narrow purpose of guiding parole decisions and considered only a handful of factors. The tools were then expanded to inform a range of correctional management tasks and, concomitantly, began to incorporate a significantly longer list of factors.

1. Paroling Risk

The first actuarial risk assessment tools were developed in the 1970s for use by parole boards and were intended to make parole decisions more consistent, predictable, and fair.[135] Tools developed for this purpose attempt to assist parole

128. *See supra* Section I.A.2.

129. Turner v. Safley, 482 U.S. 78, 84 (1987).

130. *Id.* at 84–85.

131. *Id.* at 85.

132. *See, e.g.*, Tapia v. United States, 564 U.S. 319, 331 (2011) (noting that the federal Bureau of Prisons has "plenary control" over decisions pertaining to conditions of confinement after the judge announces the sentence of a federal offender).

133. *Id.*

134. *See* Mistretta v. United States, 488 U.S. 361, 364 (1989) (noting that correction officials "possessed almost absolute discretion over the parole decision").

135. *See* Michael Tonry, *Legal and Ethical Issues in the Prediction of Recidivism*, 26 FED. SENT'G REP. 167, 167–68 (2014) (discussing the 1970s' "shifts in attitudes and beliefs" that led to the development of "prediction instruments" that could "take account of prisoners' prospects for law-abidingness" with the goal of ultimately "mak[ing] decisions about punishment fairer, more consistent, more predictable, and more transparent"); *see also* Hamilton, *supra* note 125, at 234 ("Initially, evidence-based practices were adopted to inform post-conviction decisions and management strategies, such as parole determinations, supervised release conditions, provision of reentry services, decisions to revoke supervision, and judgments concerning probation and parole sanctions."); Simon, *supra* note 57, at 399–400 ("Before the 1980s, [risk assessment] was used primarily in deciding who to release from confinement.").

boards in identifying the likelihood that a parole-eligible inmate would recidivate if he or she were released on parole.[136] Parole risk assessment tools tend to incorporate only static (unchangeable) recidivism risk factors, such as criminal history or history of probation violations.[137] For example, Connecticut uses the Salient Factor Score (SFS) assessment, which was originally developed by the U.S. Parole Commission for use in the federal system.[138] The SFS considers the following factors: number of prior commitments of sixty days or more, age at commencement of current offense, recent commitment free period, prior court-imposed term of imprisonment of more than one year, and use of violence in the current or previous offenses.[139]

Significantly, those who created parole risk assessment tools intentionally avoided incorporating into their calculations factors for which the offender bore no responsibility, such as gender or race.[140] And they originally incorporated, but eventually abandoned, consideration of age at first offense and "status variables" that were "heavily correlated with race," such as employment and education history, family characteristics, and residential status.[141]

2. Correcting Risk

Thus, actuarial recidivism prediction tools emerged in the 1970s to inform a specific decision—parole—and considered a discrete number of factors. The tools expanded significantly in the 1990s in three areas: (1) the type of decisions they were used to inform, (2) the purpose of those decisions, and (3) the kinds of information they incorporated into their prediction.[142] First, in contrast to parole risk assessment tools, which focus on whether to release an individual, the tools developed in the 1990s and onward—third- and fourth-generation risk

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Social science literature counter-intuitively calls these "second generation" risk assessment tools. *See* Hamilton, *supra* note 125, at 236–39 (describing four generations of risk assessment instruments). The first generation of risk assessment is clinical risk assessment. *Id*. at 236. Popular examples of second-generation tools are the Violence Risk Appraisal Guide, Static-99, and the federal Pre-Trial Risk Assessment tool. *Id*. at 237.

136. *See* Tonry, *supra* note 135, at 168.

137. However, some jurisdictions have begun to incorporate dynamic factors into their parole risk assessment. *See* SHAMIR RATANSI & STEPHEN M. COX, CONN. STATISTICAL ANALYSIS CTR., ASSESSMENT AND VALIDATION OF CONNECTICUT'S SALIENT FACTOR SCORE 10–11 (2007) (surveying parole risk assessment practices of U.S. jurisdictions and Canada). For an explanation of the difference between static and dynamic risk factors, see *supra* notes 35–36 and accompanying text.

138. RATANSI & COX, *supra* note 137, at 3.

139. *See id*. at 12.

140. *See* Tonry, *supra* note 135, at 168.

141. *Id*.

142. Although jurisdictions began to integrate actuarial risk assessment information into correctional management decisions in the 1990s, the practice did not gain popularity until the last decade. VERA INST. OF JUSTICE, CRT. ON SENTENCING & CORRS., MEMORANDUM TO DELAWARE JUSTICE REINVESTMENT TASK FORCE, RISK AND NEEDS ASSESSMENTS 4 (Oct. 12, 2011), http://www.ma4jr.org/wp-content/uploads/2014/10/vera-institute-memo-on-risk-assessment-for-delaware-2011.pdf [hereinafter VERA, DJRTF MEMO]. A 2010 national survey conducted by the Vera Institute of Justice identified sixty community supervision agencies in forty-one states that used a risk assessment tool to assist with offender management. *Id*. Most of these agencies—70%—had implemented their tools since 2000, and one-third of those had adopted them after 2005. *Id*.

assessment instruments, as they are called in the social science literature[143]—are intended to guide decisions about how to manage an individual while he or she is under correctional supervision.[144] Specifically, such tools are intended to inform decisions relating to classification, placement, and programming for individuals sentenced to a term of incarceration,[145] and decisions relating to the supervision of defendants sentenced to probation.[146] For example, they are used to help determine in what kind of facility an individual will be housed (for example, maximum, medium, or low security),[147] and what kind of treatment programs that individual should complete during his or her term of supervision (for example, educational, occupational, or behavioral programs).[148]

Two of the most popular risk assessment tools—the Level of Services Inquiry–Revised (LSI–R) and the Correctional Offender Profiling for Alternative Sanctions (COMPAS)—were developed in 1995 and 1998, respectively.[149] The LSI–R describes itself as "a quantitative survey of offender attributes and their situations relevant to level of supervision and treatment decisions."[150] The

143. *See* Hamilton, *supra* note 125, at 237–39.

144. *See infra* notes 149–53 and accompanying text.

145. *See*, *e.g.*, State v. Loomis, 881 N.W.2d 749, 753–54 (Wis. 2016) (describing the COMPAS "risk-need assessment tool" used by the corrections department "when making placement decisions, managing offenders, and planning treatment").

146. Indiana, for example, began using risk assessment to guide standards and recommendations for probation departments in 1995. *See* Malenchik v. State, 928 N.E.2d 564, 570 (Ind. 2010). California adopted risk assessment in corrections as part of a realignment of its criminal sentencing procedures to "prioritize limited probation resources" by establishing "an appropriate program of supervision" for offenders. *See* JUDICIAL COUNCIL OF CAL., CRIMINAL LAW ADVISORY COMM., INVITATION TO COMMENT: SPR17-27, CRIMINAL PROCEDURE: USE OF RISK/NEEDS ASSESSMENTS AT SENTENCING 1 (2017), http://www.courts.ca.gov/documents/SPR17-27.pdf; *see also* CAL. PENAL CODE § 17.5(a)(7) (2011) (providing for a statewide "justice reinvestment strategy," defined as "a data-driven approach to reduce corrections and related criminal justice spending and reinvest savings in strategies designed to increase public safety" by "manag[ing] and allocat[ing] criminal justice populations more cost-effectively"). And the Broward County, Florida Sheriff's Office began using COMPAS in 2008 to determine levels of supervision. THOMAS BLOMBERG ET AL., VALIDATION OF THE COMPAS RISK ASSESSMENT CLASSIFICATION INSTRUMENT 15 (2010), http://criminology.fsu.edu/wp-content/uploads/Validation-of-the-COMPAS-Risk-Assessment-Classification-Instrument.pdf.

147. JAMES, *supra* note 30, at 4 ("Correctional authorities use risk assessment to make decisions about the security level to which inmates will be assigned (e.g., a high, medium, low, or minimum security facility.)").

148. *See* Tonry, *supra* note 135, at 171 (explaining that actuarial risk predictions can be used by correctional agencies to direct individuals toward "educational, vocational, anger management, cognitive skills, and parenting programs meant to target identified deficits"); *see also* Latessa & Lovins, *supra* note 30, at 209 (explaining that correctional interventions should target "factors that are highly correlated with criminal conduct," such as "substance abuse" and "antisocial attitudes").

149. *See* JAMES, *supra* note 30, at 25 (discussing the LSI–R's development in 1995). Northpointe Institute for Public Management developed COMPAS in 1998. *See* NORTHPOINTE, *supra* note 43, at 2; *see also* VERA INST. OF JUSTICE, CTR. ON SENTENCING & CORRS. MEMORANDUM TO ILLINOIS RISK ASSETS AND NEEDS ASSESSMENT TASK FORCE 1 (May 27, 2010) https://www2.illinois.gov/idoc/Documents/National_Information_Offender_Assessments_PartII_Memo.pdf (reporting results of a national survey that found that the LSI–R is the "most commonly used generic tool" and noting that the COMPAS tool was also "commonly used").

150. D.A. Andrews & James Bonta, *LSI–R: Level of Service Inventory-Revised*, MHS ASSESSMENTS, https://www.mhs.com//MHS-Publicsafety?id=153 [https://perma.cc/ULE9-UX2D].

COMPAS Practitioner's Guide explains that the tool was created "to provide decisional support for the Department of Corrections when making placement decisions, managing offenders, and planning treatment."[151]

Second, in addition to expanding the site of the risk inquiry beyond parole to supervision, classification, and treatment decisions, these newer tools added a second step to the actuarial inquiry: risk reduction. Like parole assessment tools, correctional risk assessment tools evaluate an individual's risk of recidivism; but they also purport to identify particular recidivism risk factors or "criminogenic needs" that correctional agents should address to reduce that risk.[152] In other words, they identify both the risk of recidivism and the dynamic factors that should be targeted with correctional intervention to reduce that risk.[153]

This process of risk identification and reduction emerged from social science research of the Risk-Needs-Responsivity (RNR) principle.[154] The risk principle identifies *who* should be targeted for correctional intervention.[155] This principle emerged from research by social scientists Andrews, Bonta, and Hoge indicating not only that correctional intervention decreases recidivism amongst higher risk offenders, but also that such interventions actually increase recidivism rates amongst low-risk offenders.[156] Accordingly, the risk principle dictates that recidivism reduction efforts should target those with the higher risk of recidivism, whereas low-risk offenders should be "identified and excluded . . . from intensive correctional programs."[157]

The need principle identifies *what* to target in the offender to reduce her risk of recidivism.[158] The principle dictates that correctional intervention should be

151. *See* State v. Loomis, 881 N.W.2d 749, 754 (Wis. 2016) (citing COMPAS Practitioner's Guide).

152. *See* Monahan & Skeem, *supra* note 34, at 499 (distinguishing between tools that "are designed exclusively to predict recidivism" from those that "are meant to inform risk reduction").

Because risk-identification tools were developed before tools that also engage in risk intervention, risk-assessment literature typically refers to the former as second-generation risk-assessment tools and the latter as third- and fourth-generation risk-assessment tools. *See* Hamilton, *supra* note 125, at 236–39.

153. *See* Hamilton, *supra* note 125, at 237–39 (describing third- and fourth-generation risk-assessment tools). Many call this secondary task a "needs assessment," as it involves identifying the subject's "criminogenic needs" or dynamic risk factors that may be amenable to intervention. *See* MODEL PENAL CODE: SENTENCING § 6B.09 cmt. a (AM. LAW INST., Proposed Final Draft 2017) (describing the difference between "[n]eeds and risk assessment"); Gottfredson & Moriarty, *supra* note 113, at 192 (distinguishing between risk assessment, or "predicting who will or will not behave criminally," and "needs assessment," which involves "using predictive methods to attempt a reduction in criminality through assignment to differential treatments"). I refrain from using the phrase "needs assessment" to avoid confusion.

154. *See* Latessa & Lovins, *supra* note 30, at 206–08.

155. *Id*.

156. *See id*. A meta analysis demonstrated that correctional intervention for high-risk offenders decreased recidivism by nineteen percent and increased recidivism for low-risk offenders by four percent. *Id*. at 207 fig.2. Prevailing explanations for this counterintuitive increase in recidivism in low-risk offenders is that they are exposed to the "antisocial" attitudes of high-risk offenders in intensive correctional interventions and that placing low-risk offenders in restrictive settings disrupts the factors that make them low-risk, like a stable job and supportive community. *Id*. at 207–08.

157. *Id*. at 206–08.

158. *See id*. at 208–09.

directed toward the offender's "criminogenic needs," also referred to as "dynamic" (or changeable) risk factors.[159] The "crime producing needs" that are most commonly targeted for correctional intervention are substance abuse; antisocial attitudes and association with antisocial peers; and lack of empathy, problem solving, and self control.[160]

The responsivity principle dictates *how* such correctional intervention should be delivered.[161] It suggests that treatment should be delivered in a way that is the most accessible and engaging to the offender based on her mental and emotional condition, level of motivation, and cognitive functioning.[162] In sum, the RNR principle aims to "assess[] an offender's risk of reoffending, match[] supervision and treatment to the offender's risk level, and target[] the offender's criminogenic needs or dynamic risk factors with the social learning and cognitive-behavioral programs most likely to effect change in the offender's behavior."[163]

Thus, as risk assessment expanded and evolved from parole to correctional management, the purpose of the assessment also changed. For parole purposes, actuarial risk assessment identifies recidivism risk as a proxy for public safety risk. For correctional management purposes, as embodied in contemporary risk assessment tools, risk is identified *so that it can be reduced* through appropriate correction intervention.[164] In service of this risk-reduction goal, correctional management risk assessment tools drastically increased the range of factors upon which they base their recidivism prediction. Such tools explicitly incorporate static risk factors that most parole assessment tools intentionally exclude, such as age at first offense, gender, and history of family criminality.[165] Moreover, they also incorporate a range of other factors that are "dynamic," or factors that can (at least in theory) be changed through either the passage of time or intervention, such as employment status, marital status, current age, and educational achievements.[166]

This broadening of the risk inquiry to include both static and dynamic factors is said both to increase the accuracy of the risk prediction and help craft an effective management plan.[167] Criminologists Edward Latessa and Brian Lovins analogize to assessing risk in the medical context to illustrate this point. They explain that if you wanted to understand your risk for a heart attack, for example, you would consider a range of static and dynamic factors, such as age, family

159. *Id*. at 209.

160. *Id*.

161. *See* JAMES, *supra* note 30, at 6.

162. Latessa & Lovins, *supra* note 30, at 210.

163. CASEY ET AL., *supra* note 8, at 6.

164. *Id*.

165. *See* Hamilton, *supra* note 125, app. A at tbls. 2–3 (listing factors incorporated into various third- and fourth-generation risk assessment tools, including LSI-R and COMPAS).

166. *See id*. Some scholarship and various tools identify the "dynamic risk factors" as the "criminogenic needs." *See, e.g*., Monahan & Skeem, *supra* note 34, at 498. I will use the more direct phrase "dynamic risk factors" or "dynamic factors" to avoid confusion.

167. *See* Latessa & Lovins, *supra* note 30, at 209 ("Combining static and dynamic factors together give us the best picture of the overall risk of recidivism.").

history, weight, and others.[168] However, "to *affect*—and lower—your risk you would focus on the dynamic ones."[169]

3. Correctional Risk Assessment Principles: Use Only as Directed

Thus, actuarial risk assessment has evolved and expanded within the correctional context. These expansive third- and fourth-generation correctional management tools are the same tools that are being integrated into sentencing decisions.[170] For example, Indiana uses the LSI–R,[171] and Wisconsin uses COMPAS.[172] Before moving on to scrutinize this new application, two principles of correctional risk assessment require attention.

First, these tools were created to help correctional agents administer punishment more effectively and efficiently, and their creators cautioned against their use for other purposes. The creators of LSI–R, for example, specify that it "is not a comprehensive survey of mitigating and aggravating factors relevant to criminal sanctioning and *was never designed to assist in establishing the just penalty*."[173] Similarly, COMPAS was not designed for decisions "regarding incarceration."[174] Thus, Wisconsin judges who receive COMPAS scores in advance of sentencing are warned that "risk scores are not intended to determine the severity of the sentence or whether an offender is incarcerated."[175] They must also be notified of the other "limitations" of COMPAS, including that "COMPAS *was not developed for use at sentencing*, but was intended for use by the

168. *Id.*

169. *Id.*

170. The only exception is Virginia, the only jurisdiction with a risk assessment "specific to the purpose of sentencing." VERA, DEL. JRTF MEMO, *supra* note 142, at 10. Otherwise, all jurisdictions that engage in actuarial sentencing use instruments designed for use in the correctional context, such as the LSI–R, COMPAS, or state-specific correctional risk assessment tools. *See id.* (noting that Virginia is the only jurisdiction with a risk assessment "specific to the purpose of sentencing"). However, although Virginia's tool is specifically designed for use at sentencing, it operates in the same way as correctional risk assessment tools. *See* OSTROM ET AL., *supra* note 83, at 12 (describing Virginia's risk assessment process).

171. *See* Malenchik v. State, 928 N.E.2d 564, 575 (Ind. 2010) (approving of the use of LSI–R at sentencing).

172. *See* State v. Loomis, 881 N.W.2d 749, 757, 769, 772 (Wis. 2016) (upholding the use of COMPAS at sentencing).

173. *See Malenchik*, 928 N.E.2d at 572 (quoting ANDREWS & BONTA, *supra* note 21, at 1) (emphasis added).

174. *Loomis*, 881 N.W.2d at 756 (describing testimony of an expert witness about the COMPAS risk assessment instrument); *see also* Angwin et al., *supra* note 66 (describing testimony of one of the creators of COMPAS who said that the software was not created for sentencing; instead, his focus was on reducing crime, not punishment, and he "wanted [it] to stay away from the courts"); Anthony W. Flores et al., *False Positives, False Negatives, and False Analyses: A Rejoinder to "Machine Bias: There's Software Used Across the Country to Predict Future Criminals. And It's Biased Against Blacks,"* 80 FED. PROB. 38, 39 (2016) (critiquing the study of Angwin et al., *supra* note 66, which found COMPAS racially biased because it was tested on pretrial defendants and "was not designed for use on pretrial defendants" but was rather "developed upon and for individuals on post-disposition supervision").

175. *Loomis*, 881 N.W.2d at 768.

Department of Corrections in making determinations regarding treatment, supervision, and parole."[176]

Second, these tools are intended to help correctional agents administer punishment in a way that reduces recidivism. Indeed, as per the RNR principle, risk is identified so that it can be reduced through correctional intervention. The RNR principle is intrinsically democratic: risk is identified for every offender so that it may be reduced through effective and appropriate rehabilitative programming. Of course, this principle is not necessarily democratically actualized: rehabilitative resources are limited and may not be allotted consistent with the RNR principle. But at least in theory, if not in practice, the RNR principle should lead to investment in the rehabilitation of all offenders.[177]

According to this principle, the mechanism for recidivism reduction is the provision of services, supervision requirements, and programming aimed at the offender's particular risk factors. Somewhat counterintuitively, the RNR principle should lead to *more* investment in the rehabilitation of high-risk offenders;[178] those who are a higher risk of recidivism should receive more intensive and targeted programming, supervision, and treatment requirements, all of which are resource intensive. Meanwhile, low-risk offenders need little by way of rehabilitation. In fact, intensive and restrictive programming for low-risk offenders has been deemed criminogenic—it may increase the likelihood they will reoffend.[179] Thus, the RNR principle may dictate that low-risk offenders receive little rehabilitative investment. But this lack of investment is perfectly consistent with the RNR principle: fewer resources are dedicated to low-risk offenders because it will increase their likelihood of future desistance.[180]

Undoubtedly, corrections officials wield great power over those who are under their supervision, and they use the risk assessment information to make decisions that increase or decrease the severity of an individual's conditions of confinement. For example, an individual who receives a low-risk score may be placed in a low-security facility that allows them to go into the community for work release. Conversely, an inmate who receives a high risk score may have greater restrictions placed on his movement within the facility or be required to attend more onerous treatment programs.[181] Yet, when high-risk offenders receive more intensive programming and low-risk offenders receive less based on their risk score, it is not because they deserve more or less sanction. Rather, it is because correctional intervention—or lack thereof, for low-risk offenders—is believed to

176. *Id*. at 769–70 (emphasis added).

177. *See supra* Section II.A.2.

178. *See* Latessa & Lovins, *supra* note 30, at 207.

179. *Id*. at 207–08.

180. *Id*.

181. *See* James Austin, *The Proper and Improper Use of Risk Assessment in Corrections*, 16 FED. SENT'G REP. 194, 196 (2004) (recommending that inmates who pose a high risk of reoffending be assigned to restrictive housing units, receive intensive treatment services, or both).

decrease their likelihood of recidivism in the future.[182] In other words, it is done to correct their risk level. As Latessa and Lovins explain, "[w]hen we are able to identify the higher risk offender, providing an appropriate correctional response that can reduce that risk, we have achieved a level of public protection through risk reduction."[183]

B. ACTUARIAL SENTENCING: ASSESSING RISK TO DETERMINE PUNISHMENT

Despite the clear admonishments that actuarial risk assessment tools should be used only as directed, many jurisdictions are nevertheless beginning to incorporate them into sentencing decisions.[184] This section describes how actuarial sentencing employs these tools in ways that depart from their intended, on-label design. It identifies two points of departure: (1) the decisions such tools are used to support and (2) the theoretical justifications for those decisions.

1. Going "Off-Label" in Practice: Sentencing Risk

As delineated in Part I, actuarial risk information has been applied in two sentencing-specific contexts: decisions about sentence length and sentence location.[185] This section contends that both of these decisions are decisions about the severity of the sentence and are therefore off-label applications of this risk information.

The decision about the length of a defendant's sentence is a decision about its severity. Perhaps because it so directly undermines the warning that risk assessment information should not be used to determine the severity of the sentence, this sentence-length use—and particularly the possibility of using a high-risk score to increase a defendant's sentence—has been met with much more circumspection than the sentence location decision. For example, the Model Penal Code "encourages the use of actuarial risk-assessment instruments as a regular part of the felony sentencing process"[186] and authorizes using actuarial information to guide decisions about both sentence location and length, as discussed above.[187] Yet, the drafters recommend actuarial tools with significantly less enthusiasm for the latter purpose, particularly for high-risk offenders, stressing that they do not "mandat[e]" or "encourag[e]" using actuarial risk information to increase the length of an offender's sentence.[188]

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182. *See* Latessa & Lovins, *supra* note 30, at 216 (arguing that risk assessment improves public safety by reducing recidivism).

183. *Id.*

184. *See, e.g.*, State v. Loomis, 881 N.W.2d 749, 759 (Wis. 2016) (noting that risk assessment tools like COMPAS "were designed for use by those within the Department of Corrections" but are "being transitioned to a sentencing venue governed by different guiding principles").

185. *See supra* Section I.A.2.

186. *See, e.g.*, MODEL PENAL CODE: SENTENCING § 6B.09 cmt. a (AM. LAW INST., Proposed Final Draft 2017).

187. *See supra* notes 54–56, 79.

188. *See* MODEL PENAL CODE: SENTENCING § 6B.09 cmt. e (AM. LAW INST., Proposed Final Draft 2017).

Many proponents of actuarial sentencing attempt to reconcile this conflict between the intended and applied use of actuarial recidivism predictions by distinguishing decisions about the severity of the sentence from decisions about where a defendant will serve his sentence. Such proponents claim that using risk information to impose community-based sentences on probation-eligible defendants is not a decision that impacts the severity of the sentence, and they limit their support to this use. In so doing, they purport to be in conformity with the intended, on-label use for which these tools were created. The National Center for State Courts (NCSC), for example, claims that actuarial risk information "should not be used as an aggravating or mitigating factor in determining the severity of an offender's sanction."[189] Yet at the same time, NCSC has wholeheartedly endorsed the use of actuarial information to guide sentencing decisions about where probation-eligible defendants should serve their sentences.[190]

The Wisconsin Supreme Court drew a similar distinction between incarceration decisions and sentence severity in *State v. Loomis*, discussed above.[191] In *Loomis*, the actuarial risk information was conveyed to the judge in a presentence report, which cautioned that "*it is very important to remember that risk scores are not intended to determine the severity of the sentence or whether an offender is incarcerated*."[192] The court claimed it was "in accord with" this limitation[193] and held that risk information may not be used "to determine whether an offender is incarcerated" or "the severity of the sentence."[194] Nonetheless, the court upheld the judge's consideration of actuarial information to determine that it would sentence Mr. Loomis to incarceration instead of probation.[195]

Thus, the rationale circulated by the NCSC and *Loomis* implies that the judge's decision whether a defendant will serve his sentence in community or institutional supervision is not a decision about the severity of the sentence or "whether [a defendant] is incarcerated."[196] In other words, using actuarial risk information to guide decisions about where a defendant will serve her sentence is not an off-label use.

This distinction, however, collapses under scrutiny. When a judge is deciding whether a probation-eligible defendant will serve his sentence in an incarcerative or community setting, she is assessing whether he can be supervised safely and effectively in the community. If the answer, guided by the risk information, is affirmative, the defendant may serve his sentence in the community; on the other hand, if the risk information suggests the defendant poses a high risk of

189. CASEY ET AL., *supra* note 8, at 11.

190. *Id.* at 13–14 (recommending that courts consider risk assessment information in determining whether to sentence a defendant to community supervision).

191. *See supra* notes 72–76 and accompanying text.

192. State v. Loomis, 881 N.W.2d 749, 760 (Wis. 2016) (emphasis added) (quoting the presentence investigation report).

193. *Id.*

194. *Id.* at 769.

195. *Id.* at 767.

196. *Id.* at 769.

recidivism, the judge may decide the defendant should serve his sentence in an incarcerative setting. In such a scenario, the judge *is* using risk information to guide a decision about whether to incarcerate the defendant. The facts of *Loomis* illustrate this point. The circuit court referenced Mr. Loomis's "extremely high" risk score as a reason for ruling out probation.[197] In other words, the court used the risk information as a basis for sentencing Mr. Loomis to prison instead of community supervision.

Moreover, decisions about where a defendant will serve his sentence directly impact the severity of the sentence. Certainly, the requirements of probation can be quite onerous. They can include requirements that the defendant wear an electronic monitoring device, check in frequently with a probation officer, allow the probation officer to enter his residence without advance notice, abide by a curfew, and attend drug treatment, mental health, and/or educational programming.[198] Yet, few would contest that a sentence served in a non-incarcerative setting is less severe than one served in a setting in which one's liberty is completely circumscribed. Furthermore, according to the approach followed in some jurisdictions, the decision about where a probation-eligible defendant will serve his sentence is intertwined with decisions about the length of sentence. In Virginia and under the Model Penal Code, for example, a prison-bound defendant with a low risk score may be sentenced to community-based supervision *or* a shorter jail sentence.[199]

Thus, arguments that sentence-location decisions are not decisions about the severity of a sentence are unavailing. Moreover, sentence-location decisions are often intertwined with the paradigmatic determination of sentence severity, the decision about the length of a sentence.

2. Going "Off-Label" in Theory: Incapacitating Risk

When used as directed, actuarial risk instruments help correctional agents administer punishment and do so in a way that attempts to rehabilitate individuals under their control. Actuarial sentencing proponents promise that this practice similarly advances rehabilitative goals.[200] However, as this section explains, the incorporation of actuarial information into sentencing also triggers an unintended theoretical justification: the incapacitation of defendants.

When used for the off-label, sentencing-specific purposes identified above, actuarial risk information is used to set the terms of that punishment. This use is a more complex inquiry that requires a more complex consideration of the risk of

197. *Id*. at 755.

198. *See, e.g*., 18 U.S.C. § 3563 (2012) (listing mandatory and discretionary conditions of probation); ROGER K. WARREN, NAT'L CTR. FOR STATE COURTS, A BRIEF MEMO ON PROBATION CONDITIONS, http://www.ncsc.org/~/media/Microsites/Files/CSI/Additional%20Learning%20Materials/Handout%2024%20Probation%20Conditions.ashx [https://perma.cc/F5CP-YU6L] (describing common monitoring, treatment, and control conditions of probation).

199. *See, e.g*., MODEL PENAL CODE: SENTENCING § 6B.09(3) (AM. LAW INST., Proposed Final Draft 2017); VA. CRIMINAL SENTENCING COMM'N, *supra* note 38, at 87.

200. *See supra* Section I.B.1.

future behavior. When determining the severity of punishment, judges must consider not just whether the future behavior is likely to occur, but also whether the risk of future behavior justifies additional sanction. In other words, their decision must resound in a theory of punishment.[201]

Many jurisdictions permit or require judges to consider multiple theories of punishment—retribution, deterrence, incapacitation, and rehabilitation—in determining a just sentence.[202] The purpose of predicting a defendant's future behavior at sentencing varies depending on which theory of punishment is being used. Generally, theories of punishment fall into one of two categories: retributive or utilitarian.[203]

Retributive theory is backward-looking, concerned only with matching the punishment to the conduct giving rise to criminal offense; the offender should get his or her "just deserts" and nothing more.[204] From this perspective, "punishment is directed at imposing merited harm upon the criminal for his wrong, and not at the achievement of social benefits."[205] The greater the harm, the greater the penal sanction.[206] Future conduct, including future criminal behavior, is thus irrelevant to retributive theories of punishment. Risk prediction is "anathema" to the retributivist perspective—it is "an unacceptable basis for suspending the liberty of a person who does not otherwise deserve prison as punishment."[207]

On the other hand, prediction of future conduct is central to utilitarian theories of punishment, which justify punishment by its social utility in increasing public safety.[208] All three utilitarian theories of punishment—rehabilitation, deterrence, and incapacitation—justify punishment as a means of decreasing future harm and increasing public safety. They differ, however, in how they strive to attain that shared goal of public safety maximization. Rehabilitation seeks to prevent future criminal activity and increase public safety through treatment or programming, such as drug treatment, anger management, or behavioral therapy, that targets the

201. *See* Sidhu, *supra* note 17, at 730 ("The theories of punishment . . . 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.").

202. *See, e.g.*, 18 U.S.C. § 3553(a) (2012) (directing federal judges to "consider . . . the need for the sentence imposed" to advance the goals of retribution, deterrence, incapacitation, and rehabilitation).

203. *See* Sidhu, *supra* note 17, at 682–83, 730–31 (describing common theories of punishment).

204. *Id.* at 677; *see also* George P. Fletcher, *The Recidivist Premium*, 1 CRIM. JUST. ETHICS 54, 56 (1982) ("Retributivists hold generally that punishment should be a fitting response to the defendant's crime.").

205. Michele Cotton, *Back with a Vengeance: The Resilience of Retribution as an Articulated Purpose of Criminal Punishment*, 37 AM. CRIM. L. REV. 1313, 1315–16 (2000).

206. *See generally id.* (discussing the role of the degree of harm caused in assessing an offender's punishment under a retributivist framework).

207. Simon, *supra* note 57, at 403; *see also* Starr, *supra* note 1, at 818 (explaining that risk prediction is irrelevant to the retributive perspective). *But see* Youngjae Lee, *Recidivism as Omission: A Relational Account*, 87 TEX. L. REV. 571, 576–77 (2009) (noting that retributivists are generally critical of recidivist enhancement statutes, but articulating a "retributivist defense" of the recidivist premium).

208. *See* Sidhu, *supra* note 17, at 678; *see also* Cotton, *supra* note 205, at 1316.

root causes of criminal behavior.[209] Deterrence aims to curb future criminal activity by threatening or imposing punishment severe enough that would-be offenders will refrain from such activity to avoid that punishment.[210] Incapacitation theory also seeks to prevent future criminal activity, but through a different mechanism—by removing the potential offender from the community. Toward that end, incapacitation theory relies heavily on the instrumental benefit of incarceration.[211] Indeed, according to incapacitation theory, "[i]f the prison can do nothing else, . . . it can detain offenders for a time and thus delay their resumption of criminal activity."[212]

These three utilitarian theories justify different mechanisms by which punishment should reduce recidivism: rehabilitation by reforming the individual so they do not commit additional crimes; deterrence by scaring the individual so they comply with the law; and incapacitation by rendering the individual physically incapable of reoffending in the community through incarceration.[213]

As discussed above, actuarial sentencing is marketed in utilitarian terms as a primarily rehabilitative intervention. The risk information will help judges craft a sentence that will respond to the offender's criminogenic risk factors, reducing the likelihood that they will commit future crimes.[214] However, when used for the off-label, sentencing-specific purposes identified in Part I—that is, when used to inform decisions regarding the length and location of a sentence—actuarial sentencing resonates strongly in incapacitation.

Actuarial sentencing justifies imposing an incarceratory sentence instead of a community-based sentence and extending the amount of time for which the individual is incarcerated in the name of public safety. When a judge considers recidivism risk to set the location and length of a defendant's sentence, the judge is essentially asking whether there is too great a chance that the individual will reoffend if sentenced to a nonincarcerative sentence. Thus, if the person has a relatively low risk of recidivism, she may serve her sentence in the community without endangering the public; if she is a high risk, she should be incapacitated to protect the public from the harm caused by the crime she may commit in the future. And, if she is a particularly high risk, she should be incapacitated for a longer term to maximize the public safety benefit.

A few actuarial sentencing proponents have recognized that the practice implicates incapacitation instead of, or in addition to, rehabilitation. The Model Penal

209. *See* Sidhu, *supra* note 17, at 679.

210. *See generally* JEREMY BENTHAM, THE RATIONALE OF PUNISHMENT 19 (Robert Heward 1917) (1830) (identifying "two branches" of deterrence theory: "[*p*]*articular prevention*, which applies to the delinquent himself; and *general prevention*, which is applicable to all members of the community without exception").

211. Cotton, *supra* note 205, at 1316 ("*Incapacitation* uses imprisonment to remove the offender from society to protect it from the danger he poses.").

212. Malcolm M. Feeley & Jonathan Simon, *The New Penology: Notes on the Emerging Strategy of Corrections and Its Implications*, 30 CRIMINOLOGY 449, 458 (1992).

213. *See* Monahan & Skeem, *supra* note 34, at 492 (describing utilitarian theories of punishment).

214. *See supra* Section I.B.1.

Code reporters candidly acknowledge that incapacitation provides the strongest justification for integrating actuarial risk information into decisions about where a defendant will serve her sentence. "Risk assessments," they contend, "are *most easily justified* when used to identify otherwise prison-bound offenders whose confinement *will likely serve no incapacitative purpose*."[215] In other words, a low risk score indicates that the defendant does not need to be separated from the community to protect the public; she can safely serve her sentence in the community.

The flip side of this reasoning, of course, is that a high risk score supports a decision that the defendant should be incarcerated—and perhaps for a longer term—to protect the public. The Model Penal Code reporters also acknowledge, albeit hesitantly, that the use of actuarial risk information to extend a sentence resonates in incapacitory logic.[216] Though they deny that the model provision is motivated by a determination that it is "desirable to expand the use of risk assessment as a basis for longer incarceration terms," the reporters nonetheless admit that the Model Code "permit[s] the use of actuarial offender risk assessments as a basis for punishments more severe than offenders would otherwise have received."[217] This practice is justified, they explain, by its utility in increasing public safety: high-risk offenders can be sentenced to "crime-preventive terms of confinement" to prevent future victimizations.[218] This justification echoes the reasoning of researchers Peter Imrey and A. Philip Dawid, who characterize actuarial risk assessment's ability to distinguish "groups of individuals with high and low propensities for violence recidivism" as a "great benefit."[219] If courts act on these distinctions, Imrey and David claim, "recidivism will decline to the extent that groups most prone to violence are incapacitated."[220]

Thus, though it is popularly marketed as an approach that will revive rehabilitative aims within the criminal justice system, actuarial risk assessment, when used to guide sentencing decisions, triggers an off-label theory: incapacitation. Indeed, the justifications articulated by the Model Penal Code reporters and by scholars above directly invoke the traditional incapacitative justification for incarceration. On their view, incarceration delays future criminal activity and, "if such delays are sustained for enough time and for enough offenders, significant aggregate effects in crime can take place although individual destinies are only marginally altered."[221]

This observation may, without more, cause concern for some. Indeed, incapacitation-inspired sentencing schemes that justify lengthy incarceratory

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215. MODEL PENAL CODE: SENTENCING § 6B.09 cmt. d (AM. LAW INST., Proposed Final Draft 2017) (emphasis added).

216. *See id.* § 6B.09 cmt. e.

217. *Id.*

218. *Id.*

219. Peter B. Imrey & A. Philip Dawid, *A Commentary on Statistical Assessment of Violence Recidivism Risk*, 2 STATS. & PUB. POL'Y 25, 40 (2015).

220. *Id.*

221. Feeley & Simon, *supra* note 212, at 458.

sentences in the name of public safety, such as "three strikes" laws and recidivist enhancement statutes, are beginning to fall out of favor because they have contributed to the rise of mass incarceration.[222] Perhaps this concern is unfounded if, as actuarial sentencing proponents claim, the practice will reduce the instances in which judges resort to incapacitory logic. The following Part, however, casts doubt on this possibility.

III. THE PROBLEMS OF ACTUARIAL SENTENCING

The observation that actuarial sentencing requires an unintended and unapproved use of actuarial risk information does not, on its own, render the practice intrinsically wrong or detrimental. Indeed, the off-label use of certain medicines, for example, is quite common and often beneficial.[223] Actuarial sentencing may be desirable, despite its off-label nature, if it nevertheless delivers what its proponents promise: a mechanism for refining the risk inquiry at sentencing that ultimately reduces incarceration. Perhaps, as its proponents claim, actuarial risk assessment simply helps judges do what they should be doing at sentencing and helps them winnow the number of cases in which they determine incarceration is warranted.[224]

This Part reexamines those claims in light of the foregoing analysis and reveals a disjuncture between the promise and practice of actuarial sentencing. It contends that actuarial sentencing expands and distorts, rather than refines, how risk should be defined and measured at sentencing. Consequently, it cautions that actuarial sentencing can lead to greater reliance on incarceration, and for reasons that are antithetical to traditional sentencing principles.

A. QUESTIONING THE BENEFIT

As discussed in Part I, actuarial sentencing is marketed as a cost-saving reform.[225] Its proponents focus on the promise of accurately distinguishing those who are unlikely to recidivate from "dangerous" offenders and expending carceral resources only on the latter. Society thus saves money in the short term because it avoids the cost of incarcerating those who will not reoffend and in the long term because these offenders are rehabilitated.

Given its employment of data to produce economic efficiency though selective rehabilitation, actuarial sentencing can be classified as an example of a

222. *See, e.g.*, Jonathan Simon, *Positively Punitive: How the Inventor of Scientific Criminology Who Died at the Beginning of the Twentieth Century Continues to Haunt American Crime Control at the Beginning of the Twenty-First*, 84 TEX. L. REV. 2135, 2168–70 (2006) (noting the "incapacitative thrust" of recidivist laws and other law and policies adopted as part of the "War on Crime").

223. *See supra* note 22. *See generally* Wittich et al., *supra* note 22 (discussing the prevalence of prescribing medicine in "off-label" ways).

224. *See supra* Section I.B.2.

225. *See supra* Section I.B.3.

"neorehabilitative" reform effort.[226] Neorehabilitation revives and revises traditional rehabilitation principles. This new paradigm of criminal justice reform replaces the egalitarian impulse of traditional rehabilitative measures—which seek to rehabilitate all offenders for the offender's sake—with an approach that is "cautious and selective, [and] attentive to the need for evidence of efficacy, cost effectiveness, and success."[227] The animating impetus of the neorehabilitative movement is to relieve the fiscal strain on the penal system that has resulted from decades of tough-on-crime, incapacitory policies that contributed to the era of mass incarceration.[228] Toward that end, neorehabilitiative reforms employ social science data and predictive tools to select candidates for rehabilitation and divert them from incarceration, thus reserving scarce carceral resources for those who remain.[229] In other words, neorehabilitation rehabilitates rehabilitation with an eye toward economic efficiency.[230] The current roster of neorehabilitative reforms includes: problem-solving courts and other alternatives to incarceration programs;[231] reforms to early release and parole revocation programs;[232] and, now, actuarial sentencing.

Scholars have begun to critique the basic premise of neorehabilitative reforms. For example, the myopic emphasis on saving money eclipses other, non-monetary values that the criminal justice system purports to protect, such as equity and fairness.[233] Moreover, neorehabilitative reforms may partially relieve the fiscal burden on the system while leaving its structural flaws intact.[234] Such reforms are, in other words, merely release-valve reforms that may enable the broken system to operate in perpetuity.[235] Thus, even if actuarial sentencing operates as promised and ultimately provides monetary savings, perhaps the practice of selecting some defendants for rehabilitative intervention based on actuarial prediction is normatively unsound.

Furthermore, the following analysis should give pause even to those who support this and other fiscally-focused reform efforts. Scrutinizing the off-label application of corrections-based tools to sentencing practices casts doubt on whether actuarial sentencing can deliver the fiscal savings it promises. In fact, actuarial sentencing can lead to more, not less, reliance on

226. *See* Jessica M. Eaglin, *Against Neorehabilitation*, 66 SMU L. REV. 189, 199–203 (2013) (describing neorehabilitation); Eric J. Miller, *Drugs, Courts, and the New Penology*, 20 STAN. L. & POL'Y REV. 417, 441 (2009) (same).

227. Mary D. Fan, *Beyond Budget-Cut Criminal Justice: The Future of Penal Law*, 90 N.C. L. REV. 581, 633 (2012). Professor Fan calls this approach "rehabilitation pragmatism" instead of "neorehabiltiation." *Id.* at 585.

228. *See* Eaglin, *supra* note 226, at 199–202.

229. *See id*.

230. *See id*. at 189.

231. *See id*. at 208–09; *see also* Collins, *supra* note 97, at 1498–99 (identifying problem-solving courts as neorehabilitative reforms).

232. *See* Eaglin, *supra* note 226, at 203–09.

233. *See generally id*.

234. *See* Collins, *supra* note 97, at 1508–09.

235. *Id*. at 1508.

incarceration—a possibility that results from a disjuncture between the level of risk that justifies incarceration and the definition of risk embraced in actuarial risk assessment.

Given the expense of incarceration, investing in incarceration instead of community supervision is only a sound economic decision if the harm prevented is severe.[236] To justify incarceration instead of community supervision, or to justify an extension of incarceration in the name of public safety, the defendant's predicted conduct should pose the risk of more than a *de minimis* harm to the public. In short, the defendant should be dangerous.[237]

Although the concept of "future dangerousness" has received significant scrutiny from scholars and jurists in the context of capital sentencing, the level of "dangerousness" that justifies incapacitation for non-capital cases remains somewhat amorphous.[238] When defendants have raised due process challenges to sentencing enhancements based on "future dangerousness," courts have rebuffed their claims by noting that the practice is common, and often with reference to *Jurek v. Texas*, in which the Supreme Court upheld "future dangerousness" as an aggravating factor for the imposition of the death penalty.[239]

For decades, the mere possibility of any future criminal activity seems to have satisfied this "dangerousness" requirement. Recidivist sentencing statutes, for example, equate recidivism risk and risk to the public, and justify increasing the severity of sanctions for repeat offenders to prevent future offending.[240] As the Supreme Court explained in *Rummel v. Estelle*, recidivist enhancement statutes seek to "deter repeat offenders" and "segregate" them from society due to the "propensities [they have] demonstrated over a period of time."[241] Such statutes can justify drastic increases in sentences based on relatively innocuous behavior, such as a series of low-level thefts, in the name of public safety. The Texas statute at issue in *Rummel* illustrates this dynamic.[242] Texas's recidivist enhancement

236. George Fletcher points out that the justification for a recidivist sentencing premium requires that the prediction be accurate; we need to know the probability that person will offend again to determine whether the social benefit of preventing future crime outweighs the moral and monetary costs of incarceration. Fletcher, *supra* note 204, at 55 (noting that utilitarians contend that those who have done wrong once are "likely to do so in the future"). In other words, if we are simply predicting that the person is going to commit a low-level property crime, the cost of incarceration does not justify the public safety gain. *See generally* Paul H. Robinson, *The Criminal-Civil Distinction and Dangerous Blameless Offenders*, 83 J. CRIM. L. & CRIMINOLOGY 693, 698 (1993) ("Where the threatened harm is serious, incapacitation will be achieved through incarceration.").

237. Robinson, *supra* note 236, at 710–11 ("Dangerousness is the rationale and the criterion for special extended terms of incarceration for habitual offenders.").

238. Carissa Byrne Hessick & F. Andrew Hessick, *Recognizing Constitutional Rights at Sentencing*, 99 CAL. L. REV. 47, 73 (2011) (discussing the "few cases" in which defendants have raised due process challenges to judicial findings of future dangerousness in non-capital cases). Interestingly, this same case—*Jurek v. Texas*—is often cited to support actuarial sentencing. *See supra* notes 108–12 and accompanying text.

239. Hessick & Hessick, *supra* note 238, at 73.

240. *See* ROBERTS, *supra* note 34, at 7–8 (describing the theoretical justifications for recidivist sentencing enhancements).

241. 445 U.S. 263, 284 (1980).

242. *See id*. at 264.

statute provided that anyone who was convicted of three non-capital felonies "shall on such third conviction be imprisoned for life."[243] Mr. Rummel was convicted of felony theft for forging a check in the amount of $120.75.[244] Because he had previously been convicted of two prior theft-related felonies, for offenses involving $80 and $28.36, respectively, he was sentenced under the recidivist statute to life in prison.[245]

Although this practice has withstood constitutional scrutiny,[246] there is growing skepticism of its purported public safety rationale and its advisability as a matter of public policy.[247] As a result, some jurisdictions are beginning to soften or reverse these harsh sentencing practices.[248] Indeed, the concern that we expend too many resources incarcerating those who do not present a true "danger" to the public has recently united reformers across the political spectrum and motivates many contemporary criminal justice reform efforts, including actuarial sentencing.[249] Reform advocates commonly point to statistics revealing that a significant portion of the prison population are low-level, nonviolent criminal offenders, and argue that their continued incarceration is unnecessary because they do not threaten public safety.[250] In other words, many criminal justice reform advocates agree that the mere possibility of future criminal activity of unspecified severity does not justify incarceration.[251] Rather, scarce penal resources should be used for those who have committed high-level or violent offenses—that is, those who may pose a more severe threat to public safety.

Counterintuitively, however—and despite proponents' claims to the contrary—actuarial sentencing actually broadens, rather than restricts, the type of risk that may justify resorting to incapacitation. Actuarial tools do not predict precisely. They define risk broadly, without parsing *how* one is likely to recidivate.[252] Risk, as measured by most of the actuarial sentencing instruments, is the general risk of recidivism; these tools predict the likelihood an offender will commit a crime of

243. *Id*.

244. *See id*. at 265–66.

245. *See id*.

246. *See id*. at 268.

247. *See generally* Erik Luna & Paul G. Cassell, *Mandatory Minimalism*, 32 CARDOZO L. REV. 1, 2–4 (discussing calls from courts, politicians, conservative commentators, and the public for reform to harsh sentencing practices).

248. *See*, *e.g*., Erik Luna, *Mandatory Minimums*, *in* 4 REFORMING CRIMINAL JUSTICE: PUNISHMENT, INCARCERATION, AND RELEASE 117, 122–24 (Erik Luna ed., 2017) (discussing recent reforms to mandatory minimum polices, including California's "three strikes" recidivist sentencing enhancement statute).

249. *See, e.g*., JAMES AUSTIN ET AL., BRENNAN CTR. FOR JUST., HOW MANY AMERICANS ARE UNNECESSARILY INCARCERATED? 7 (2016) (finding that thirty-nine percent of federal and state prisoners are "incarcerated with little public safety rationale" and identifying cost savings of their release); *The Conservative Case for Reform*, RIGHT ON CRIME, http://rightoncrime.com/the-conservative-case-for-reform/ [https://perma.cc/S4XN-AN5A] (last visited Aug. 8, 2018) ("At a time of tight budgets in state capitols and households alike, it is time for innovative policy approaches that maximize the public safety return on our investment of taxpayers' dollars.").

250. *See, e.g*., AUSTIN ET AL., *supra* note 249, at 27, 29–30.

251. *See, e.g*., *id*. at 42, 46.

252. *See supra* notes 42–44 and accompanying text.

any severity, ranging from a low-level property crime or even a violation of probation to more serious crimes against the person. And some tools also capture the possibility that an individual will simply be arrested for, but not necessarily charged with (let alone convicted of), future criminal conduct. Thus, those who are deemed particularly "risky" may not be particularly "dangerous." One may earn the label of a "high-risk" offender simply because they (or more accurately, people who share their characteristics)[253] are statistically more likely to commit or be arrested for a low-level offense in the subsequent years. Nevertheless, actuarial sentencing would support and perhaps even encourage incarcerating this high-risk offender or extending her sentence in the name of public safety. Thus, as Jonathan Simon has noted, modern risk assessment has transformed "[t]he question of dangerousness . . . into one of risk more generally."[254]

In this way, actuarial sentencing conflates a general risk of recidivism with dangerousness. In so doing, it may encourage incapacitation of a broad swath of the population—not because they are dangerous, but because they are purportedly more likely to commit or be rearrested for an inarguably low-level offense. In light of the imprecision of this prediction, it may be impossible to predict, let alone promise, true cost savings.

Moreover, the actuarial risk algorithms are themselves imprecise, intrinsically risk-averse, and conservative. A meta-analysis of the accuracy of the risk instruments found that they predict recidivism at a "moderate" or "above chance" level.[255] The most favorable studies suggest they predict with "about 70% accuracy."[256] Some have questioned whether the tools are actually more accurate than risk predictions that are "clinical," that is, predictions made based on experience, or "gut feeling," without the assistance of an actuarial tool.[257] A 2018 study by computer scientists at Dartmouth College casts even further doubt on the utility of the risk assessment instruments. It found that individuals who completed an online survey were able to predict recidivism risk about as accurately as the COMPAS risk instrument.[258] One of the researchers described their findings as follows: "There was essentially no difference between people responding to an online survey for a buck and this commercial software being used in the courts."[259]

253. *See supra* notes 39–41 and accompanying text.

254. Simon, *supra* note 57, at 414.

255. JAMES, *supra* note 30, 3 & n.17 (noting, based on a meta-analysis of the accuracy of risk assessment instruments, that they estimate at a "moderate" or "above chance" level of accuracy).

256. *See* Latessa & Lovins, *supra* note 30, at 212 ("Even with large data sets and advanced analytical techniques, the best models are usually able to predict recidivism with about 70% accuracy . . . provided it is completed by trained staff."); *see also* Dressel & Farid, *supra* note 15, at 3 (finding sixty-five percent accuracy).

257. *See*, *e.g.*, Starr, *supra* note 1, at 853–55 (reviewing accuracy studies of actuarial risk tools and concluding that "the shibboleth that actuarial prediction outperforms clinical prediction is . . . a generalization that is not true in every case").

258. *See* Dressel & Farid, *supra* note 15, at 3.

259. Issie Lapowsky, *Crime-Predicting Algorithms May Not Fare Much Better than Untrained Humans*, WIRED (Jan. 17, 2018, 2:16 PM) (quoting Hany Farid), https://www.wired.com/story/crime-predicting-algorithms-may-not-outperform-untrained-humans/ [https://perma.cc/69NC-V2C6].

At the very least, then, these tools will be wrong thirty percent of the time, and in one of two ways: by falsely identifying an offender who does not commit a future offense as presenting a high risk of recidivism (false positive), or by falsely identifying an offender who commits a future offense as presenting a low risk of recidivism (false negative).[260] The tools err on the side of overestimating risk because the "cost" of a false negative —the individual who is deemed a low risk but then commits a future offense—is believed to outweigh that of a false positive. Latessa and Lovins claim, for example, "False negatives are more visible and damaging because they can actually involve new offenses that cause harm to victims and jeopardize public safety. False negatives are potentially very costly; hence most assessment strategies err on the conservative side."[261]

Given the conservative nature of this estimate, some individuals who do not pose a high risk of recidivism are nevertheless identified as such. When the risk assessment is completed in the correctional context, many easily dismiss the cost of an erroneous false positive prediction. If one is erroneously identified as posing a low risk of recidivism, she will not receive sufficient correctional intervention; her risk level will not be corrected, and she will commit additional crimes, thereby jeopardizing public safety. In contrast, if she is erroneously identified as posing a high risk of recidivism, according to the Risk-Need-Responsivity (RNR) principle, she should receive more intensive treatment than she actually needs—a higher level of supervision, more programming requirements, and more reporting requirements if she is sentenced to probation. These costs are hardly inconsequential. As the risk principle dictates, intervention for one who is actually low-risk may be criminogenic. Moreover, the more conditions placed on an offender, the greater the possibility that he or she will not be able to satisfy them.[262]

Crucially, however, in the correctional context, this overprediction of recidivism risk cannot enhance or extend the default terms of the sentence itself, namely where the defendant serves his sentence and the length of that sentence. For example, if the judge sentences a defendant to probation, the correctional agent may administer the RNR principle when determining probation requirements and may, based on the conservative risk estimate, erroneously assign more restrictive requirements than are necessary. That agent may not, however, use the risk assessment information to override the judge's decision and incarcerate the defendant instead of supervising him on probation.

In the sentencing context, by contrast, the conservative risk algorithm can be used to increase the severity of the terms of punishment. The cost of an erroneous false positive prediction is even greater: the defendant who is actuarially indicated as likely to reoffend, but who in fact never will, may be incarcerated rather

260. Latessa & Lovins, *supra* note 30, at 212–13.

261. *Id*. at 213.

262. *See* Hannah-Moffat, *supra* note 38, at 276 (noting that individuals who score a high risk level will be sentenced to "custodial sentences and/or a greater number of conditions attached to the disposition," which makes these individuals "more vulnerable to breach, increased surveillance, and further criminalization").

than sentenced to probation, or be incarcerated for a greater period of time in the name of public safety.

This significant, yet unquantifiable, cost remains largely invisible: we do not and cannot know who has been incarcerated unnecessarily. Such costs also remain invisible in the literature that praises actuarial sentencing, which compares the financial cost of unnecessarily incarcerating someone against the possibility of future criminal activity. For example, when the Pennsylvania Commission on Sentencing's Risk/Needs Assessment Project considered the issue of false positives and negatives, it articulated the possible "tradeoffs" as follows: "Is it better to err on the side of over predicting arrest [which potentially could result in correctional overcrowding] or under predicting arrest [which potentially could result in more crime][?] How much better? That is, how many false positives equal one false negative [or vice versa]?"[263]

When framed as a tradeoff between the unnecessary expenditure of money compared to a risk to public safety, the answer seems simple: public safety should win. The cost of *not* following the risk prediction, it follows, is that the public will be victimized. This simplistic balancing of the public safety against financial resources is common throughout laudatory actuarial sentencing literature.[264]

This equation overlooks altogether the immense humanistic costs to the individual who is inaccurately identified as presenting a high risk of recidivism and is accordingly incapacitated. These costs include the experience of brutal, dangerous conditions,[265] the severance of family and community ties,[266] and often insurmoubtable obstacles to re-entering society upon release.[267] It also ignores literature demonstrating that prison itself can be crimonogenic, or crime-causing.[268]

Structural and institutional influences encourage judges to err on the side of caution and follow these conservative estimates, despite the possibility of a false positive. Indeed, if a court ignores a prediction that a defendant is "high-risk" and that person re-offends, "blame will accrue to the original sentencer."[269] An "error" in the other direction—unnecessarily incarcerating an individual or extending the

263. PA. COMM'N ON SENTENCING RISK/NEEDS ASSESSMENT PROJECT, INTERIM REPORT 5: DEVELOPING CATEGORIES OF RISK 15 (2012), http://www.hominid.psu.edu/specialty_programs/pacs/publications-and-research/research-and-evaluation-reports/risk-assessment/phase-i-reports/interim-report-5-developing-categories-of-risk/view [https://perma.cc/8AEY-BDTD].

264. *See supra* note 122 and accompanying text.

265. *See* Johnson v. California, 543 U.S. 499, 515 (2005) ("Prisons are dangerous places . . . ."). *See generally* Martin H. Pritikin, *Is Prison Increasing Crime?*, 2008 WIS. L. REV. 1049, 1056–57 (describing the "brutalization effect of prison").

266. *See* Pritikin, *supra* note 265, at 1055–56.

267. *Id*. at 1060–64.

268. *See* Todd R. Clear, *Backfire: When Incarceration Increases Crime*, *in* THE UNINTENDED CONSEQUENCES OF INCARCERATION (1996), https://www.vera.org/publications/the-unintended-consequences-of-incarceration-papers-from-a-conference-organized-by-vera [https://perma.cc/RDN8-8UWC] (identifying three "crime-enhancing" effects of imprisonment); *see also* Pritikin, *supra* note 265, at 1052 ("There is a growing body of literature discussing the ways in which incarceration may unintentionally increase crime.").

269. ROBERTS, *supra* note 34, at 23.

term of her sentence—does not carry this risk. Thus, risk assessment information may encourage "decisions in which a sentence is imposed to prevent a crime that would in fact not have been committed."[270]

Thus, for the foregoing reasons, actuarial sentencing could lead to more, not less, reliance on incarceration. This possibility provides reason to question whether actuarial sentencing will provide the financial savings its proponents promise. And for the reasons explored below, the analysis itself is missing a number of costs that, when factored into the equation, militate against the adoption of actuarial sentencing.

B. IDENTIFYING "OFF-LABEL" COSTS

Actuarial sentencing is in its nascency, and existing scholarship has yet to determine whether actuarial sentencing can or will meaningfully reduce consumption of incarceratory resources. Indeed, for the reasons just discussed, the practice can justify incarcerating many offenders, which may counterbalance any cost savings resulting from the diversion and rehabilitation of others. The focus on fiscal incentives has led many actuarial sentencing proponents and risk researchers to strive to refine the risk prediction analysis to enhance its accuracy—to get the prediction "right" more often to maximize savings.

This section contends that, even if widespread adoption of this practice can lead to a net financial gain, these savings are not costless—they will be realized at the expense of principles of equity and justice that motivate and legitimize our criminal justice system. Regardless of how accurately the tools predict recidivism, the risk inquiry these tools advance is anathema to a principled, constitutional, and just sentencing inquiry. Indeed, there is a significant fissure between principles restricting how risk is measured at sentencing and how risk is measured in actuarial sentencing.

A fundamental tenet of sentencing law and policy is that "[o]ur law punishes people for what they do, not who they are."[271] Two principles that flow from this premise inform the interaction between risk prediction and sentencing. The first is a negative rule against punishing people for "who they are": when predicting whether a defendant poses a danger to public safety that justifies extending a sentence, the sentencing court should not consider non-culpable characteristics.

The Supreme Court recently affirmed this principle in *Buck v. Davis*.[272] Mr. Buck was convicted of capital murder. At the sentencing phase, the jury heard expert testimony that an individual's race was statistically correlated with "propensity for violence," and that Mr. Buck was "statistically more likely to act violently because he is black."[273] After hearing this testimony, the jury sentenced him to death.[274] The Court summarized the testimony as suggesting that "the

270. *Id.*
271. Buck v. Davis, 137 S. Ct. 759, 778 (2017).
272. *Id.*
273. *Id.* at 767.
274. *Id.*

color of [Mr.] Buck's skin made him more deserving of execution,"[275] and ultimately ruled that it was reversible error for the jury to make a "predictive judgment" about Mr. Buck's future conduct based on "hard statistical evidence" that his race increased the likelihood of future violent conduct.[276] The Court specified that "[i]t would be patently unconstitutional for a state to argue that a defendant is liable to be a future danger because of his race."[277] In so doing, the Court drew a clear line prohibiting "[d]ispensing punishment on the basis of an immutable characteristic" such as race.[278]

Honoring this proscription against punishing someone for "who they are" logically and ethically precludes consideration of characteristics that are perhaps mutable or volitional but nevertheless non-culpable. Indeed, as Micheal Tonry recently argued, "[i]t ought to be platitudinous and anachronistic to write that there is something fundamentally unethical or immoral about apportioning punishments or other intrusions on liberty on the basis of ascribed characteristics for which no coherent argument can be made that offenders bear personal responsibility for them."[279] Thus, the Court has specified that consideration of non-culpable associational characteristics, including religion and political affiliation, is both "constitutionally impermissible" and "totally irrelevant to the sentencing process."[280] And the Sentencing Reform Act requires that the federal Sentencing Guidelines be "entirely neutral" not only as to defendants' "race, sex, [and] national origin," but also as to their "creed" and "socioeconomic status."[281] The Act also stresses that it is "general[ly] inappropriate[]" to consider other non-culpable personal characteristics at sentencing, such as education, vocational skills, and employment record.[282]

The second guiding principle is the positive converse of the first: to justify enhancing or extending punishment because of the risk of future conduct, the risk inquiry should consider only volitional culpable conduct ("what they do"). There are two potential sources of volitional culpable conduct: the crime of conviction and the defendant's criminal history. Logically, the former—the very reason for the imposition of punishment—should at least factor into, if not predominate, the sentencing risk inquiry. The conviction of a crime is a necessary precondition to punishment;[283] it is the event that separates criminal punishment from preventive

275. *Id*. at 775.

276. *Id*. at 776.

277. *Id*. at 775. The specific constitutional issue presented to the Court was whether Mr. Buck's defense attorney was ineffective for soliciting this information from the expert.

278. *Id*. at 778.

279. Tonry, *supra* note 135, at 171.

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

281. 28 U.S.C. § 994(d) (2012).

282. *Id*. § 994(e).

283. *See* Christopher Slobogin, *The Civilization of the Criminal Law*, 58 VAND. L. REV. 121, 131 (2005) ("By definition, we *cannot* punish someone unless he has committed a crime, or at least we say he has committed one."); *see also* Paul H. Robinson, *Punishing Dangerousness: Cloaking Preventive Detention as Criminal Justice*, 114 HARV. L. REV. 1429, 1432 (2001) ("[P]unishment can only exist in relation to a past wrong.").

detention mechanisms, such as sexual predator laws.[284] Even those utilitarian theories that justify punishment in terms of public safety gains cannot justify incarcerating someone who has not been convicted of a crime, regardless of the public safety gains to be had from penal intervention.[285]

It is also common practice to integrate the defendant's past criminal behavior into a prediction about her future conduct. An offender's criminal history is second in importance in sentencing decisions only to the severity of the offense of conviction.[286] This "recidivist sentencing premium," or the notion that punishment for a criminal offense should increase progressively along with the offender's criminal history, dates back to at least the 1600s,[287] and grew in prominence with rise of recidivist enhancement statutes in the 1980s.[288] Recidivist enhancement statutes, such as "three strikes" laws, permit or require an increase—often a dramatic increase—in an individual's sentence because of his or her prior criminal history.[289]

Recidivist enhancement statutes are themselves a form of "rough actuarialism."[290] They start from the premise that past criminal behavior predicts future criminal behavior,[291] and use this presumption to justify increasing a sentence in the name of crime prevention.[292] The role of criminal history in sentencing in general, and recidivist enhancement statutes in particular, have recently met with circumspection as scholars and practitioners have begun to recognize that criminal history may be more reflective of the biased application of discretionary policies and practices of criminal justice agents than any innate criminal

284. Robinson, *supra* note 283, at 1432. Punishment and prevention are fundamentally different; they rely on different criteria and call for different procedures. Punishment, especially through imprisonment, happily produces a beneficial collateral effect of incapacitation. If preventive detention is needed beyond the prison term of deserved punishment, it ought to be provided by a system that is open about its preventive purpose and is specifically designed to perform that function. *Id*.

285. *See* Markus Dirk Dubber, Note, *The Unprincipled Punishment of Repeat Offenders: A Critique of California's Habitual Criminal Statute*, 43 STAN. L. REV. 193, 216 (1990) (explaining that "[m]odern advocates of incapacitation theory" would "distance themselves" from the "absurd" policy of allowing punishment without conviction).

286. ROBERTS, *supra* note 34, at 2, 11–12 (identifying an offender's criminal record as "the second most important sentencing factor," and one that is used "around the world"); *see also* Hessick & Hessick, *supra* note 238, at 71–72 (noting that consideration of the possibility of future criminal activity is one of the most common sentencing enhancements).

287. ROBERTS, *supra* note 34, at 3–5. Roberts observes that the interest in identifying recidivist offenders was so great it justified branding people convicted of offenses. *Id*. at 6.

288. *Id*. at 18–19.

289. *See id*. at 20–21 (describing "three strikes" statutes).

290. Simon, *supra* note 57, at 407.

291. Julian V. Roberts, *The Role of Criminal Record in the Sentencing Process*, 22 CRIME & JUST. 303, 316 (1997) ("For the utilitarian purposes of special deterrence and incapacitation, the link between past and future offending is unambiguous: previous criminal conduct is predictive of future offending."); *see also* Fletcher, *supra* note 202, at 55 (utilitarians contend that those who have done wrong once are "likely to do so in the future").

292. ROBERTS, *supra* note 34, at 15 ("Historically, the [recidivist sentencing] premium has been justified by reference to prevention.").

propensity.[293] But at the very least, this practice, even if not advisable as a matter of policy, does not violate the proscription against punishing someone for anything other than volitional culpable conduct.

Thus, to justify increasing the severity of a sentence based on the risk of future conduct, a court should not consider personal characteristics and should only consider culpable, volitional conduct. A primary marketing promise of actuarial sentencing is that it simply refines, but does not fundamentally change, the sentencing risk inquiry. Counterintuitively, however, actuarial sentencing actually expands and distorts these two sentencing risk principles.

First, it expands the way risk is measured by incorporating into the risk prediction a range of factors that are purportedly anathema to a valid and just sentencing inquiry; the incorporation of these factors violates the proscription against punishing someone for "who they are."[294] As noted above, using criminal history to predict future activity is itself a contested and concerning practice.[295] Equally troubling, however, is the way these tools explicitly incorporate additional factors into the prediction inquiry. Some of these "plus" factors are "static" and cannot be changed through criminal justice intervention, such as gender; other plus factors are "dynamic," or changeable, such as employment status or education level.[296] Importantly, however, all are non-culpable, and many have been identified as patently irrelevant to sentencing[297] or "general[ly] inappropriate[]" to a just sentencing inquiry.[298]

Jurisdictions have been careful to exclude from their actuarial calculations the most provocative and constitutionally suspect consideration: race.[299] For example, in preparation for statewide adoption of actuarial sentencing, the Pennsylvania Sentencing Commission conducted a series of studies to identify factors that should be incorporated into the state's sentencing risk assessment tool.[300] In the first round of studies, the working group found that race and county were highly correlated with likelihood of recidivism: African Americans and individuals from

293. *See* John Monahan, *Risk Assessment in Sentencing*, *in* 4 REFORMING CRIMINAL JUSTICE: PUNISHMENT, INCARCERATION, AND RELEASE, *supra* note 248, at 77, 88 ("A record of prior criminal arrests and convictions can reflect the differential *involvement* of the members of given groups in criminal behavior, and it can also reflect the differential *selection* of the members of given groups by police to arrest, by prosecutors to indict, and by judges and juries to convict.").

294. Buck v. Davis, 137 S. Ct. 759, 778 (2017).

295. *See supra* note 293 and accompanying text.

296. *See supra* notes 35–36 and accompanying text.

297. *See* 28 U.S.C. § 994(d) (2012) (listing gender).

298. *See id.* § 994(e) (listing education level, employment status, and history).

299. *See* Scurich & Monahan, *supra* note 120, at 37 ("No risk assessment instrument explicitly includes race as a risk factor in sentencing.").

300. *See generally* PA. COMM'N ON SENTENCING RISK/NEEDS ASSESSMENT PROJECT, INTERIM REPORT 3: FACTORS THAT PREDICT RECIDIVISM FOR VARIOUS TYPES OF OFFENDERS 2 (2011), http://pcs.la.psu.edu/publications-and-research/research-and-evaluation-reports/risk-assessment/phase-i-reports/interim-report-3-factors-that-predict-recidivism-for-various-types-of-offenders/view [https://perma.cc/GS3J-QU8G] (describing the Pennsylvania Commission on Sentencing's Risk Assessment Project).

urban counties were found to present a higher risk of recidivism.[301] In future studies, however, the group omitted race and county as factors.[302]

Nevertheless, as scholars have noted, some of the seemingly less suspect actuarial risk factors correlate with race so strongly that they are essentially a proxy for this impermissible factor.[303] In any event, simply omitting direct incorporation of race into the assessment leaves a number of personal, non-culpable characteristics, such as gender, age, and educational history, within the actuarial equation.

Proponents justify this consideration of seemingly troubling characteristics by reference to their utility in increasing the accuracy of the actuarial prediction. For example, in defending the explicit consideration of gender in the COMPAS risk assessment tool used in *Loomis*, the State of Wisconsin argued that such consideration is "necessary to achieve statistical accuracy . . . . [B]ecause men and women have different rates of recidivism and different rehabilitation potential, a gender neutral risk assessment would provide inaccurate results for both men and women."[304] The Wisconsin Supreme Court found this argument compelling and held that the incorporation of gender into the sentencing risk assessment "promotes accuracy that ultimately inures to the benefit of the justice system including defendants."[305] Others reason that actuarial consideration of these factors is better than the alternative scenario, in which judges would make these predictions based on potentially biased intuition.[306] In short, they contend that actuarial tools

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301. *Id.* at 1.

302. *See* PA. COMM'N ON SENTENCING RISK/NEEDS ASSESSMENT PROJECT, PHASE II, INTERIM REPORT 1: DEVELOPMENT OF A RISK ASSESSMENT SCALE BY OFFENSE GRAVITY SCORE FOR ALL OFFENDERS 11 n.5 (2015), http://pcs.la.psu.edu/publications-and-research/research-and-evaluation-reports/risk-assessment/phase-ii-reports/Interim-Rpt-1-Phase-2/view [https://perma.cc/BFM2-KEZD] ("While race was found to be a significant predictor of recidivism, it is not included in the risk scale. It was a factor, however, controlled for in the analyses."); *see also* PA. COMM'N ON SENTENCING RISK/NEEDS ASSESSMENT PROJECT, PHASE II, INTERIM REPORT 2: VALIDATION OF A RISK ASSESSMENT INSTRUMENT BY OFFENSE GRAVITY SCORE FOR ALL OFFENDERS 12 n.8 (2016), http://pcs.la.psu.edu/publications-and-research/research-and-evaluation-reports/risk-assessment/phase-ii-reports/interim-report-2-validation-of-risk-assessment-instrument-by-ogs-for-all-offenses-february-2016/view [https://perma.cc/RZR5-8CCW] ("While race and county were found to be significant predictors of recidivism, they are not included in the risk scale. They are, however, statistically controlled for in the analyses, which means that the effects of the other factors are included only after eliminating the effects of race and county.").

303. *See* Scurich & Monahan, *supra* note 120, at 37 (noting the "widespread belief that many risk factors that can be found on actuarial risk assessment instruments used in sentencing serve as close proxies for race"); *see, e.g.*, Oleson, *supra* note 4, at 1386–87 ("[A]ctuarial sentencing builds upon a statistical association between variables (such as race) and crime to predict recidivism. These predictions may justify—at least in part—the imposition of disparate criminal sentences based on a number of variables correlated with risk, including race.").

304. State v. Loomis, 881 N.W.2d 749, 765 (Wis. 2016). *See generally* Hannah-Moffat, *supra* note 38, at 283–84 (noting that "eliminating problematic variables and those associated with protected categories (i.e. race and gender) from risk assessment instruments compromises the predictive power of these instruments"); Oleson, *supra* note 4, at 1337 ("Such problematic items can be eliminated from risk assessment instruments, but as the variables associated with protected categories are struck from assessment tools, the predictive power of these instruments wanes.").

305. *Loomis*, 881 N.W.2d at 767.

306. *See, e.g.*, Joe Palazzolo, *Judges Turn to Risk-Evaluation Tools in Sentencing Decisions*, WALL ST. J., (Sept. 23, 2014, 6:30 PM) https://www.wsj.com/articles/judges-turn-to-risk-evaluation-tools-in-sentencing-decisions-1411499848 [https://perma.cc/A4HH-VDV8] ("Christopher Slobogin, a Vanderbilt

help the sentencing judge give appropriate weight to factors such as gender; without these tools, judges would give a factor like gender either too much or too little consideration.[307]

That including these characteristics may increase the accuracy of the prediction, however, does not make the practice just. The appropriate weight to be given to non-culpable characteristics is, quite simply, no weight at all.[308] Regardless of accuracy gains or losses, this practice embraces the procedure rejected in *Buck*: it incorporates purportedly "hard statistical evidence," gleaned from an array of the defendant's personal characteristics—some of which are immutable and most of which are non-culpable—to make a predictive judgment about the defendant's future conduct.[309] In other words, it endorses a system that punishes people for "who they are."[310]

Actuarial sentencing also violates the second sentencing principle: that we punish people for "what they do."[311] Indeed, actuarial risk assessment tools measure risk in a way that is unmoored from criminal culpability. Although actuarial risk instruments incorporate a range of non-culpable characteristics into their calculations, most of the tools omit one seemingly crucial factor: the crime for which the defendant is being punished.[312] Somewhat surprisingly, the crime of conviction does not statistically correlate with recidivism.[313] In fact, some studies have found a "non-intuitive" correlation between the severity of the crime of conviction and recidivism: the more serious the offense, the lower the risk of recidivism.[314] For example, a recent Bureau of Justice Statistics study indicated that violent offenders were less likely to recidivate within five years of their release from prison than property, drug, or public order offenders.[315] It is unsurprising, therefore, that many actuarial risk assessment tools do not factor it into their

University law professor, said the alternative was potentially worse. 'At least these risk-assessment instruments don't explicitly focus on race or poverty, unlike what might occur in a sentencing regime where judges are making risk assessments based on seat-of-the-pants evaluations,' he said."); *see also* Monahan, *supra* note 291, at 85 (arguing that risk assessment is better at addressing racial or socioeconomic disparities in sentencing compared to "judicial hunch" or heavy reliance on criminal history).

307. And one scholar has justified the consideration of immutable characteristics to determine a sentence as a sort of "moral luck." Oleson, *supra* note 4, at 1389–90. As one scholar has noted, there is a "surreal quality" to the literature's "mostly untroubled embrace" of incorporating gender into the risk algorithm. Starr, *supra* note 1, at 825.

308. *See supra* notes 279–82 and accompanying text.

309. Buck v. Davis, 137 S. Ct. 759, 776 (2017).

310. *Id*. at 778.

311. *Id*.

312. *See* Starr, *supra* note 1, at 811.

313. *Id*.

314. MATTHEW DEMICHELE & JULIA LASKORUNSKY, SENTENCING RISK ASSESSMENT: A FOLLOW-UP STUDY OF THE OCCURRENCE AND TIMING OF RE-ARREST AMONG SERIOUS OFFENDERS IN PENNSYLVANIA 35 (2014), http://justicecenter.psu.edu/research/projects/files/PCS%20_Risk%20Assessment_Tool.pdf (finding "that a more serious offense is associated with lower recidivism").

315. Matthew R. Durose et al., *Recidivism of Prisoners Released in 30 States in 2005: Patterns from 2005 to 2010–Update*, BUREAU OF JUST. STATS. (Apr. 2014), https://www.bjs.gov/index.cfm?ty=pbdetail&iid=4986 [https://perma.cc/2S5Q-DMXY].

predictive algorithms.[316] Such a prediction of future behavior, which calibrates punishment based on factors having nothing to do with the crime of conviction, undermines the principle that we punish for "what they do," and perhaps even justifies imposing or enhancing a punishment purely to prevent future crimes.[317]

Thus, even if actuarial sentencing helps judges more accurately identify those who are likely to recidivate, it can also justify punishing someone more severely for reasons that are divorced from traditional punishment principles. Under an actuarial sentencing regime, individuals may be incarcerated, or incarcerated for longer, only because—based on an assessment of their personal, non-culpable characteristics—they are purportedly more likely to reoffend. This consideration of non-culpable, personal characteristics to predict future behavior calls into question the propriety of using actuarial risk prediction for any purpose and at any stage in the criminal justice system.

Perhaps the shortcomings of actuarial recidivism predictions are somewhat tolerable, even if not advisable, when the predictive tools are used for their on-label use—that is, when used to "correct risk." A key shortcoming of actuarial risk prediction is that it defines recidivism broadly as "probability of reoffending,"[318] which may be measured by the likelihood of being convicted or arrested for *any* offense and predicts risk without reference to the instant crime. If the purpose of recidivism risk identification is to reduce that risk over the term of correctional control, it may make sense to assess risk independent of culpability. The goal is to reduce the likelihood the defendant will return to the system for any reason, regardless of the severity of the preceeding or subsequent offense. As the crime of conviction is not predictive of recidivism, it is irrelevant to this inquiry.[319] Presumably the treatment or intervention points would be the same, regardless of the type of offense the offender is likely to commit: targeting antisocial attitudes, substance abuse, and other dynamic risk factors.

Furthermore, if the goal is to "correct risk" by reducing recidivism through correctional intervention, it may be acceptable to take into account certain personal, non-culpable characteristics such as gender and educational or employment history. Key components of the Risk-Needs-Responsivity principle are to identify and target interventions toward the defendant's dynamic characteristics, and to deliver such treatment or programming in a way that is the most responsive to his

316. Starr, *supra* note 1, at 811 (noting that "almost none" of the evidence-based sentencing instruments "include the crime for which the defendant was convicted in the case at hand").

317. *See*, *e.g.*, State v. Loomis, 881 N.W.2d 749, 764 (2016) ("[A]n offender who is young, unemployed, has an early age-at-first-arrest, and a history of supervision failure, will score medium or high on the Violence Risk Scale even though the offender never had a violent offense." (quoting *Electronic Case Reference Manual, COMPAS Assessment Frequently Asked Questions*, WIS. DEP'T OF CORRS. https://doc.helpdocsonline.com/dcc-business-process [https://perma.cc/H845-94GZ] (last visited Aug. 11, 2018))).

318. Latessa & Lovins, *supra* note 30, at 206.

319. As Latessa and Lovins explain, "though a felon has been convicted of a more serious offense than a misdemeanant, their relative risk of reoffending may have nothing to do with the seriousness of the crime." *Id*. at 205–06.

particular needs and learning styles. For example, as Michael Tonry explains, "[i]t would make little sense not to take educational credentials and existing work experience and skills into account in assignment to educational or vocational programs."[320] Moreover, there is growing attention to the ways in which differences of culture, gender, and other static characteristics impact the efficacy of rehabilitative efforts.[321] Even if these characteristics cannot be changed through correctional intervention, perhaps it may be necessary to consider them in order to direct an individual toward correctional programming that is gender-responsive, culturally compentent, or otherwise tailored to that person's rehabilitative needs.

However, when used to "sentence risk" as opposed to merely "correct risk," actuarial risk assessment imposes a systemic consequence that cannot be countenanced: the possibility that we will punish someone more severely for non-culpable, personal characteristics. As Professor Starr has persuasively argued, actuarial sentencing presents concerns of constitutional proportions.[322] Specifically, she contends that the incorporation of gender and wealth-related classifications (such as employment status, education, and dependence on government assistance) into the sentencing risk algorithm should not pass scrutiny under the Equal Protection Clause, and raises due process concerns.[323]

Even if this practice withstands constitutional scrutiny, it is nevertheless misguided. It distorts the RNR principle that underlies and legitimizes actuarial risk prediction, and justifies considering non-culpable characteristics. The RNR principle, as developed in the correctional context, dictates that we should invest more rehabilitative resources in high-risk offenders. In the sentencing context, however, this principle is upended. Actuarial sentencing stratifies the risk inquiry. Risk is identified not to craft a rehabilitative program, but rather to determine how that risk will be mitigated: through rehabilitation if the individual is sufficiently low-risk, or incapacitation if the offender is high-risk. In other words, an individual's risk level is not used to determine how she will be rehabilitated, but rather to determine the theory of punishment that should be followed. In light of this distinction between correctional and sentencing purposes, it follows that we must be even more circumspect of the inputs and outputs of the actuarial risk prediction inquiry.

In addition to these doctrinal and constitutional concerns, there is an additional equitable cost: its impact will not be fairly or evenly distributed amongst the population of criminal defendants. The laudatory account of actuarial sentencing focuses on its beneficiaries: the public, which saves money without compromising public safety, and those defendants who will be diverted from prison or serve

320. Tonry, *supra* note 135, at 171.

321. *See, e.g.*, BARBARA BLOOM ET AL., NAT'L INST. OF CORRS., GENDER-RESPONSIVE STRATEGIES: RESEARCH, PRACTICE, AND GUIDING PRINCIPLES FOR WOMEN OFFENDERS (2003).

322. *See* Starr, *supra* note 1, at 821–36.

323. *See id.*

shorter sentences because they are sufficiently low-risk.[324] To fully assess the impact of actuarial sentencing, however, we must account for a question that is largely overlooked by those who support this practice: how will this benefit be distributed?[325] More precisely, who will be disadvantaged? Who will be deemed "risky," and why?

The answers to these questions are easy to predict. Recidivism risk factors are markers of structural disadvantage. An individual can quickly rack up recidivism risk points under some risk tools because they lack educational achievement or established work history, and come from a neighborhood that has a high crime rate. They also can be "risky" because they have had prior interactions with law enforcement. Indeed, "criminal history" itself may be as consistent with living in a heavily policed neighborhood as it is with any sort of criminal proclivity.

In fact, actuarial sentencing replicates and amplifies the troubling dynamics of criminal history. Importantly, actuarial risk information supplements, but does not replace, other information provided to the judge in advance of sentencing. Thus, the sentencing judge in an actuarial sentencing jurisdiction receives *both* details regarding the defendant's criminal history and her actuarial recidivism risk prediction, which itself is based on that same criminal history. Defendants with a criminal history are thus doubly disadvantaged. The sentencing judge may consider criminal history directly for whatever sentencing purpose she sees fit—as evidence the defendant is dangerous, requires greater specific deterrence, is ill-suited for diversion, or is deserving of a longer sentence—*and* may then consider it indirectly, as a predictive indicator of the defendant's future behavior.

Thus, the actuarial risk factors amplify and replicate the existing dynamics within the criminal justice system. Those who stand to lose the most, therefore, are those who are already disproportionately represented therein: young men of color from urban neighborhoods.[326]

C. REASSESSING ACTUARIAL SENTENCING

Proponents of neorehabilitative reforms in general, and actuarial sentencing in particular, characterize such measures as a movement away from the harsh, incapacitative policies of the past.[327] But the foregoing analysis reveals an artifact of this revival of rehabilitation: the selective re-entrenchment of incapacitation. Indeed, by default, those whom data do not select for rehabilitation through problem-solving court participation, community-based sentences, or drug treatment in lieu of incarceration are left to established criminal justice practices and

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324. *Id.* at 816 (noting that advocates of actuarial sentencing "argue, or assume, that the prediction instruments will primarily allow judges to identify low-risk offenders whose sentences can be reduced, not high-risk offenders whose sentences must be increased").

325. *See, e.g.*, *id.* at 819 (noting that the current actuarial sentencing literature's "treatment of the disparity concern is surprisingly limited; the commentary to the MPC revision, for instance, barely mentions it").

326. *See* Oleson, *supra* note 4, at 1387 ("[E]vidence-based sentencing has the potential to reify, rather than ameliorate, extant racial disparities.").

327. *See supra* Section B.1.

institutions. Thus, in this way, neorehabilitative reforms may help sustain a broken system indefinitely.[328]

This dynamic is both more visible and perhaps even more troubling in actuarial sentencing. Although actuarial sentencing uses data as a basis for imposing more lenient sentences for those who pose a sufficiently low risk of recidivism, it authorizes resort to incapacitation in the name of public safety for others. The process by which it imposes these sentences distorts traditional sentencing principles, by authorizing and encouraging the consideration of non-culpable and personal characteristics to predict future behavior. The incorporation of actuarial, data-based predictions can justify the imposition of a longer or more severe sentence than defendants would otherwise receive. The problem is not just that individuals who pose too great a risk of recidivism are incapacitated, but that such individuals may be incapacitated because of "who they are," rather than "what they did."[329]

In short, actuarial sentencing authorizes sentencing decisions that are unfair and unprincipled. The problem with actuarial sentencing is not just that it can lead to more severe outcomes for some people—the problem is with the inquiry itself. Actuarial risk tools measure and define risk in a way that does not comport with sentencing principles; they do not measure what should count in a just sentencing inquiry.

Some actuarial sentencing proponents have suggested that we restrict the practice only to those uses that appear to benefit defendants, by using actuarial risk information only to decrease sentencing exposure or militate in favor of a community-based sentence.[330] Others have recommended that we use actuarial sentencing as a way to actualize a limiting retributive sentiment—to sequence the sentencing inquiries so that the judge determines the range of sentences that are "not undeserved," and *then* consults actuarial risk information to determine the particular sentence to impose within that range.[331]

These suggestions may mitigate some of the unfairness that can result from actuarial sentencing, but they are nevertheless unavailing. Those who benefit from these decisions are benefiting because of "who they are." They benefit because they come from a background of relative privilege and were afforded access to educational and employment opportunities, a low-crime zip code, and perhaps even the privilege of committing low-level, quality-of-life criminal violations that were brought to the attention of law enforcement authorities.[332] Conversely, those who do not benefit from such an approach—those who are not

328. *See* Collins, *supra* note 97, at 1507–08.

329. *See supra* notes 308–17 and accompanying text.

330. *See, e.g.*, Starr, *supra* note 1, at 839–40 (noting that some actuarial sentencing proponents "propose that it should be used only to *mitigate* sentences" and providing citations).

331. *See, e.g.*, Monahan & Skeem, *supra* note 34, at 502.

332. For example, as Michelle Alexander has highlighted, "[t]he drug war has been waged almost exclusively in poor communities of color, despite the fact that studies consistently indicate that people of all races use and sell drugs at remarkably similar rates." Michelle Alexander, *The New Jim Crow*, 9 OHIO ST. J. CRIM. L. 7, 13 (2011).

selected for diversionary treatment or lower sentences—are excluded because they lack such privilege. In other words, although such an approach may be characterized as simply letting some (but not all) benefit, it may also be characterized as leaving most (but not all) subject to the dysfunction and discrimination of the established system.

CONCLUSION

We are at a critical juncture in criminal justice reform. There is widespread consensus that we must move away from the tough-on-crime polices that contributed to an era of mass incarceration, and there is a growing assumption that data should lead the way.[333] Meanwhile, history is threatening to repeat itself as top criminal justice policymakers are beginning to call for a revival of the war on crime.[334]

This unique posture demands that now, more than ever, we carefully scrutinize how data is incorporated into criminal justice decisions, with particular attention to how we label people as "risky," and the consequences of that label. In short, we must scrutinize how we punish risk. The foregoing demonstrates what can happen when that scrutiny is lacking: we may end up with more—not less—incarceration, and for reasons that defy the very principles that legitimate and motivate our criminal justice system.

333. *See supra* note 247 and accompanying text.

334. *See, e.g.*, Memorandum from Jeff Sessions, Att'y Gen., to Fed. Prosecutors (May 10, 2017) (instructing prosecutors to "charge and pursue the most serious, readily provable offense").