NOTES

Risk Assessment Instruments Are Inappropriate for Sentence Reform: Real solutions for reform address racial stratification

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I. INTRODUCTION

Some prison reformers have championed risk assessment instruments ("RAIs") as a reliable tool in decarcerating prisons of low-risk prisoners.[1] RAIs are purported to contribute to a more just and fair system by replacing the subjective bias of human decision making with objective mathematical algorithms.[2] However, scholars have expressed concerns that these instruments are problematic because the lack of transparency and the existing racial stratification will only perpetuate racial bias.[3] As academics continue to debate RAIs' potential harm, at least twenty states are allowing RAIs to be used at sentencing.[4]

RAIs should not be used at sentencing, because without leveraging a systematic racism lens, the RAIs will not produce reform and will only further entrench our racially stratified society. Data and technology are powerful and can be used to highlight exploitation and oppression. But risk scores created from inherently biased data should not be used to restrict and/or eliminate someone's life and liberty.[5] A historical understanding of the legal system's role and responsibility for American racial stratification instructs us to leverage a transformative approach to reform.

RAIs were originally designed to create an actuarial—statistical—risk score to guide decisions in bail setting or parole consideration for convicted prisoners.[6] A vast number of people who cycle through the criminal justice system are people of color. This fact reflects state coercion to control and dominate the "others" in society.[7] The "tough on crime" policies of the 1970s through the 1990s that resulted in mass incarceration targeted Black[8] inner-city communities.[9] State coercion of low-income

1. *See* Sonja B. Starr, *Evidence Based Sent'g and the Sci. Rationalization of Discrimination*, 66 STAN. L. REV. 803, 805 (2014).

2. *See id.*

3. *See* Danielle Keats Citron & Frank Pasquale, *The Scored Society: Due Process for Automated Predictions*, 89 WASH. L. REV. 1, 20 (2014) (arguing for more transparency in the tool design and creation); Anupam Chander, *The Racist Algorithm*, 115 MICH. L. REV. 1023, 1093 (2017) (arguing for the explicit inclusion of race so affirmative action principles could be leveraged when creating threshold determinations of the different risk classifications); Jessica Eaglin, *Constructing Recidivism Risk*, 67 EMORY L.J. 60, 111 (2017) (arguing for more transparency in the algorithm design and data used); Aziz Z. Huq, *Racial Equity in Algorithmic Crim. Just.*, 68 DUKE L.J. 1043, 1130 (2019) (creating algorithm fairness metrics and the collection of more comprehensive data to understand the criminal justice spillover effects so a cost benefit analysis could be conducted); Sandra G. Mayson, *Bias In, Bias Out*, 128 YALE L.J. 2218, 2224 (2019) (arguing inputs of data tainted with racism will create biased outcomes); Starr, *supra* note 1, at 821 (arguing that inclusion of socioeconomic and demographic categories in RAIs will create biased results).

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

5. *See* Mayson, *supra* note 3, at 2226 (arguing that the racism inherent in the criminal justice will create racist outcomes form RAIs).

6. *See* Huq, *supra* note 3, at 1060.

7. Eaglin, *supra* note 3, at 95.

8. I capitalize the "B" in "Black" "to reflect my view that Blacks, like Asians, Latinos, and other 'minorities,' constitute a specific cultural group and, as such, require denotation as a proper noun." Kimberle

Black communities leaves distinguishable patterns highlighting more arrests in those communities due to heightened scrutiny and control by the police.[10] These patterns are built into every data set that leverages criminal history to determine risk.[11] For example, a Black individual who is frequently stopped and arrested for any number of petty misdemeanors could be labeled high risk simply due to the number of arrests, where he lives, and his age, even though none of those variables predict criminal involvement.[12] The number of arrests is more correlated to the over-presence of police in a particular area than to an individual's criminal involvement.[13] Static historical criminal data does not have the necessary overlay to consider the lack of jobs, educational opportunities, and other supportive services in those same communities.[14] Even more than criminal history data, demographic data has the remnants of racial discrimination and stratification. For example, home addresses, marital status, whether parents or family members have ever been incarcerated, and educational attainment can all be proxies for race.[15]

RAIs used to classify and identify risk are created and trained on data that has pervasive bias from centuries of racial stratification.[16] By leveraging this data steeped in racial bias, the algorithmic outcome will only compound errors of the past.[17] The entrenched racial bias in our society will be perpetuated in most instances—particularly when the impact of racial bias is not actively being focused on. RAIs were designed for determining the level of risk for recidivism, not to determine how an individual would respond to one sentence versus another.[18]

Yet, states are using RAIs in sentencing.[19] Wisconsin State Supreme Court found that if the RAI output is one of many factors considered in sentencing—it did not violate due process protections.[20] The court's holding is not unexpected, but it is wrong, as this Note will demonstrate. First, I will evaluate existing judicial sentencing objectives to highlight the need to include the elimination of racial stratification into judicial objectives. Next, I will critique the Wisconsin decision to show why the court's holding was incorrect from a historical and constitutional perspective. Then, I will analyze the previous scholarship that critiques RAIs by acknowledging the potential harm without taking a stand against using them. Finally, I will offer

Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 Harv. L. Rev. 1331, 1332 n. 2 (1988).

9. *See* Loic Wacquant, *Class, Race & Hyperincarceration in Revanchist America*, 139 Daedalus 74, 74 (2010).

10. *See* Huq, *supra* note 3, at 1055-56.

11. *Id.*

12. Eaglin, *supra* note 3, at 95.

13. *See* Mayson, *supra* note 3, at 2256.

14. Eaglin, *supra* note 7, at 95-96.

15. *See id.*; Chander, *supra* note 3, at 1042.

16. Chander, s*upra* note 3, at 1036.

17. *Id.*

18. Starr, *supra* note 1, at 843, 855.

19. *Id.* at 809.

20. State v. Loomis, 881 N.W.2d 749, 768 (Wis. 2016).

recommendations for reducing potential harms and producing the long term transformation our society needs in order to eliminate mass incarceration.

II. JUDICIAL SENTENCING OBJECTIVES DO NOT INCLUDE ELIMINATION OF RACIAL STRATIFICATION

The traditional objectives of punishment do not acknowledge the criminal justice system's accountability in creating our racially stratified society or in the hyperincarceration that targets impoverished Black communities.[21] Instead, judges issue sentences to achieve one of the four traditional objectives: retribution, deterrence (specific or general), incapacitation, or rehabilitation. Retribution, colloquially referred to as "an eye for an eye," is based on the concept of "blameworthiness."[22] Harsh sentences are justified by the blameworthiness of an individual.[23] General deterrence is meant to deter people in general from committing crimes; whereas specific deterrence is meant to deter the convicted person from committing the same crime in the future.[24] Blameworthiness is also a consideration in specific deterrence.[25] Incapacitation is meant to take the individual off the streets and protect the public from future danger.[26] And finally, rehabilitation provides the individual with resources, treatment, and tools to become a contributing member of society.[27] Rehabilitation appears to be the most suitable of the four objectives to address the continuous and ongoing harm the legal system has perpetrated on the Black community.[28] Yet, the system is not set up to achieve rehabilitative goals.[29]

In 1984, the Sentencing Commission attempted to address the issues of increased sentence lengths, lower release rates, and less access to rehabilitative programing for convicted Black people by reducing judicial discretion.[30] The Sentencing Commission's goals were to "provide certainty and fairness, avoid unwarranted sentencing disparities . . ., and provide flexibility to permit individualized sentencing when warranted by mitigating factors . . . ."[31] To better understand judges' sentencing practices, a survey was constructed that considered the four objectives of punishment as well as public safety, certainty, flexibility, and avoiding unwarranted sentencing disparities.[32] The responding judges ranked deterrence and protecting the

21. Wacquant, *supra* note 9, at 74.
22. *See* Miller v. Alabama, 567 U.S. 460, 472 (2012).
23. *See id.*
24. Richard S. Frase, *Punishment Purposes*, 58 STAN. L. REV. 67, 70-71 (2005).
25. *See id.* at 70.
26. *Id.*
27. *Id.*
28. *See* Ian F. Haney Lopez, *Post-Racial Racism: Racial Stratification and Mass Incarceration in the Age of Obama*, 98 CALIF. L. REV. 1023, 1041 (2010).
29. *See* Michael Edmund O'Neill & Linda Drazga Maxfield, *Judicial Perspectives in the Federal Sentencing Guidelines and the Goals of Sentencing: Debunking the Myths*, 56 ALA. L. REV. 85, 88 (2004) [hereinafter O'Neill & Maxfield] (leveraging data from O'Neil, *infra* note 32); *see also* Wacquant, *supra* note 9, at 74.
30. O'Neill & Maxfield, *supra* note 29, at 87-88.
31. 28 U.S.C. § 991(b)(1)(B) (2008).
32. Michael Edmund O'Neill, *Surveying Article III Judges' Perspectives on Federal Sentencing Guidelines*, 15 FED. SENT'G R. 215, 215 (2003) (describing the results of a 2002 sentencing goals survey answered by 51.8 percent of district court judges and 33.9 percent of circuit court judges).

public as the highest objectives in sentencing—82.2 percent and 79.8 percent respectively.[33] Rehabilitation was ranked the lowest—only drug trafficking obtained a slightly higher ranking for rehabilitation but was still far below the other goals.[34] The initial impetus for new sentencing guidelines was to alleviate the sentencing disparities.[35] However, the objectives focused on judicial discretion and not on the overall racial stratification. As such, the sentencing guidelines did not eliminate the disparity in sentences.[36] Without a deeper understanding of how the criminal justice system has contributed and continues to entrench racial stratification, Black people with scarce economic resources will continue to receive disparate sentences.

Criminal justice exerts coercion on the Black population to perpetuate the "normative positive characteristics" associated with white people and "subordinate, even aberrational characteristics" associated with Black people.[37] Slavery and the Black Codes were obvious examples of explicit coercion targeted at Black people. The white legal society leveraged thick, unmistakably racist rhetoric to justify these laws.[38] The underlying assumption was that Black people, once they were no longer white people's property, continued to be inherently inferior to the white population. The paternalistic language in the seminal cases explicitly expresses that any differential treatment between the two groups was simply the natural order of things.[39]

Another way criminal justice has historically subjugated Black people was by leasing out convicted prisoners, exclusively Black prisoners, to the plantation fields or into coal mines or other labor intensive industries.[40] Taking advantage of the Thirteenth Amendment that allows for enslaving the criminally convicted, this legal system sanctioned practice resulted in the first dramatic increase of Black prisoners.[41]

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33. O'Neill & Maxfield, *supra* note 29, at 114. The survey found that judges' goals may differ depending on the convicting crime. For example, judges ranked protecting public safety as highest for firearms charges, while drug trafficking offenses obtained a goal of deterrence. *Id.* at 113.

34. *Id.* at 113.

35. *See* Shawn D. Bushway & Anne Morrison Piehl, *Judging Judicial Discretion: Legal Factors and Racial Discrimination in Sentencing*, 35 L. & Soc'y Rev. 733, 733 (2001) ("Using data in Maryland, we find African Americans have 20% longer sentences than whites . . . . We find more judicial discretion and greater racial disparity than is generally found in the literature.").

36. *See id.* at 741 (reviewing literature that found judges will order a downward departure from the sentencing grid more often for white defendants then Black defendants based on the judge's opinion of the defendant's criminal history and crime severity).

37. Crenshaw, *supra* note 8, at 1373-74.

38. *See* Plessy v. Ferguson, 163 U.S. 537, 541-42 (1896); Dred Scott v. Sandford, 60 U.S. 393, 411-13 (1857).

39. *See Plessy*, 163 U.S. at 549 ("The power to assign to a particular coach obviously implies the power to determine to which race the passenger belongs, as well as the power to determine who, under the laws of the particular state, is to be deemed a white, and who a colored, person."); *Dred Scott*, 60 U.S. at 407, 411 (referring to Black people as "that *unfortunate* race" and "specifically . . . as a separate class of persons, . . . not regarded as a portion of the people or citizens."); *see also* Derrick Bell, Faces at The Bottom of The Well: The Permanence of Racism 12 (1992) ("Black people will never gain full equality in this country. Even those herculean efforts we hail as successful will produce no more than temporary 'peaks of progress,' shortlived victories that slide into irrelevance as racial patterns adapt in ways that maintain white dominance.").

40. Lopez, *supra* note 28, at 1042.

41. *Id.* at 1041.

Between 1850 and 1870, the percentage of Blacks in Alabama prisons went from two percent to seventy percent.[42] Black men were picked up for any number of "crimes" in order to be "leased out" as extremely low labor.[43] Convict leasing continued well into the 1940s resulting in over seventy years of unacknowledged trauma and abuse of the Black community.[44]

The racial stratification perpetuated by the legal system continued through the 1940s and 1950s by the expansion of the separate but equal doctrine validated in *Plessy*.[45] The Black population did not have access to the same resources or forms of remedies that the white population took for granted. The Black population did not consent to the coercive acts that left them in a subordinate position.[46] In the 1960s, Blacks, demanding their equal rights, created the civil rights movement and "constituted a serious ideological challenge to white supremacy."[47] However, the nation did not shift to a new normal where the centuries of racial stratification were eliminated in a matter of years. Instead, the entrenched ideology and coercion created a significant backlash in the 1970s and began the increased criminalization of Black men and youth.[48]

Today, prisons overflow disproportionately with people of color. In fact, one in three Black men is expected to be incarcerated during their lifetime.[49] That number is staggering and significantly less than the one in seventeen white men who have a likelihood of incarceration.[50] The prison population has increased by 500 percent in forty years with 2.2 million people currently incarcerated across the nation.[51] The massive explosion of the carceral state was specifically targeted at lower class Black men who lived in the inner city.[52] The excessive policing was tolerated and accepted because the expansion of police power and control was not targeted at affluent neighborhoods.[53] Impoverished Black communities have been decimated by incarceration: the fact that one in every ten Black men in his thirties is held in prison or jail on any given day[54] wreaks havoc on the family and community that person leaves behind.[55]

This brief overview highlights the systemic approach the legal system has bolstered to dominate and deny power to the Black community. Each time the Court has created and/or validated the social construction of race, it has further entrenched the

42. *Id.* at 1041-42.
43. *Id.* at 1042-43.
44. *See id.* at 1045.
45. Plessy v. Ferguson, 163 U.S. 537, 541-42 (1896).
46. Crenshaw, *supra* note 8, at 1357.
47. *Id.* at 1365.
48. *See* Wacquant, *supra* note 9, at 74.
49. SENT'G PROJECT, *Criminal Justice Facts*, https://www.sentencingproject.org/criminal-justice-facts/ [https://perma.cc/2NBJ-VAPL] (last visited Aug 1, 2020).
50. *Id.*
51. *Id.*
52. Wacquant, *supra* note 9, at 78.
53. *Id.*
54. *See* SENT'G PROJECT, *Racial Disparity*, https://www.sentencingproject.org/issues/racial-disparity/ [https://perma.cc/B7P5-UM92] (last visited Aug. 1, 2020) [hereinafter *Racial Disparity*].
55. Huq, *supra* note 3, at 1110; *see also* Wacquant, *supra* note 9, at 78.

racist systems. Yet, the penology of racial innocence creates a colorblind judiciary that does not acknowledge the explicit contributions racial stratification has had on the "criminality" of the Black community.[56] When criminal history and crime severity are leveraged in sentencing,[57] the existing system entrenches without options for alleviating the racial stratification the system has created. The historical social construction of race by the courts continues to sustain white dominance, power, and exploitation of the Black population.[58] In Wisconsin's *State v. Loomis*, we see the remnants of racial stratification reflected in the criminal justice system and how RAIs are helping to continue that narrative.[59]

III. *State v. Loomis:* not an Unexpected Conclusion on the Constitutionality of Risk Assessment Instruments Used in Sentencing

In *Loomis*,[60] the Wisconsin Supreme Court considered a due process challenge to utilizing an RAI at sentencing.[61] The court held that the RAI could be used as one of many factors at sentencing even though it acknowledged many limitations of the tool.[62] The court's conclusion was not unexpected as the judiciary has not incorporated an objective to either acknowledge its complacency in the system's racially disproportionate sentencing or to eliminate racial stratification.

A. Wisconsin Supreme Court Rejects Due Process Arguments Reasoning that RAIs Can Be Used as One of Many Factors that Can Help the Sentencing Decision

Mr. Loomis, the defendant, challenged the use of a recidivism risk score under the Due Process Clause because (1) the propriety nature of the algorithm used in a risk assessment tool called COMPAS[63] prevented him from assessing the accuracy of the outcome, and (2) it denied individualized sentencing.[64] Northpointe, the organization that created COMPAS, leveraged intellectual property laws to limit its disclosure of how COMPAS calculated the risk scores.[65] Therefore, no information is publicly available on how the risk score was calculated, the weights of the given input variables, or how the threshold points were determined between each of the risk classifications.[66] The court agreed that Mr. Loomis had a constitutional right to have accurate data in his sentencing as well as a right to review and verify that information.[67] But even with the right validated, the court still rejected the due process

56. *See* Naomi Murakawa & Katherine Beckett, *The Penology of Racial Innocence*, 44 L. & Soc'y Rev. 695, 705, 721 (2010).
57. *See* Bushway, *supra* note 35, at 737.
58. *See* Crenshaw, *supra* note 8, at 1370-71.
59. *See* Mayson, *supra* note 3, at 2222.
60. State v. Loomis, 2016 WI 68, 371 Wis.2d 235, 881 N.W.2d 749.
61. *Loomis*, 2016 WI 68, ¶ 29.
62. *Id.*, ¶ 98.
63. *Id.*, ¶ 13.
64. *Id.*, ¶ 26-28, 67.
65. *Id.*, ¶ 14, 46.
66. *Id.*
67. *Id.*, ¶ 47.

challenge reasoning that Mr. Loomis could refute the publicly available input variables.[68] The input variables consisted of publicly available static criminal history data and answers Mr. Loomis provided in a questionnaire.[69] Since none of the input variables were hidden or withheld from Mr. Loomis, there were no *Brady* type violations[70] to consider, which reduced the judge's concern significantly.[71]

The court also rejected Mr. Loomis' second argument that his due process rights were violated because he did not get an individualized sentence. The COMPAS risk score is based on group averages like any other type of actuarial data and attempts to predict the risk of particular groups.[72] The potential issue that arises from this is that a young person who had several supervision failures may receive a medium- or high-risk score on the Violent Risk Scale, even though that person never committed a violent crime.[73] The court accepts this possibility by explaining that the Department of Corrections (DOC) allows for overriding the score when it makes sense to do so in light of other known factors.[74] Underlying the court's acceptance is its foundational decision that the risk score cannot be used as the determinative factor in sentencing.[75] But as one of many factors, even if the score can potentially be significantly inaccurate, the court reasoned it added value because it provided "more complete information upfront, at the time of sentencing."[76] The court reasoned that the risk score provides information necessary for statutory sentencing considerations including "criminal history, the likelihood of affirmative response to probation or short term imprisonment, and the character and attitudes indicating that a defendant is unlikely to commit another crime."[77]

B. Wisconsin Supreme Court's Due Process Analysis is Limited Without Racial Stratification Analysis

The court's due process analysis did not consider the racial bias inherent in static criminal history data. Instead, it focused on prosecutorial misconduct precedents where data had been withheld from the defendant. When racism is infused into the very data being used to analyze the potential for recidivism, the fact that all data was publicly available is irrelevant.[78] If the court wanted to reduce the entrenched racism, the due process analysis would take a much closer look at the data to reveal the systemic patterns caused by racial stratification. A closer look would reveal data based

68. *Id.*, ¶ 55.
69. *Id.*, ¶ 55.
70. *See generally* Brady v. Maryland, 373 U.S. 83, 87 (1963) (holding "suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution").
71. *Loomis*, 2016 WI 68, ¶ 69.
72. *Id.*
73. *Id.*
74. *Id.*, ¶ 70.
75. *See id.*, ¶ 67-74.
76. *Id.*, ¶ 72 (quoting State v. Gallion, 206 2004 WI 42, ¶ 34, 270 Wis.2d 535, 678 N.W.2d 197 (internal quotations omitted)).
77. *Id.* (quoting Malenchik v. State, 928 N.E.2d 564, 574 (Ind. 2010) (internal quotations omitted)).
78. See discussion *supra* Part I.

on the number of arrests—not convictions—which reflects policing decisions not the criminality or dangerousness of any one individual.[79] By taking the analysis one step further, it becomes obvious that over-policing primarily occurs in poor Black communities.[80]

Unfortunately, the court relies on a flawed assumption that RAIs would not be harmful when used to bolster other information also considered at sentencing. The court assumed the tool could provide a "likelihood of affirmative response to probation or short-term imprisonment." [81] This implies that the judges want to use a risk score to help understand how a person will react to incapacitation from one sentence versus another. Neither COMPAS nor any other RAI today answers that question.[82] COMPAS classifies individuals as high, medium, or low risk for three risk scales: pretrial recidivism risk, general recidivism risk, and violent recidivism risk.[83] Northpointe provided explicit caution that the risk scores did not reveal the potential recidivism risk of any specific individual.[84] Group averages of potential recidivism do not answer the question of how an individual will react to a given sentence.[85] For example, without knowing how a person may mature and change while incarcerated, the risk score cannot predict how a person will respond to a five-year versus a fifteen-year sentence. Instead, the risk score only illustrates that the individual had some level of similarity to a group of individuals that were more or less likely to be arrested in two to three years of the assessment.[86] "It is a statistical truism that the mean of a distribution tells us about everyone, yet no one."[87] The court assumed that sentencing courts would have sufficient knowledge to separate out the risk score when it appeared to be invalid without even considering if the score could ever be valid.[88] When the data provides an answer to a question not asked, the results do not provide "more complete information upfront."[89] Instead, without full information, the judge must determine how to consider a score and what weight to give it when determining a sentence. The Constitution demands a stricter standard to justify group-based predictions for individualized sentencing.[90] Not only did the court not account for what COMPAS was designed to predict—re-arrest rates—the court also did not explicitly recognize the impact our racially stratified society has on the data.

79. *See* Mayson, *supra* note 3, at 2252.
80. *See id.*
81. *Loomis*, 2016 WI 68, ¶ 73.
82. Eaglin, *supra* note 7, at 100.
83. *Loomis*, 2016 WI 68, ¶ 14.
84. *Id.*, ¶ 15.
85. *See* Starr, *supra* note 1, at 842.
86. *Loomis*, 2016 WI 68, ¶ 15.
87. Starr, *supra* note 1, at 842 (quoting David J. Cole & Christine Michie, *Limits of Diagnostic Precision and Predicative Utility in the Individual Case: A Challenge for Forensic Practice*, 34 L. & Hum. Behav. 259, 259 (2010)).
88. *Loomis*, 2016 WI 68, ¶ 71.
89. *Id.* at 758.
90. Starr, *supra* note 1, at 847 ("[T]o justify group-based discrimination in sentencing, both the Constitution and good policy require much more demanding standard of predictive accuracy").

In 2016, a study showed that COMPAS disproportionately flags Black defendants incorrectly as high risk.[91] The study's focus group consisted of people who had not been arrested after two years of being assessed through COMPAS.[92] Within this pool of "innocent people,"[93] it was more likely for Black people to have been defined as higher risk than white people.[94] Technically, this is a false positive that determines the number of times a positive indication for high risk is incorrect. Northpointe disputed the findings by arguing that the study evaluated potential bias in the risk scores with the wrong metric.[95] Instead of false positives, the study should have evaluated how often a white or Black person with the same risk score recidivates.[96] Each group, the company argued, was equally likely to recidivate when they had the same score.[97] The court acknowledged this debate and the concerns it raised for Black defendants but nonetheless accepted the score as being valuable as long as limiting instructions were included in the Presentence Investigation Report (PSI) that contained any COMPAS risk scores.[98] The court reasoned[99] that the following limiting instructions would give sentencing courts the information needed to assess and weigh the risk scores in order to achieve sentencing goals:

> Specifically, any PSI containing a COMPAS risk assessment must inform the sentencing court about the following cautions regarding a COMPAS risk assessment's accuracy: (1) the proprietary nature of COMPAS has been invoked to prevent disclosure of information relating to how factors are weighed or how risk scores are to be determined; (2) risk assessment compares defendants to a national sample, but no cross-validation study for a Wisconsin population has yet been completed; (3) some studies of COMPAS risk assessment scores have raised questions about whether they disproportionately classify minority offenders as having a higher risk of recidivism; and (4) risk assessment tools must be constantly monitored and re-normed for accuracy due to changing populations and subpopulations.[100]

Neither the brief acknowledgement of potentially disparate results nor the limiting instructions give justice to the effect of centuries old racism. Nor does it reveal the underlying bias in the data itself. Further, the limiting instructions do not reference the inherent racist patterns in the data. Therefore, they are not effective in providing the necessary guidance to sentencing judges.

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91. Julia Angwin, Surya Mattu & Lauren Kirchner, *Machine Bias: There's Software Used Across the Country to Predict Future Criminals. But it's Biased Against Blacks.*, PROPUBLICA (May 23, 2016), https://www.propublica.org/article/machine-bias-risk-assessments-in-criminal-sentencing [https://perma.cc/FJ6W-K8Y3] (last visited Aug. 1, 2020).

92. Huq, *supra* note 3, at 1048.

93. Innocent equals not re-arrested. *Id.*

94. *Id.*

95. *See* State v. Loomis, 2016 WI 68, ¶ 63, 371 Wis.2d 235, 881 N.W.2d 749, 763; Huq, *supra* note 3, at 1048.

96. Huq, *supra* note 3, at 1048-49.

97. *Loomis*, 2016 WI 68, ¶ 63.

98. *Id.*, 881 N.W.2d at 763.

99. *Id.* at 764.

100. *Id.* at 763-64.

Finally, the *Loomis* court did not consider a central issue in sentencing—blameworthiness.[101] With deterrence being one of the highest ranked objectives in sentencing,[102] blameworthiness is a key component of achieving that objective. Yet, the risk scores attempt to predict group recidivism rate, not individual culpability.[103] An individual's blameworthiness is determined by who the individual is, and not what he has done in the past unrelated to the convicting crime.[104] Neither deterrence nor public safety can be achieved when an RAI is used at sentencing because they do not measure an individual's culpability or blameworthiness. The decision in *Loomis* to allow RAI in sentencing, even with limiting instructions, does not give judges additional information to make fair and just decisions. Judges may have an "inflated understanding of the estimates' precision"[105] and fall into the trap of shifting correlation to causation when viewing a person's risk for violence; and thus order a longer or shorter sentence. The potential arbitrariness reduces the certainty of sentencing when an RAI is used as one of many factors. Instead, it only illuminates how RAIs worsen the ability to uncover the underlying racial stratification.

C. A Shift in Acceptable Story Telling is Critical in Exposing the Underlying Racial Stratification Risk Assessment Instruments Hide

Successful legal claims require skillful storytelling and reliance on precedent. This requires that the stories must have been "deemed acceptable by previous courts."[106] The court determines what is significant and what is not. By this very nature, legal storytelling does not allow for illumination or discovery of oppression and marginalization.[107] An unsuccessful claim brought by the Mashpee Indians is illustrative of this truth.[108] The domination and control the state exerted over the Mashpee resulted in conflicting accounts of how the Mashpee lost their land.[109] The very heart of the dispute was whether the Mashpee were "legally" a people.[110] Yet, it was only the white man's laws and definitions that were allowed to answer that question. The Mashpee's self-understanding of being Mashpee and how they kept their identity alive while living through structural genocide[111] was not considered in the courtroom.[112] The court leveraged a Supreme Court precedent that defined "Tribe" as "a body of Indians or some similar race, united in a community under one leadership or

101. Starr, *supra* note 1, at 817.
102. *See supra* Part I.
103. Starr, *supra* note 1, at 817.
104. *See id.*
105. *Id.* at 848.
106. Gerald Torres & Kathryn Milun, *Translating* Yonnondio *by Precedent and Evidence: The Mashpee Indian Case*, 1990 Duke L.J. 625, 647 (1990).
107. *See id.*
108. *Id.* at 629.
109. *Id.* at 629, 631.
110. *Id.* at 641.
111. Patrick Wolfe, *Settler Colonialism and the Elimination of the Native*, 8 J. Genocide Rsch. 387, 403 (2006)
112. Torres & Milun, *supra* note 106, at 641-42.

government, and inhabiting a particular though sometimes ill-defined territory."[113] The court ultimately decided that the Mashpee was not a Tribe as they had integrated into the "outside community" by living with and marrying people who were not defined as Mashpee by the court.[114] The court refused to hear the Mashpee's own story as they stood in court "trying to prove that they existed."[115]

Legal storytelling and precedent did not allow the Mashpee voices to be heard. RAIs also prevent the racial stratification story from being heard for the same reason. The resulting risk scores mask the underlying oppression with an "objective" number that is not clearly understood. The lack of detailed information on how the algorithm is designed, trained, and deployed reduces the judge's ability to interrogate its accuracy. But instead of creating a story acknowledging the racialized history, the *Loomis* court looked to prosecutorial misconduct precedent, not entirely on point, to support its reasoning that the risk score was accurate. Prosecutorial misconduct is an accepted story that protects the defendant's rights.[116] But racial stratification is not. When racial discrimination claims are allowed into the court room it must be a specific instance of insidious racism perpetrated by a specific individual or entity,[117] not the generalized impact of centuries of racial stratification.[118] The existing acceptable stories and precedent shelter the courts from revealing the underpinnings that would illuminate how the criminal justice system has marginalized impoverished Black communities.

Another acceptable legal story that has its roots in racial stratification is the wealth discrimination doctrine. The Supreme Court has ruled that punishing a person based on his poverty is unconstitutional under the Equal Protection Clause and Due Process Clause.[119] A wealth discrimination challenge on the use of social-economic factors used in RAIs might be successful.[120] Risk assessment instruments (RAIs) are *not* used to determine if a person should be punished or not regardless of poverty—which is constitutional.[121] They are used to determine if the punishments should be greater or not *and* on unequal economic terms—which is unconstitutional.[122] The terms are unequal because many of the factors used to increase risk relate to poverty. For example, six of the eleven question classifications used in COMPAS relate to a

113. *Id.* at 633 (quoting Montoya v. United States, 180 U.S. 261, 266 (1901)).
114. *Id.* at 650-51.
115. *Id.* at 649.
116. *See generally* Brady v. Maryland, 373 U.S. 83 (1963).
117. *See, e.g.*, Pena-Rodriguez v. Colorado, 137 S. Ct. 855, 870 (2017) (reversing conviction when "alleged statements by a juror were egregious and unmistakable in their reliance on racial bias").
118. *See, e.g.*, McCleskey v. Kemp, 481 U.S. 279, 298 (1987) (rejecting the statistics that showed racial disproportionate application of the death penalty because Mr. McCleskey could not prove the legislature enacted or maintained the death penalty statute because of an anticipated racially discriminatory effect).
119. Bearden v. United States, 461 U.S. 660, 661-62 (1983).
120. Starr, *supra* note 1, at 835.
121. *Id.* at 832.
122. *Id.*

person's economic level.[123] The questions perpetuate the class distinctions where the criminal justice system treats you better if you are rich and guilty than if you are poor and innocent.[124] The wealth discrimination doctrine was not used to challenge the imposed sentence in *Loomis*. But even if the wealth discrimination doctrine was argued, the Wisconsin court would have likely rejected it because of its reasoning that the risk score was only one of many factors considered. Like the Mashpee whose valid claim could not be heard by a court using only the white man's precedent,[125] the wealth discrimination doctrine may not be persuasive when invoked by a party attempting to reject RAIs at sentencing, unless there is a shift to a new form of story-telling. This new story must include how RAIs do not allow courts to achieve sentencing objectives and are potentially unconstitutional because of the focus on social-economic factors.

IV. Risk Assessment Instruments Should not be Used in Sentencing

Reliance on a risk assessment instrument (RAI) in sentencing "would violate the due process protections"[126] and potentially equal protection rights.[127] The Leadership Conference on Civil & Human Rights denounced the use of RAIs in pre-trial decision making.[128] One hundred and nineteen civil rights organizations signed onto the Leadership Conference's statement demanding RAIs not be used and defined six principles to mitigate harm if an RAI is used.[129] Scholars have critiqued RAIs, arguing they are ineffective in sentencing, because they will create racially biased results that only perpetuate our racially stratified society and do not provide the judge additional information on individual predictions or the consequence of one

123. Northpointe Inc., *Sample Risk Assessment COMPAS*, https://www.documentcloud.org/documents/2702103-Sample-Risk-Assessment-COMPAS-CORE.html [perma.cc/PD9G-MYSY] (last visited Aug. 1, 2020). The questions include the following topics 1) Family of origins including primary caretakers, and incarceration of family members 2) Peers including incarceration of peer group and gang relations 3) Residence and stability includes questions around living arrangements, and homelessness 4) Social environment with questions focusing on crime and ease of acquiring drugs 5) Educational attainment with no questions that ask about any attainment greater than a high school diploma 6) Work experience with questions related to number of times fired and conflicts over money including trouble paying bills 7) Leisure/recreation that asks about periods of boredom, unhappiness, and discouragement 8) Social isolation 9) Criminal personality 10) Anger and 11) Criminal attitudes.

124. *See generally* Bryan Stevenson, Just Mercy (2014).

125. Torres & Milun, *supra* note 106, at 633.

126. *Loomis*, 881 N.W.2d at 774 (Roggensack, J., concurring).

127. *Id.* at 775 (Abrahamson, J., concurring) (quoting Ryan J. Reilly, *Eric Holder Warns of Risks in 'Moneyballing' Criminal Justice*, Huffington Post (Aug. 1, 2014 11:28 AM), https://www.huffpost.com/entry/eric-holder-moneyball-criminal-justice_n_5641420 [https://perma.cc/G6TZ-5M5X] ("Holder warned using 'static factors and immutable characteristics, like the defendant's education level, socioeconomic background or neighborhood' in sentencing could have unintended consequences, including undermining our goal of 'individualized justice, with charges, convictions, and sentences befitting the conduct of each defendant and the particular crime he or she commits.'")).

128. Leadership Conference on Civil & Human Rights, *The Use of Pretrial "Risk Assessment" Instruments: A Shared Statement of Civil Rights Concerns*, http://civilrightsdocs.info/pdf/criminal-justice/Pretrial-Risk-Assessment-Full.pdf [https://perma.cc/9ZBK-J3BY] (last visited Aug. 1, 2020) [hereinafter Leadership Conference].

129. *Id.*

sentence over another.[130] Yet, these scholars have found reasons to not take a firm stand against using RAIs in sentencing.[131]

Following the Leadership Conference's lead, I join the rejection of using RAIs in sentencing. Beyond the four punishment objectives, the three primary factors considered at sentencing are the gravity of the crime, the character of the person convicted, and the need to protect public safety.[132] As previously described, RAIs do not fulfill those considerations for two primary reasons. First, static criminal history patterned with racial stratification illuminate police activity more than an individual's "criminality."[133] Second, the risk of recidivism based on arrest history is not the correct question to be asking at sentencing.[134] Scholars have articulated affirmative action principles and the potential to make RAIs more appropriate at sentencing through the use of racially equitable algorithms.[135] I reject each of these justifications in turn.

A. Affirmative Action Principles

In the *Racist Algorithm*, Anupam Chander argues that affirmative action principles are the answer to racist algorithms.[136] He defines affirmative action as not focusing on how or why discrimination exists, but on fixing the existing problem.[137] He further argues that by having data input transparency the potential for discrimination can be reduced. His argument requires race and sex to be directly considered.[138] By removing all racial identification or proxies for race, we are limiting the ways data can expose the inequities inexorable in the criminal justice system. It would entail "upholding as 'not-racism' gross racial disparities corresponding directly to

130. *See* Chander, *supra* note 3, at 1036 ("Even facially neutral algorithm will produce discriminatory results because they train and operate on the real world of pervasive discrimination."); Huq, *supra* note 3, at 1081 (arguing that racial stratification has created the potential for inequitable algorithmic results); Mayson, *supra* note 3, at 2221 ("Algorithmic prediction has the potential to perpetuate or amplify social inequality, all while maintaining the veneer of high-tech objectivity"); Starr, *supra* note 1, at 843, 855 (arguing RAIs risk scores do not provide insight into an individual's risk level and that recidivism rate is not related to sentencing).

131. *See* Chander, *supra* note 3, at 1040-41 (arguing that affirmative action principles can remedy algorithmic discrimination); Huq, *supra* note 3, at 1047, 1055 (arguing that the "criminal justice elicits racial stratification" and to understand the impact of state coercion, a racially equitable metric needs to be created); Mayson, *supra* note 3, at 2277 (arguing that instead of using RAI outcomes to determine punishment, they should be used to provide support to individuals who have been harmed by the racist system); Starr, *supra* note 1, at 872 (arguing that demographic and socioeconomic variables should be removed from RAI if they are to be used in sentencing). *But see* Bernard Harcourt, *Risk as Proxy for Race: The Dangers of Risk Assessment*, 27 FED. SENT'G REP. 237, 240 (2015) (argues that risk assessment will not help criminal justice reform, instead must reduce prison admissions and prison sentences).

132. *Loomis*, 881 N.W.2d at 773 (Roggensack, J., concurring).

133. *See* Chander, *supra* note 3, at 1025; Mayson, *supra* note 3, at 2256; Huq, *supra* note 3, at 1046; *see also supra* Section II for further discussion.

134. *See* Starr, *supra* note 1, at 856; *see also supra* Section III.B for further details.

135. *See, e.g.*, Chander, *supra* note 3, at 1039-41 (calling for "algorithmic affirmative action"); Huq, *supra* note 3, at 1111-15 (introducing the potential for equitable algorithms).

136. Chander, *supra* note 3, at 1040-41.

137. *Id.* at 1041.

138. *Id.*

longstanding racial hierarchies."[139] The answer is not to turn a blind eye to the racist data, but instead to look at it directly.

For many years, there has been the acknowledgement that the criminal justice system disproportionately imprisons Black people—particularly Black men. This knowledge has not helped to reduce the hyperincarceration of the inner-city Black community. The statistic that one in every three Black males born in 2001 will be incarcerated at some point in his life has not shifted.[140] Criminal history data will show that Black people are arrested at greater numbers than other groups. The data alone will not resolve the over criminalization problem. For some people, the statistics only reinforce the belief that the criminal justice system is not the source of the harm, but instead is protecting society from the harm. Without leveraging a racially critical lens, the understanding of why more crimes seem to occur in the Black communities is fraught with inaccuracies. Transparency alone is not enough. Racially biased outputs can result in a greater punishment that restricts an individual's life and liberty. The harm is greater than what the transparency can reveal, particularly when the underlying racial stratification is not acknowledged. Therefore, the potential for transparency alone is not enough to allow risk assessments to be used in sentencing.

B. Racially Equitable Algorithm

In *Racial Equity in Algorithmic Criminal Justice*, Aziz Huq convincingly argues that constitutional equal protection challenges against RAIs will be unsuccessful because of the inability to prove intent[141] and the likelihood that algorithms will indirectly leverage race as a variable.[142] Huq also fully supports the premise that "criminal justice elicits racial stratification."[143] Even with the solid background that the constitution is not likely to protect an individual from the invidious data, he still puts forth an argument of how RAIs could be used. He introduces a new concept of equitable algorithms that could show not only the direct positive impact criminal justice has had, but also the indirect spill over that has decimated Black families and communities.[144] He argues for the need to capture both the total benefits and costs of intraracial crime so that a racially equitable metric could be created.[145] Once the costs and benefits are quantified, the subsequent analysis would determine if the state coercion was justified or not.[146]

In theory, this wholistic approach is an appropriate way to use machine learning and other advanced algorithmic techniques. However, we still need to start at the

139. Lopez, *supra* note 28, at 1062.

140. Sent'g Project, *Shadow Report to the United Nations on Racial Disparities in the United States Criminal Justice System* (Aug. 31, 2013), https://www.sentencingproject.org/publications/shadow-report-to-the-united-nations-human-rights-committee-regarding-racial-disparities-in-the-united-states-criminal-justice-system/ [https://perma.cc/MW2T-DTYN].

141. Huq, *supra* note 3, at 1091.

142. *Id.* at 1053.

143. *Id.* at 1047.

144. *Id.* at 1113.

145. *Id.* at 1114. Huq argues that because crime is primarily intraracial the needs of each community must be analyzed separately to determine the costs and benefits of state coercion on each community.

146. *Id.* at 1129.

beginning—always with the data when dealing with algorithms. Take, for example, a violent crime where one young Black man is shot by another Black man within the inner city. The hard questions begin with how to define the costs and benefits of this trauma. The direct benefit of police interference is enhancing public safety by taking an armed individual off the street. But the costs are difficult to quantify. The costs that are incurred from the police investigation represent not only financial costs of police resources but also community costs of trauma, fear, and restrictions as a result of the police presence. After a person is arrested, further costs accrue for the individual's family as well as the victim's family. If the person who was shot died, the requirement for surviving family members to attend court and relive the harm without control on what the system will do creates costs. If the shooter is incarcerated, additional costs are endured by the family and community. Then more costs are created when or if he comes home and tries re-integrating into the community. As more and more young men are taken from the community, the coercive costs enlarge. Racialized stratification is responsible for the lack of resources, education, and opportunities within poor communities.[147] Huq does not provide any insight into these questions regarding how to quantify costs in his wholistic approach.[148] If the benefits and costs are defined by the white elite, then even this approach will only reinforce the existing racial stratification. Much work would need to be done to make this theory an actionable one. Today, we remain a long way from executing Huq's racially equitable approach, even though it presents a productive way to leverage machine and data algorithms. The existing RAIs continue to create harm and, therefore, should not be used in sentencing.

V. RECOMMENDED SOLUTIONS

Knowing that risk assessment instruments (RAIs) are being used in sentencing and are unlikely to be discontinued anytime soon, I offer the following immediate and long-term recommendations to address the issues highlighted in this Note. As the Leadership Conference stated,[149] these recommendations are not to be construed as an endorsement of RAIs, instead, they are meant to reduce immediate harm and provide long-term solutions for real reform to our criminal justice system.

A. Immediate

1. Judicial training

The need for judicial training on RAIs was articulated in *Loomis*.[150] The court did not receive adequate information on how to interpret the COMPAS risk scores.[151]

147. *See id.* at 1108.

148. Huq's approach leaves many unanswered questions: Where is the line drawn on accumulating costs? Where does this data come to quantify the collateral damage of state coercion? Who defines what the benefits were? How are the benefits quantified? Should people who are the most vulnerable in society be monitored even more than they already are?

149. *See* LEADERSHIP CONFERENCE, *supra* note 128.

150. *Loomis*, 881 N.W.2d at 776 (Abrahamson, J., dissenting).

151. *Id.*

The training would be similar to judicial training offered on DNA and other "forensic sciences."[152] The judiciary needs to be trained on the limitations of the data and the impact of the inherent racism. Data is a powerful tool. If data is being offered as describing one set of phenomena but in reality, is describing something else entirely, the data should not be used. Based on the rationale in *Loomis*, judges are failing to heed the direct instructions and caveats from the risk assessment companies not to use the data for individual sentencing—not even in combination with other factors. The allure of the objective quantitative risk score will impact the judge's ability to resist the temptation to trust and apply the score. This has negative effects by either perpetuating the privilege a low score obscures or concealing the over criminalization a high score reveals.[153]

Judges need to be explicitly trained on what the algorithm is revealing and what it is not. For example, the current tools do not attempt to explore the relationship between specific crimes, the severity of the crime, and recidivism.[154] Some of the demographic factors that are used to predict recidivism include dependence on social assistance, parent's criminal history, and high school grades.[155] A low score may be more predictive of the privilege of growing up in a white community with a two-parent household rather than the lack of criminality. A low score used to impose a lesser sentence may only perpetuate the status quo without the judge understanding the background of the data used. Most importantly, these RAIs do not evaluate the individual's blameworthiness.[156] Judges must be educated explicitly on the limitations to sentencing by individuals who understand both data and how racism is perpetuated by its use.

2. Data to highlight racial disparities

Data analysis can be helpful in exposing inequities. The Washington Supreme Court recently declared the death penalty unconstitutional under its state constitution, based primarily on data analysis that exposed the racist and arbitrary way death sentences were imposed.[157] Importantly, this study was rigorously evaluated by both parties during the course of the litigation.[158] Race or proxies for race were not eliminated from this analysis. Instead, they were used to highlight the inherent racism in capital sentencing. The study was built on data obtained through trial reports where prosecutors had indicated at least one aggravating factor that made the case death-

152. *See generally* Robert Sanger, *The Forensic Community Can Educate Lawyers, Judges*, Forensic Mag. (June 23, 2017), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2992303 [https://perma.cc/W6TN-V2ZC].

153. See Starr, *supra* note 1, at 840-41.

154. *Id.* at 811.

155. *Id.* at 812-13.

156. *See id.* at 817 (citing John Monahan, *A Jurisprudence of Risk Assessment: Forecasting Harm Among Prisoners, Predators, and Patients*, 92 Va. L. Rev. 391, 427-28 (2006)).

157. Washington v. Gregory, 427 P.3d 621, 633 (Wash. 2018). *But see* McCleskey v. Kemp, 481 U.S. 279, 301-02 (1987) (holding a statistical study showing racial disparity in the application of death sentences was not enough to render the death penalty unconstitutional under either the equal protection or cruel and unusual punishment clauses).

158. *See Gregory*, 427 P.3d at 633.

penalty eligible.[159] The study illustrates how data can be used to expose inequities and the importance of acknowledging what analysis the data could and could not provide.

Algorithmic predictions can also be used to diagnose societal issues as well as to provide supportive assistance.[160] For example, a person's criminal history can offer insights into resources missing from that person's life. If an individual has been charged with possessing drugs, she maybe an addict, and could benefit from treatment. Similarly, a charge of robbery may indicate the person could benefit from training or other education. Data is not the issue; the issue is when it is used to punish those who have been historically targeted unfairly.

B. Long Term Healing from the Racially Stratified Society[161]

Most of the discourse on RAIs are missing the key topic: racial stratification. Even when the topic is brought into the conversation, solutions are not discussed. Instead, it is taken as a given, and not as something that should be transformed. The focus on RAIs is a key opportunity to change the narrative on criminality and mass incarceration. The responsibility of this education cannot be shouldered only by those most directly impacted. Instead, the larger society must be educated on how the legal system has created the racially stratified society we live in. But given that "[j]ust under one in two Americans (45 percent) have . . . had an immediate family member incarcerated,"[162] there are a considerable number of Americans that have first-hand knowledge of the system. We may be close to a tipping point where, as Dr. Derrick Bell argued, interests converge,[163] and true reform can be achieved.

Violence and fear drive over-criminalization and mass incarceration. The majority of those incarcerated have been convicted of violent crimes.[164] Without talking about the ways we harm each other, and the way society disproportionately harms some of us, we cannot find new ways of dealing with the issues that arise in our communities. Those most directly impacted by state coercion must set the agenda for this work. Like the Truth and Reconciliation Commission that was first introduced in South Africa[165] in 1994, the United States must acknowledge the torture that has been

159. Katherine Becket & Heather Evans, *Race, Death, and Justice: Capital Sentencing in Washington State, 1981 – 2014*, COLUM. J. RACE & L. 77, 89-90 (2016).

160. Mayson, *supra* note 3, at 2284.

161. These solutions are not new nor are they mine alone. Many of the solutions have been raised by Black activists. I honor and accept their ongoing leadership in this space. My training in restorative justice principles comes from the Insight Prison Project as well as the People's Institutes' Undoing Institutional Racism training and by interacting with the Black Power Epicenter members from Seattle, Washington.

162. Peter K. Ennis et al., *What Percentage of Americans Have Ever Had a Family Member Incarcerated?: Evidence from the Family History of Incarceration Survey*, 5 SOCIUS 1, 10 (2019).

163. Derrick Bell, Comment, Brown v. Board of Education *and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 523 (1980).

164. Wendy Sawyer & Peter Wagner, *Mass Incarceration: The Whole Pie 2019*, PRISON POL'Y INITIATIVE (Mar. 19, 2019), https://www.prisonpolicy.org/reports/pie2019.html [https://perma.cc/5ZFG-AF3V]. Fifty-five percent or 712,000 people, of all those in state prisons are there for violent convictions.

165. Promotion of National Unity and Reconciliation Act 95-34 of 1995 (S. Afr.). https://fas.org/irp/world/rsa/act95_034.htm [https://perma.cc/C6XY-HT39].

endured by the Black community for generations. This approach has been leveraged in social justice communities with peace circles[166] and other restorative justice circle healing processes.[167] The circle provides a powerful place for those who have harmed to listen to those who have been harmed. However, it takes a lot of preparation for those who have harmed to be ready to listen respectfully to those who have been harmed.[168]

The Insight Prison Project has established incredibly successful restorative justice circles within San Quintin prison.[169] Groups of men who have committed significant harm, including taking another's life, sit together in a circle to gain an understanding of their own profound accountability as well as awareness of their own unresolved trauma and victimization.[170] The work requires intensive self-reflection and typically takes over a year of weekly circles for the men to be ready to meet survivors.[171] When the men have completed all the required curriculum, they are ready to meet with survivors of harm similar to the harm the men have inflicted.[172] The result is profound healing for both sides of the harm and accomplishes the main goal of restorative justice—to bring wholeness to a community after harm has occurred.

Similar circles could be leveraged to help the white community understand the impacts of complacency within systemic racism. The white community has the privilege of walking away from this conversation and is not reminded daily that they are the "other" and somehow less than. The Black community has no such freedom or relief. A restorative justice circle could be started with only white members to build understanding and accountability for each members' role in ongoing racism. A curriculum could be created to help understand how the systemic nature of racism creates a distinct power differential and harms the entire society. The goal would be to cultivate deeper compassion, accountability, and understanding.

Leveraging the successful process of programs like Insight Prison Project, after the required material is digested and owned by the white circle members, the circle could be opened to the Black community to allow for healing on both sides. The white circle members would be ready to truly listen to the harm Black people have suffered only after extensive exploration of their own complacency and pain. This would create a mutual interest in healing for the members of the circle. The potential of

166. *See generally* Just Peace Circles, *Just Peace Circles*, https://justpeacecircles.org/ [https://perma.cc/7QLD-S44N] (last visited Aug. 1, 2020); The Circle Works, *The Circle Works: Social Justice Consultants*, https://thecircleworks.com/about/ [perma.cc/FF85-UZZ8] (last visited Aug. 1, 2020).

167. Amy Bintliff, *Talking Circles: For Restorative Justice and Beyond*, Teaching Tolerance (July 22, 2014), https://www.tolerance.org/magazine/talking-circles-for-restorative-justice-and-beyond [https://perma.cc/8DQ3-G7UJ].

168. *See generally* Insight Prison Project, *Victim Offender Education Group*, http://www.insightprisonproject.org/victim-offender-education-group-voeg.html [https://perma.cc/Z3UB-CR6P] (last visited Aug. 1, 2020); U. Wash. Ctr. Hum. Rts., *Rethinking Punishment: Holding Space for Restorative Justice* (Oct. 6, 2017), https://jsis.washington.edu/humanrights/2017/10/06/holding-space-restorative-justice/ [https://perma.cc/5ZLB-MDXH] (last visited Aug. 1, 2020).

169. *See* Insight Prison Project, *supra* note 168.

170. *Id.*

171. *See id.*

172. *See id.*

additional harm to anyone within the circle is reduced by the bifurcated process and increases the potential for healing. Without dialog, understanding, and compassion it will be difficult—potentially impossible—to make significant reform to the criminal justice system. And that level of transformation will not occur over night. Instead, it takes direct, dedicated, and ongoing attention to how we have all been impacted by the racially stratified society. People, not data, are the solution to disproportion sentencing; and by finding convergence across differences, hyperincarceration of the Black community can be eliminated.

VI. CONCLUSION

The only way this country will deal with its racist history is to discuss it openly and honestly. While data can help facilitate that, data can also be used to perpetuate racial harm that is centuries old. Any analysis of criminal history data will include remnants of underlying racism. Since the effort is already underway to utilize data to "improve" the criminal justice system, we must take efforts to ensure it does not create unintended harm to the Black community. First, RAIs must not be used in sentencing. Second, some short-term recommendations to reduce the harm of RAIs should include judicial training and the illumination of the racial disparities. But the most crucial work is the long-term recommendation that leverages restorative justice principles. We must have the long-needed dialogue around how the legal system has created racial stratification, including how that racial stratification continues to exploit and oppress Black communities. That dialog would create new stories that could be leveraged in the court room to slowly begin the process of legal transformation. It is the long-term work that is necessary, for which data does not provide a quick fix.