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Predictions of offending and classifications of offenders are inexorably connected. Sometimes the predictions are used to sort people into risk categories that can influence decisions about sentencing, parole release, institutional custody level, or intensity of supervision. Other times they are used in assigning people to appropriate treatment programs or in trying to allocate scarce correctional programs cost-effectively, as, for example, by focusing resources on higher-risk offenders. Simple and, in the abstract, widely supported normative and ethical injunctions are largely incompatible with contemporary uses of predictions to sort people into risk categories for sentencing, parole, and similar decisions, but present fewer obstacles to classification for program assignments.

These injunctions include the following:

1. Don't treat people differently on the basis of race or ethnicity.
2. Don't treat people differently on the basis of gender.
3. Don't treat people differently on the basis of age except to mitigate treatment of the young.
4. Don't treat people differently on the basis of social class.
5. Don't treat people differently on the basis of law-abiding decisions about how to live their lives.

Injunctions about age, gender, and inherently personal choices (such as whether to marry) are sometimes violated explicitly, for example, when Virginia's sentencing guidelines use them as bases for determining who will be sentenced to imprisonment. The others are violated indirectly when factors are used such as education and employment, which are correlated with race and social class.

Development and use of prediction methods are in their heyday in our time, but there is nothing inherently distinctive about them. Indeterminate sentencing was predicated in large part on the idea that sentencing and parole release decisions should be based on assessments of offenders' prospects of living law-abiding lives and on efforts to enhance those prospects by means of correctional treatment programs.[1] Development of base expectancy tables for parole prediction was a major focus, most famously associated with Ernest W. Burgess[2] of the Chicago School of Criminology from the 1920s through the 1950s.[3] European and American positivists from the 1890s through the early 1930s assumed that behavior is largely determined and that the aim of the criminal system should

be to treat when it can and incapacitate when it cannot.[4] Jeremy Bentham's utilitarian punishment system proposed that penalties be individualized to offenders' "sensibilities," by which he meant their personal characteristics, on the basis of judges' assessments.[5] Plato and Aristotle two millennia ago discussed the desirability of reforming many wrongdoers, implicitly assuming some ability to predict who needed what kinds of handling.[6]

Two things concerning prediction are distinctive to our time. The first is a preoccupation with prediction of recidivism rather than other plausible outcomes such as successful completion of treatment programs, improvement in qualities or capacities, or development of employable skills. Recidivism prediction is ubiquitous. Everybody's doing it. There is an enormous academic and professional literature. Unprecedented private sector involvement has occurred in designing and marketing instruments and providing services to government.

The second is a collective amnesia about what was learned about the use of prediction in the 1970s when widespread support for indeterminate sentencing collapsed. Basing decisions about individuals' liberty and autonomy on calculations of risk raises fundamental normative and ethical issues that were once taken seriously but are no longer often acknowledged or discussed.

Before the 1970s, the desirability of individualization, and with it the need to make *ad hoc* assessments of rehabilitative and incapacitative considerations in individual cases, was taken for granted.[7] When the determinate sentencing era began, and support for retributive ideas about punishment ballooned, people devoted extensive thought to when, under what circumstances, and subject to what constraints rehabilitative and incapacitative considerations should be taken into account when dealing with individual offenders. The premise was that pursuit of justice, of imposition of punishments proportioned to the offender's culpability or the gravity of the offense, should be the primary considerations in sentencing. The challenge was to find ways to reconcile pursuit of utilitarian aims within that framework. Considerations of risk and treatment remained generally accepted in relation to administrative judgments about the intensity of supervision or eligibility for programs but were widely believed to be highly suspect concerning decisions about the nature or duration of sentences.

Norval Morris's *The Future of Imprisonment*,[8] among the most influential books of its time on sentencing and corrections, offered a comprehensive analysis. He, among

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many others at the time, believed that parole release should be abolished. Respect for offenders' personal autonomy and the goal of equal treatment of comparably culpable offenders, he wrote, forbade sending people to prison for the purpose of rehabilitative treatment, and forbade compelling them to participate in treatment programs while there, though they could be required to participate for a short time in order to learn about programs they should be free later to reject. Risk predictions, he wrote, should not ordinarily influence decisions about sentence lengths. This was partly because of considerations of justice and partly because of the problem of false positives. Predictions of future violent offending then (as now) were much more often wrong than right. Within any class of people predicted to commit violent or sexual crimes in the future, many fewer would do so ("true positives") than would not ("false positives"). As a result most people confined for longer periods for preventive reasons would not have committed serious new crimes, and thus would be deprived unjustly of their liberty. In later work, Morris developed criteria for identifying cases in which incapacitative sentences might be justifiable, but the criteria were narrow and could seldom be satisfied in practice.[9]

Morris argued that for any offender, the nature of the current offense (and to some degree of his or her prior record), should set a range from within which punishments might justifiably be imposed.[10] This approach, which he and others called "limiting retributivism," remains highly influential and serves as the implicit rationale of many state sentencing guidelines systems.[11] It is the explicit normative framework of the current edition of the *Model Penal Code*'s provisions on sentencing.[12] To the extent that Morris considered utilitarian considerations to be appropriate in setting a sentence, they were relevant to choosing punishments from within the prescribed range. Any punishment, however, that exceeded the upper bound of that range would be to that extent unjust. He argued that sentences should normally be imposed at or near the bottom of the allowable range with special evidence-based justifications required for harsher sentences predicated on rehabilitative or incapacitative considerations. Richard Frase's more recent asymmetric version of limiting retributivism, in which upper bounds of deserved punishment are near absolute but lower bounds are highly flexible, offers much the same prescription.[13]

Many corrections officials and researchers in the 1970s were influenced by the same shifts in attitudes and beliefs toward retributivism that affected policy makers and scholars. Parole guidelines were the first major policy initiative of the sentencing reform movement, though one foot remained firmly placed in the individualization logic of indeterminate sentencing.[14] Their proponents, like supporters of statutory determinate sentencing, sentencing guidelines, and parole abolition, sought to make decisions about punishment fairer, more consistent, more predictable, and more transparent.[15] Evening out disparities in sentences imposed by judges was an important aim. However, the core idea was that parole boards should take account of prisoners' prospects for law-abidingness. To do that, prediction instruments were developed.

The most famous was the Salient Factor Score developed for use in federal parole guidelines. Based on research by Vince O'Leary, Don M. Gottfredson, Leslie Wilkins, and others, the federal guidelines incorporated empirically based factors that could be used to classify prisoners in relation to predictions of future offending. The factors used, however, reflected concerns for fairness prevalent at the time. Gender and race were ruled out because they are ascribed traits for which offenders bore no responsibility. Age at first commitment was initially a factor but was later abandoned. The initial guidelines incorporated status variables such as employment, education, residential status, and family characteristics, but these were abandoned because they are heavily correlated with race. Blacks were on average less well educated than whites, had weaker employment records, had less stable residential circumstances, and had weaker family roles and statuses. Use of such factors would systematically treat blacks more severely than whites, and that, the U.S. Parole Commission decided, would be unjust.[16] In a similar vein, scholars argued that it is unjust and undesirable in a society that celebrates Enlightenment values of freedom and personal autonomy to penalize citizens for making quintessentially personal choices about such things as marriage, education, work, and living arrangements.[17]

The succession of changes to the Salient Factor Score is shown in Table 1. Age at first commitment and three socio-

Table 1. Changes Over Time in Salient Factor Score Elements in U.S. Parole Guidelines

	1973 version	1976 version	1991 version
Convictions	YES	YES	YES
Incarcerations	YES	YES	YES
Age at first commitment	YES	YES	NO
Age at current commitment	NO	NO	YES
Recent commitment free period	NO	NO	YES
Not auto theft	YES	YES	NO
Not check fraud	NO	YES	NO
No parole revoke, offense on parole	YES	YES	YES
Custody status			YES
No drug dependence	YES	YES	YES
Education	YES	NO	NO
Employment	YES	YES	NO
Family	YES	NO	NO

economic factors appear in the initial system, but all gradually disappear. So also do auto theft and check fraud factors, which were removed because their use would delay release dates for large number of prisoners who commit high-frequency, low-seriousness offenses. Prediction systems would have comparatively low rates of false positives if minor property and drug crimes were counted, but doing so would fill prisons with minor offenders for whom incapacitation by imprisonment is neither cost-effective nor just. If imprisonment is to be used largely for serious offenses and offenders, recidivism predictions should target only violent and sexual crimes (and genuinely serious property crimes, but prisons hold comparatively few such offenders).

A number of ethical and normative propositions emerge from the sentencing and parole initiatives of the 1970s and writing about them:

1. The primary criteria taken into account in decisions about the nature, duration, and severity of punishments should be based on considerations of justice; the offender's culpability and the gravity of the offense should be the primary determinants.

2. Sentences should ordinarily be imposed at the bottom of the applicable range, unless persuasive, validated, evidence-based reasons are given for imposing something harsher.

3. Sentences above the upper bound of the applicable range are *prima facie* unjust.

4. Ascribed characteristics for which individuals bear no responsibility, such as race, ethnicity, gender, and age, should not be included among parole and sentencing criteria (except, for different multiple reasons, for consideration of youth and advanced age as mitigating factors).

5. Personal characteristics such as education, employment, residential stability, and family circumstances should not ordinarily be included among aggravating sentencing and parole criteria because their use systematically disadvantages black and other minority offenders (though they may be used as mitigating factors).

6. A wide range of personal characteristics including sometimes even race, gender, and age may in particular circumstances be included among eligibility criteria for treatment and related programs.

Most of these adjurations have fallen into desuetude since the 1970s including, despite occasional claims to the contrary, the retributive idea that punishments should to a meaningful degree be proportionate to the offender's culpability or the gravity of the offense. All of them, however, retain their normative force and are likely someday to re-emerge as widely recognized requirements of justice. In this article I discuss their applicability to current practices. In doing so, I draw on distinctions in Monahan and Skeems' paper on prediction: Between use of predictions for risk classification in sentencing and for program assignments and among *fixed risk markers* (e.g., race,

gender), *variable risk markers* (e.g., age, criminal history), and *variable risk factors* (e.g., employment) that might be used as factors in prediction instruments.[18] Section I briefly, for no more is required, discusses the exiguous legal limitations on predictions of recidivism. Section II discusses normative constraints on uses of prediction that are implicit in mainstream theories of punishment. Sections III, IV, and V examine arguments that can be made for use and prohibition of consideration in recidivism prediction of fixed and variable markers and variable factors.[19] Section VI recapitulates previous points about differing ethical implications and constraints of use of predictions in sentencing and other liberty-restricting settings and in program assignments. Section VII ponders the question, why are ethical and normative considerations no longer much considered or honored in criminal justice system uses of recidivism prediction?

I. Legal Constraints

Very little need be said about legal constraints on the use of predictions, for there are almost none. The U.S. Supreme Court over the past four decades reinterpreted a long-standing disproportionality doctrine implied by the U.S. Constitution's Eighth Amendment prohibition of cruel and unusual punishment in such a way that it imposes few practical constraints on the severity of substantive sentencing policies adopted by a legislature or an administrative agency exercising delegated authority. Noteworthy decisions upheld twenty-five-year and life sentences for minor property crimes under hoary habitual offender statutes[20] and California's three-strikes law.[21] Likewise, the court held that predictions of dangerousness can constitutionally justify indeterminate continued civil confinement of "sexual predators" after the expiration of sentences imposed as punishments for particular crimes.[22] The imposition of particular, including lengthy, sentences on the basis of predictions of recidivism is seldom likely to be held to violate constitutional proportionality standards.

Requirements of constitutional due process and equal protection are likewise seldom likely to impede the use of particular factors in prediction instruments. The traditional analysis requires strict scrutiny of inherently suspect factors such as race or religion; a "substantial state interest" must be shown. Gender differences in treatment must withstand "intermediate scrutiny." For other factors, only a "rational basis" need be shown.

That jurisprudence is largely toothless so far as criminal justice system decision making is concerned. The U.S. Supreme Court has held that police and immigration agents may include race and ethnicity among factors used in profiling[23] and that stark racial disparities in outcomes of officials' decisions do not rise to the level of constitutional violations unless there is convincing evidence of an invidious intention to discriminate on the basis of race in the particular case.[24] It also held that judges and juries in death penalty cases may consider clinical evidence on predictions of future dangerousness.[25]

Race, ethnicity, and religion are not to my knowledge anywhere used as an explicit factor in prediction instruments or in sentencing or parole policies. However, the use of any of them likely would be upheld, as it was in the profiling cases, so long as it was only one among several factors. Explicit use of race, ethnicity, or religion, however, is widely regarded as unseemly, and so the issue is unlikely to arise.

The explicit use of gender has arisen under the Virginia sentencing guidelines. There, male gender is used as a factor that reduces an offender's likelihood of being diverted from an otherwise applicable prison sentence. To my knowledge female gender is nowhere used as an aggravating factor. Being female in Virginia is a mitigating factor relative to the treatment of men. While writing this article I found no reported cases on Virginia's use of maleness as an aggravating factor. This is not surprising. Virginia's guidelines lack presumptive legal authority, and judges are not obliged to follow them.

Use of any other factors need satisfy only a "rational basis" test. Since courts on separation of powers reasoning bend over backwards not to be seen as second-guessing legislatures and administrative agencies operating within the scope of their authority, constitutional objections to use of other factors are exceedingly unlikely to succeed.

The old saw that what is legal is not necessarily moral, however, applies. Law and morality often march in different directions. The American constitutional jurisprudence concerning classification of people into groups for treatment within the criminal justice system has atrophied, but that cannot justify treating people differently on the basis of morally or ethically suspect categories.

II. Normative Constraints

In this section, I provide a potted summary of major ideas in punishment theory to make this point: much current policy and practice concerning risk predictions is flatly inconsistent with mainstream normative theories of punishment. People involved in setting and implementing corrections and sentencing policies are working in the same morality-free zone in which the enactors of three-strikes, LWOPs, sexual predator, career criminal, and lengthy mandatory minimum sentence laws labored. Almost all such laws are incompatible with conventional retributive and consequentialist ideas about proportionate punishments.

Every mainstream punishment philosophy incorporates two fundamental ideas that emerge from the belief that all human beings, including offenders, should be treated with concern and respect. The first is that just punishments should be scaled to some measure of the seriousness of crimes: crimes of comparable severity should be punished comparably; crimes of different severity should be punished differently. This requirement is sometimes described in terms of horizontal (like cases alike) and vertical (different cases differently) equity. All retributivist theories concur in the view that punishments, if they are to be just,

must be proportionate because they express and are justified by assessments of the offender's relative moral blameworthiness.

Utilitarian theories get to the same place by different reasoning. Threatened punishments should aim to minimize harm and should therefore provide incentives to commit lesser rather than greater crimes by proportioning punishments to their seriousness. Attempts should be punished less than completed crimes to encourage desistance; if the punishments are different, Bentham reasoned and Common Law doctrine provided,[26] malefactors having second thoughts have incentive to stop. If you're going to be punished equally severely whether you continue or not, you may as well continue. Likewise, lesser crimes should be punished less than greater ones to discourage commission of the greater. If robbery and armed robbery are punished equally severely, there is no reason not to use a weapon.

The second fundamental idea is that there are limits on the state's moral authority to punish. For retributivists there are two versions of the claim. For "positive" retributivists like Kant or Hegel, or in our time Michael Moore or Andrew von Hirsch, crimes should be punished precisely as much as is deserved, and neither more nor less.[27] For "negative" retributivists, such as Norval Morris and Richard Frase,[28] offenders may be punished as much as they maximally deserve, but need not be. For both sets of retributivist theories, however, imposition of punishments greater than are deserved relative to the seriousness of the crime is unjust.

Restorative justice theories typically take the same position though on different reasoning. John Braithwaite, the most influential restorative justice theorist, offers a negative retributivist account. Proportionality per se, he argues, is not important. The important objectives are to treat offenders and victims with respect and concern and to try to repair broken or damaged relations among the victim, the offender, and the community. If restorative processes culminate in unanimous agreements among participants for substantially different consequences for offenders in comparable cases, so be it. BUT, he writes, there is a human rights limit: the upper bound of proportionate sentences the justice system might impose.[29]

For utilitarians, respect for the humanity of the offender requires imposition of the least severe punishment that will achieve the aims sought.[30] To inflict punishments for crimes is to cause pain to offenders. Infliction of pain is a bad thing, "wicked," Bentham said, and should only be done for a good reason. If imposition of X units of pain will send the wanted deterrent message, imposition of 2X units is excessive and unjust. It is nothing more, or more defensible, than gratuitous infliction of pain. Bentham referred to this as the principle of frugality.

Norval Morris's theory of limiting retributivism synthesized these ideas.[31] From Kant and Bentham both, he derived the notion that the nature of the crime sets the upper limit of punishments that may justly be imposed. From Bentham he derived the notion that the least severe

applicable punishment should be imposed unless there are good reasons to impose something more severe.

Much that is done in the name of risk prediction is incompatible with all of these ideas. The moral myopia that characterized legislatures when they enacted three-strikes, LWOPs, sexual predator, career criminal, and mandatory minimum sentence laws afflicts the risk prediction industry. Each of these kinds of law often results in imposition of sentences that violate proportionality norms and fail to accord respect and concern to offenders.

A number of states are busy at work trying to include risk predictions in sentencing guidelines. Monahan and Skeem provide several examples and discuss ongoing work in Pennsylvania in detail.[32] There are several problems. First is the excessive punishment problem: given the extreme lengths of legally authorized and routinely imposed prison sentences in the United States, it is highly unlikely that sentence increases for offenders adjudged to be high risk will be consonant with proportionality constraints. Second is the reliability problem associated with false positives: many offenders sentenced to extended terms of imprisonment would not have reoffended. Third is the suspect factors problem (discussed below): most prediction instruments now in use include socio-economic factors correlated with race and ethnicity, and include factors that in effect punish lawful life-style choices that in a free society people are entitled to make. Examples include decisions to marry, have a family, take further education, have a regular job, and live in stable residential circumstances. These are different from life-style choices related to crime or criminal milieu such as selling or abusing unlawful substances or joining criminal enterprises.

These prediction problems are less acute in contexts other than sentencing. In jurisdictions that have chosen to maintain individualized sentencing by means of parole release, for example, risk classifications based on ethically permissible factors may be germane to release decisions. Risk predictions based on permissible factors may often be allowable in determining institutional security and custody levels. Risk predictions, even including such otherwise forbidden factors as race, ethnicity, religion, and gender, may be germane to program eligibility decisions. A fundamental difference between program assignment and sentencing decisions is that participation in programming often is meant to be and sometimes is beneficial to participants. The key issues at stake are not greater or lesser severity of punishment but humane and cost-effective allocation of scarce resources. Stark examples include culturally "appropriate" programs for members of racial, ethnic, or religious groups. Garden variety examples include educational, vocational, anger management, cognitive skills, and parenting programs meant to target identified deficits. It would make little sense not to take educational credentials and existing work experience and skills into account in assignment to educational or vocational programs.

III. Ethical Constraints—Fixed Markers

It 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. Gender, race, ethnicity, and age raise this issue albeit in different ways.

Gender in contemporary America cuts in different directions for men and women in different contexts. Assiduous efforts are made in many contexts to prevent or minimize differential treatment of women on the basis of gender. This is so even when there are strong actuarial or policy grounds for doing so. Women live longer than men, for example. Insurance companies long charged lower rates to women than men for life insurance of a particular amount. For the same reason, pension programs long charged women higher premiums or provided lower benefit levels. Insurance companies and pension administrators claimed those differences made actuarial sense, but on policy grounds those policies have come under (increasingly successful) attack for many years. A similar trend is underway to make automobile insurance gender-blind even though the effect is to increase premiums for safer-driving women. In the criminal justice system, the early sentencing commissions found that women received systematically less severe punishments than men. On gender equality grounds, every sentencing commission decided neither to promulgate less severe sentencing guidelines for women nor to make gender a mitigating factor.[33] The deliberate decision was made to establish gender-blind guidelines that if consistently applied by judges would operate to increase sentences for women.

Gender blindness is a powerful idea. Treating people differently because they are women seems wrong. So, I suspect most people believe, is treating people differently because of their sexual identities or preferences. That idea, however, has not stopped policy makers and developers of prediction instruments from incorporating maleness as an aggravating factor that, in the notorious Virginia guidelines, increases the probability of receiving a prison sentence.

Defenders of the Virginia guidelines might argue that the guidelines themselves are gender neutral but that a policy on mitigation provides criteria to guide judges in deciding whether to disregard the guidelines and divert lower-risk offenders from imprisonment. Seen in that way, the policy does not disadvantage male offenders but advantages female ones.

Such an argument might or might not be disingenuous but it is at minimum incomplete. First, guideline systems operate in their entirety. Policies on diversion are as much part of the system as policies on whether prison is or is not indicated as an appropriate sanction. Second, the structure of Virginia's diversion policy specifies not who should, but who should not be diverted, and for that choice male gender is a reason for not diverting. That is analytically

indistinguishable from using male gender as a criterion for committing offenders to prison in the first place.

Race and ethnicity raise different issues. Both race and Hispanicity are routinely used, with constitutional approval by courts, as factors in racial profiling by law enforcement officials. In the criminal justice system, no jurisdiction known to me explicitly incorporates race and ethnicity in sentencing or parole release criteria. Many do so, however, indirectly through the use of socio-economic factors correlated with race and ethnicity.[34] Thirty years ago, it seemed obvious to the U.S. Parole Commission that punishing black offenders more severely indirectly through the use of socio-economic variables is wrong, and they were removed from the original Salient Factor Score even though their removal weakened risk predictions. For similar reasons none of the early sentencing commissions included socio-economic variables in their sentencing guidelines systems. Section 994(d) of the Sentencing Reform Act of 1984 explicitly directs the federal sentencing commission: "The Commission shall assure that the guidelines and policy statements are entirely neutral as to the race, sex, national origin, creed, and socio-economic status of offenders." Section 994(e) continues: "The Commission shall assure that the guidelines and policy statements, in recommending a term of imprisonment or length of a term of imprisonment, reflect the general inappropriateness of considering the education, vocational skills, employment record, family ties and responsibilities, and community ties of the defendant." The use of such variables correlated with race and class is now commonplace in prediction instruments and parole and sentencing guidelines.

Finally, age. Individuals have no control over how old they are. To that extent, age is an ascribed status like gender, race, and ethnicity. For eighty years after the founding of the American juvenile court, through the 1980s, youth was generally viewed in the United States as a mitigating factor on multiple logics. In almost all other developed countries it still is.[35] Young people are inexperienced, emotionally immature, cognitively immature, and more susceptible than they will be in later life to peer influences. Developmentally, young people are more comfortable engaging in risky behavior than are older people. For varying combinations of all these reasons and others, criminal activity is common in the teenage years. Most people, however, soon mature and desist offending. That is why age-crime curves have for decades shown that the peak ages of property offending are in the middle teen-age years and of violent offending are in the late teen-age years.[36] That is also why most active offenders desist at early ages.[37]

Nonetheless, youth is now used, I don't know how commonly, as a factor in prediction systems. The most notorious example, now in use for more than two decades, is in Virginia's sentencing guidelines where youth is by far the most heavily weighted factor in determining which minor offenders should *not* be diverted from imprisonment. This is wrong in principle but also, in light of

a growing body of research showing that imprisonment is criminogenic, perverse.[38]

Defenders of Virginia's guidelines might argue that youth is used not as a criterion for decisions to imprison offenders but for decisions to divert from imprisonment. That, like similar arguments concerning use of maleness as an aggravating factor in sentencing, is a distinction without a difference for two reasons. First, diversion standards are a component in the overall system of guidelines calculation, and the calculation is not complete until all steps have been completed. Second, the logic of Virginia's guidelines is not that older people deserve less punishment or for substantive policy reasons should be diverted, but that younger people should be held for incapacitative reasons. The primary aim is to not to decarcerate older people but to incarcerate the young solely because they are young.

All in all, contemporary recidivism prediction instruments raise many troubling questions in relation to their handling of ascribed factors. Ethical problems that in earlier times seemed simple appear not to trouble contemporary policy makers.

IV. Ethical Constraints—Variable Markers

"Variable markers" are fixed characteristics that can change. Possible examples include age, religion, nationality, sexual identity or preference, and criminal history.

Age, because it cannot be altered by the individual or anyone else, is better regarded as a fixed marker like other ascribed statuses. Regarded, however, as a variable marker, extending concern and respect to young offenders should call for treating youth (and old age) as factors that might mitigate punishment but otherwise as a neutral factor that cannot aggravate it.

Religion and sexual identity or preference are slightly different. Unlike age, they can change as a result of personal choices. So far as I know they are nowhere used as factors in recidivism prediction instruments. It is hard to imagine that many policy makers would be more comfortable explicitly using these characteristics than explicitly using race. Here too, as with race, ethnicity, and age, they might sometimes appropriately be used as factors in making program assignments.

Nationality co-varies in complex ways with ethnicity, religion, and culture, each of which in principle should be suspect. Persuasive arguments can be made that nationality should be treated in the same way as religion and sexual identity or preference. In practice it is effectively, and sometimes explicitly (in border control profiling of people suspected of being Mexicans), used as a risk predictor.

Criminal history raises more complex issues than is usually recognized.[39] Although it appears self-evident to Americans that people who have previously been convicted of crimes should be punished more severely for a new offense, all else being equal, it is not self-evident to people in other countries. In the Scandinavian countries, for example, the general assumption is that punishments should not be increased because of prior convictions. The

reasoning is that the offender has already been punished as much as he or she deserved for the former offense and should now be punished as much as is deserved for the new one.[40] Prior convictions are often taken into account as aggravating factors in other Common Law countries, but usually subject to sharp limits.[41]

America policy makers and practitioners are unlikely soon to adopt or endorse the Scandinavian point of view and decide to take account of prior records not at all or only a little. Criminal history does, however, have dramatic aggravating effects in American sentencing. Under three-strikes, habitual offender, and career criminal laws, prior convictions make a huge difference in the sentences offenders receive. Under most sentencing guidelines systems, third or fourth convictions can result in sentences two-to-four times longer than are received by first offenders.[42] Any searching inquiry into ethical issues in American sentencing would have to explore the rationales and justifications of those differences.

Even if that fundamental question is set aside, difficult ethical issues remain. One concerns race and ethnicity. Use of criminal history factors in sentencing, like use of socio-economic status factors, works to the systematic disadvantage of members of disadvantaged minority groups. Commonly used factors in prediction instruments include age at first arrest, custody status at the time of the offense, and total convictions or arrests. All of these adversely affect more minority than white defendants, and all raise troubling issues. Black men are arrested at younger ages and more often than white men for reasons that have as much to do with racially differentiated exercises of police discretion as with racial differences in offending behavior. Racial profiling by the police targets blacks and Hispanics and exposes them proportionately more often than whites to arrest. Police drug enforcement policies target substances that black drug dealers sell and places where they sell them, resulting in rates of arrests for drug offenses that have been four to six times higher for blacks than for whites since the mid-1980s.[43]

Blacks more often commit and are more often arrested for violent crimes than whites. In a system where criminal history makes a big difference in sentencing, even that facially plausible explanation for differences in conviction rates means that criminal history factors disproportionately affect blacks. Richard Frase,[44] in the most comprehensive study ever completed of racial disparities in a state sentencing system, found that two-thirds of racial disparities in imprisonment rates in Minnesota result from the weighting of criminal history factors in sentencing.

Criminal history raises other ethical issues whose resolution may depend on the use to which predictions are put. When the sentencing provisions of the *Model Penal Code* were being developed in the 1950s, vigorous debate broke out over criminal history. The argument was over what kind of criminal history counts. Paul Tappan,[45] chair of the U.S. Parole Board, argued that with liberty at stake, only prior convictions should count. Arrests or prosecutions not

resulting in a conviction should not. This may seem surprising to contemporary minds. We, after all, live in a time when the U.S. Sentencing Commission's guidelines require as a part of "real offense sentencing" that all "relevant" conduct including behaviors not resulting in an arrest or resulting in a conviction be taken into account if the judge by a civil law standard of proof believes they occurred. On these issues, the United States is an outlier, even among common law countries. Elsewhere, only prior convictions count as criminal history.

Like some other possible prediction factors already discussed, the ethical cases to be made concerning criminal history may differ depending on the use to which predictions are put. Use of any criminal history factors at sentencing other than prior convictions raises *prima facie* ethical due process and equal protection problems. People's liberty should not be incrementally taken away except under fair procedures and standards of proof. Use even of prior convictions as aggravating factors raises troubling problems of disparate treatment and racial disadvantage that warrant greater reflection and more careful analysis than is common.

Analyses may be different concerning use of criminal history factors in parole release considerations and in programming assignments. I've explained why in discussing other factors.

V. Ethical Constraints—Variable Factors

Biographical and socio-economic status factors raise other problems in relation to use of risk predictions in sentencing. Two major ones have been discussed above. The first is that use of marital status, employment, education, family status, and residential stability as factors in prediction instruments systematically disadvantages minority defendants. The social and economic disadvantages that disproportionately afflict blacks and Hispanics in America are partly the products of historic and ongoing discrimination and bias. It should be at least discomforting that the use of socio-economic status factors in prediction instruments exacerbates those disadvantages.

The second is that many socio-economic status characteristics reflect lifestyle choices, such as the decisions to marry, go to school, or have a steady job, which in a free society are not the state's business. It is at least illiberal to attach incremental penal consequences to those choices.

Committing offenses, selling drugs, and actively participating in criminal gangs also reflect personal choices, but they are choices of a different kind. Those behaviors are unlawful; people who engage in them assume risks of arrest, prosecution, conviction, and punishment. In a sense, they choose to live dangerous lives.

People who make lawful lifestyle choices are not comparable, and do not necessarily choose to live dangerous lives. Free citizens are entitled to decide to be married or not and to have children or not, even if statistical analyses show that being unmarried is correlated with higher rates of offending and reoffending. Free citizens are likewise

entitled to decide to seek university degrees, join apprenticeship programs, or live lawfully hand-to-mouth as many artists, musicians, and writers do by some combination of choice and necessity. Citizens are entitled to choose not to work at all and to live on income from trust funds or indulgent parents.

Prediction instruments and sentencing policies that incorporate socio-economic status and other lifestyle factors generally do so because research shows them to be correlated with offending. Many offenders, however, do not—in a fundamental sense—choose to be poorly housed, poorly employed or unemployed, and poorly educated. Some do. Even if poor peoples' choices are more constrained than those of more privileged people, they are lawful choices all the same. Punishing people more severely because of their lawful choices raises the same ethical issues for a disadvantaged inner-city minority man as for a privileged trust fund beneficiary.

Such problems deserve more attention than they receive. Positive retributivists such as Kant or von Hirsch might ordinarily be expected to oppose the use of predictions of reoffending in sentencing and to limit allowable criteria to those that in some way relate to the offender's blameworthiness or the gravity of the crime. Negative retributivists such as Morris or Frase might be expected to allow uses of prediction in setting sentences from within bounded ranges, but in doing so need to work through and adequately resolve problems raised by correlations between predictive variables and race or ethnicity, and by the prospect of punishing lawful lifestyle choices.

Discriminating use of at least some of those factors in instruments developed for use in programming assignments may raise somewhat different issues than in sentencing.

VI. Predictions in Sentencing and in Program Assignments

Repeatedly above I have suggested that ethical arguments may take different forms in relation to sentencing, parole release, and program assignments. I don't repeat those points here, but offer one more ethical argument that was common in the 1970s and 1980s. Norval Morris[46] famously argued that prisoners' moral autonomy should be respected by not compelling them to participate in treatment programs against their will. Section 994(k) of the federal Sentencing Reform Act of 1984 explicitly directed the U.S. Sentencing Commission that guidelines should not provide for imprisonment for the purpose of treatment or rehabilitation: "The Commission shall insure that the guidelines reflect the inappropriateness of imposing a sentence to a term of imprisonment for the purpose of rehabilitating the defendant or providing the defendant with needed educational or vocational training, medical care, or other correctional treatment." Enabling legislation for several of the early state sentencing commissions contained similar language.

That argument was made and that legislation was enacted at times when "nothing works" ideas were current

and before research on drug treatment showed that the best predictor of success was time in treatment and it didn't matter whether participation was voluntary or coerced. One might argue that the drug treatment findings and more recent evidence that many kind of programs can reduce recidivism if they are well targeted, designed, and implemented justify coerced treatment.

I don't think the new findings alter the arguments at all. Mill's classic argument against paternalism remains powerful, and most people, particularly most privileged people, still believe in it. The prevailing right-wing paranoia about state intrusion in private lives is one piece of evidence. Even if the state arguably has more ethical latitude in developing prediction instruments for use in program assignments than in sentencing, that need not imply that the state is entitled to compel program participation for an offender's own good.

VII. Conclusion

In recent decades and increasingly in the past ten years, criminal justice policy makers and practitioners have become preoccupied with recidivism. People who want to reduce the use of imprisonment feel obliged to offer alternatives that are said to reduce recidivism.[47] Proponents of reentry programs feel obliged to propose release into programs, and forms of supervision, that are said to reduce recidivism.[48] Sentencing commissions increasingly aim to incorporate predictions of recidivism into guidelines as Virginia long ignobly has done.[49]

All of these initiatives essentialize risks of recidivism. Programs are not seen as good because they enhance offenders' life chances, address deficits, or provide tools that may enable offenders to live more satisfying or productive lives, but because they reduce risks of reoffending. This puts the cart before the horse. The origins of indeterminate sentencing lay not in thinking about recidivism but in the perception than offending often resulted largely from the circumstances of peoples' lives, including lack of education or work skills and mental health problems. According to Enoch Wines and Zebulon Brockway,[50] the nineteenth century's leading American prison and parole reformers, the aim was to individualize treatment in order to help offenders improve their lives and prospects. If that happened, they would be less likely to reoffend.

Contemporary thinking about recidivism prediction has turned that around. The emphasis is not on the offender and his or her future well-being but on his or her future law-abidingness. That is why recent probation initiatives such as Project Hope, which couple breach of drug-use and similar conditions with near-automatic imposition of short prison sentences, are pernicious.[51] They are concerned only with the offender's compliance with conditions and do little except offer legal threats of what will happen if conditions are violated, rather than attempt to address the circumstances in the offender's life that brought him or her into court. The offender is disappearing from view. What's in focus is his risk of recidivism.

The inevitable next question is, why is the offender disappearing from view in the United States? There are three likeliest explanations. The first is that neoliberal trends of recent decades have produced a popular culture that accepts reduced governmental support for social welfare initiatives, is more competitive, and is less sympathetic to the disadvantaged and disheartened.[52] The second is that the conservative political ascendency of the past 40 years brought with it a fundamentalist moralism and judgmentalism that leave little room for empathy and for according concern and respect to troubled people, including criminals.[53] The third is that it's about politics and race. Conservative Republican candidates sought to attract white and Southern voters away from Democrats by emphasizing the "wedge" issues of crime and welfare fraud, both associated in media imagery, the mass media, and public stereotypes with black people.[54] The conservative law-and-order movement targeted violent crimes for which blacks are more often convicted than whites.[55] The War on Drugs launched by Presidents Reagan and Bush I targeted street sales of cocaine and crack in minority neighborhoods even though all the available evidence suggests that no larger percentages of blacks than whites sell drugs.[56] Most likely all three explanations are important parts of the story.

Notes

* Prepared for *Federal Sentencing Reporter* on the basis of a presentation at the August 2013 meeting of the National Association of Sentencing Commissions, held at the University of Minnesota Law School.

[1] David Rothman, the Discovery of Asylum: Social Order and Disorder in the New Republic (1971).

[2] Ernest W. Burgess, *Protecting the Public by Parole and by Parole Prediction*, 27 J. Crim. L. & Criminology 491 (1936).

[3] *E.g.*, Bernard E. Harcourt, Against Predictions: Profiling, Policing, and Punishment in An Actuarial Age (2007); Lloyd E. Ohlin, Selection For Parole: A Manual For Parole Prediction (1951); Lloyd E. Ohlin & Otis Dudley Duncan, *The Efficiency of Prediction*, 54 Am. J. Soc. 441 (1949).

[4] *See* Michele Pifferi, *Individualization of Punishment and the Rule of Law*, 52 Am. J. Legal Hist. 325 (2012).

[5] Jeremy Bentham, *The Utilitarian Theory of Punishment*, *in* An Introduction to Principles of Morals and Legislation (J.H. Burns, & H.L.A. Hart eds., 1970) (1789).

[6] *E.g.*, V. Haskar, Aristotle and the Punishment of Psychopaths (1964); Mary Margaret Mackenzie, Plato On Punishment (1985).

[7] *E.g.*, Rothman, *supra* note 1.

[8] Norval Morris, the Future of Imprisonment (1974).

[9] This because the predictions had to be based on factors other than criminal history which, in every risk analysis, provides the variables that are most strongly correlated with risk. Without criminal history variables, recidivism predictions are much too weak to be of practical use. *See* Norval Morris & Marc Miller, *Predictions of Dangerousness*, *in* 6 Crime and Justice: A Review Or Research 1 (Michael Tonry & Norval Morris eds., 1985).

[10] Because as a practical matter, it is impossible to say, or for reasonable people easily to reach agreement about, what specific punishment is uniquely deserved for a particular offense committed under particular circumstances, Morris argued that we should think not about deserved punishments but about a range of "not undeserved" punishments. This awkward phrasing is based on the idea that people can much more readily reach agreement that a punishment is undeservedly severe or lenient than that a particular punishment is uniquely appropriate.

[11] *E.g.*, Richard Frase, *Sentencing Principles in Theory and Practice*, *in* 22 Crime and Justice: A Review of Research 363 (Michael Tonry ed., 1997); Richard Frase, Just Sentencing: Principles and Procedures For A Workable System (2013).

[12] American Law Institute, Model Penal Code—sentencing (Draft No. 2, 2011).

[13] Frase, Just Sentencing, *supra* note 11.

[14] *See* Don M. Gottfredson, Leslie T. Wilkins, & Peter B. Hoffman, Guidelines For Parole and Sentencing (1978).

[15] *E.g.*, Michael Tonry, *Sentencing in America: 1975–2025*, *in* 42 Crime and Justice: A Review of Research 141 (Michael Tonry ed., 2013).

[16] *E.g.*, Peter B. Hoffman, *Screening for Risk: A Revisited Salient Factor Score (SFS 81)*, 11 J. Crim. Justice 539 (1983).

[17] *E.g.*, Andrew Von Hirsch, Doing Justice (1976); Andrew Von Hirsch, Past and Future Crimes: Deservedness and Dangerousness in the Sentencing of Criminals (1985). Not all personal choices are off limits on this reasoning. Decisions, for example, to join a gang, use illicit drugs, carry a gun, or commit offenses are personal choices and within the scope of the criminal law. These last choices, however, are fundamentally different from quintessentially private-life choices such as to marry, go to college, or work full-time.

[18] John Monahan & Jennifer Skeem, *Risk Redux: The Resurgence of Risk Assessment in Criminal Sanctioning* (in this issue).

[19] *E.g.*, Helena C. Kraemer, *Current Concepts of Risk in Psychiatric Disorders*, 16 Current Opinion in Psychiatry 421 (2003).

[20] Rummel v. Estelle, 445 U.S. 263 (1980) (obtaining $120 by false pretenses; two prior property felonies over 9 years totaling $128); Solem v. Helm, 463 U.S. 277 (1983) ($100 bad check charge; over 15 preceding years, five prior property felonies, one prior DUI).

[21] Ewing v. California, 538 U.S. 11 (2003) (third strike: shoplifted three golf clubs worth $1200); Lockyer v. Andrade, 538 U.S. 63 (2003) (third strike: shoplifted nine videotapes worth $154 from two Kmarts).

[22] Kansas v. Hendricks, 521 U.S. 346 (1997) (Kansas Sexually Violent Predator Act); Seling v. Young, 531 U.S. 250 (2001) (Washington State Community Protection Act of 1990).

[23] United States v. Brignoni-Ponce, 422 U.S. 873 (1975) (Mexican "appearance" a constitutionally valid factor for immigration stop); United States v. Martinez-Fuerte, 428 U.S. 543 (1976) (Mexican "appearance" constitutionally valid basis for stopping motorists at checkpoint far from border).

[24] McCleskey v. Kemp, 481 U.S. 279 (1987) (even assuming racially disproportionate impact of Georgia death penalty law, defendant must show prosecution's "racially discriminatory purpose" to obtain relief); U.S. v. Armstrong, 517 U.S. 456 (1996) (defendant alleging racially selective prosecution must demonstrate discriminatory intent and effect).

[25] Jones v. United States, 103 S. Ct. 3043 (1983); Barefoot v. Estelle, 103 S. Ct. 3383 (1983).

[26] Bentham, *supra* note 5.

[27] Immanuel Kant, *The Penal Law and the Law of Pardon*, *in* The Metaphysical Elements of Justice (John Ladd trans., 1965) (1798); G.W.F. Hegel, *Wrong [Das Unrecht]*, *in* Elements of the Philosophy of Right (H.B. Nisbet trans., Allen W. Wood ed., 1991) (1821); Michael S. Moore, *Justifying Retributivism*, 27 Israeli L. Rev. 15 (1993); Andrew Von Hirsch, Censure and Sanctions (1996).

[28] Morris, *supra* note 8; Frase, *supra* note 11.

[29] John Braithwaite, Restorative Justice and Responsive Regulation (2001); John Braithwaite & Philip Pettit, Not Just Deserts: A Republican Theory of Criminal Justice (1990).

[30] *See* Bentham, *supra* note 5.

31 Morris, *supra* note 8.

32 Monahan & Skeem, *supra* note 18.

33 *See* Kay Knapp, the Impact of the Minnesota Sentencing Guidelines: Three Year Evaluation (Minnesota Sentencing Guidelines Commission 1983); Kathleen Daly & Michael Tonry, *Gender, Race, and Sentencing*, *in* 22 Crime and Justice: A Review of Research 201 (Michael Tonry ed., 1997).

34 Many do this in an inept way that exacerbates the indirect race effects. Developers of many prediction models and instruments exclude race and ethnicity as explanatory variables in their analyses. This has the consequence that race and ethnicity effects are loaded onto other variables. The appropriate way to do this is to use race and ethnicity as modeling variables but to exclude them from prediction instruments. Otherwise the weights of covariates look larger than they really are. *See, e.g.*, Franklin Fisher & Joseph Kadane, *Empirically Based Sentencing Guidelines and Ethical Considerations*, *in* 2 Research On Sentencing: the Search For Reform 184 (Alfred Blumstein et al. eds., 1983). This makes socio-economic variables look more predictive than they really are.

35 In Western European countries, for example, the age of criminal responsibility is typically 14 or 15 (in Belgium 18). In most, waiver of young offenders to adult courts is not legally possible; nor is direct prosecution in adult courts. In German courts, 18- and 19-year-olds may be sentenced as if they were juveniles; the vast majority of those convicted of serious crimes are. *See, e.g.*, Michael Tonry & Colleen Chambers, *Juvenile Justice Cross-Nationally Considered*, *in* The Oxford Handbook of Juvenile Crime and Juvenile Justice 871 (Barry C. Feld & Donna M. Bishop eds., 2012).

36 *See* David P. Farrington, *Age and Crime*, *in* 7 Crime and Justice: A Review of Research 189 (Michael Tonry ed., 1986); Gary Sweeten, Alex R. Piquero, & Laurence Steinberg, *Age and Explanation of Crime, Revisited*, 42 J. Youth & Adolescence 921 (2013).

37 *See* Alfred Blumstein, Jacqueline Cohen, & P. Hsieh, *The Duration of Adult Criminal Careers*, *in* Final Report to National Institute of Justice, U.S. Dept. of Justice (1982).

38 *E.g.*, Dan Nagin, Frank Cullen, & Cheryl Lero-Jonson, *Imprisonment and Re-offending*, *in* 38 Crime and Justice: A Review of Research 115 (Michael Tonry ed., 2009).

39 *See* Previous Convictions At Sentencing: Theoretical and Applied Perspectives (Julian Roberts & Andrew von Hirsch eds., 2010).

40 *See* Tapio Lappi-Seppälä, *Sentencing and Punishment in Finland: The Decline of the Repressive Ideal*, *in* Why Punish? How Much? 239 (Michael Tonry ed., 2011); Petter Asp, *Previous Convictions and Proportionate Punishment under Swedish Law*, *in* Previous Convictions At Sentencing, *supra* note 39, at 207.

41 *See* Arie Freiberg, *Sentencing Reform in Victoria: A Case-Study*, *in* The Politics of Sentencing Reform 51 (Chris Clarkson & Rod Morgan eds., 1995); Estelle Baker & Andrew Ashworth, *The Role of Previous Convictions in England and Wales*, *in* Previous Convictions At Sentencing, *supra* note 39, at 185.

42 *See* Kevin Reitz, *The Illusion of Proportionality: Desert and Repeat Offenders*, *in* Previous Convictions At Sentencing, *supra* note 39, at 137.

43 *See* Jamie Fellner, *Race and Drugs*, *in* The Oxford Handbook of Ethnicity, Crime, and Immigration 194 (Sandra Bucerius & Michael Tonry eds., 2013).

44 Richard Frase, *What Explains Persistent Racial Disproportionality in Minnesota's Prison and Jail Population?*, *in* 38 Crime and Justice: A Review of Research 201 (Michael Tonry ed., 2009).

45 Paul Tappan, *Who is the Criminal?*, 12 Am. Soc. Rev. 96 (1947).

46 Morris, *supra* note 8.

47 James Austin Et Al., Ending Mass Incarceration: Charting A New Justice Reinvestment (The Sentencing Project 2013).

48 *See* Peggy Burke & Michael Tonry, Successful Transition and Reentry For Safer Communities: A Call to Action For Parole (Council of State Governments 2006).

49 *E.g.*, Monahan & Skeem, *supra* note 18.

50 Zebulon Reed Brockway, Fifty Years of Prison Service: An Autobiography (1912); enoch wines, the state of prisons and of child-saving institutions in the civilized world (1880)

51 *See* Angela Hawken & Mark Kleiman, Managing Drug Involved Probationers With Swift and Certain Sanctions: Evaluating Hawaii's Hope (2012).

52 *See, e.g.*, Michael Cavadino & Jim Dignan. Penal Systems: A Comparative Approach (2006).

53 *See, e.g.*, Michael Tonry, Thinking About Crime: Sense and Sensibility in American Penal Culture (2004).

54 *See, e.g.*, Michael Tonry, Malign Neglect: Race, Crime, and Punishment in America (1995).

55 *See* Michael Tonry, Punishing Race: A Continuing American Dilemma (2011).

56 *See* Fellner, *supra* note 43, at 194.