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Recommended Citation

Richard Frase, *Guest Editor's Observations: Recurring Policy Issues of Guidelines (and non-Guidelines) Sentencing: Risk Assessments, Criminal History Enhancements, and the Enforcement of Release Conditions*, 26 FED. SENTENCING R. 145 (2014), available at https://scholarship.law.umn.edu/faculty_articles/527.

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Recurring Policy Issues of Guidelines (and *non*-Guidelines) Sentencing: Risk Assessments, Criminal History Enhancements, and the Enforcement of Release Conditions

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The four original papers that follow were presented at the 2013 Annual Meeting of the National Association of Sentencing Commissions (NASC), held in Minneapolis. These particular topics were chosen for two reasons: they address important, inter-related sentencing policy issues; and there is good reason to believe these topics are of current and growing interest to sentencing commissions and their staffs. The latter assumption is based on conversations with sentencing commissioners from around the country, which I and my colleague, Kevin Reitz, have had over the past several years. Building on those conversations, the Executive Committee of NASC was persuaded to devote substantial program time to presentation and discussion of commissioned papers written by academics known for their work in these areas. Although NASC has been holding annual meetings since 1994, I believe this was NASC's most substantial effort thus far to bridge the gap between academic research and sentencing commission policy formulation. And there is reason to hope that this effort will continue in future NASC meetings. The practitioners who attended the 2013 meeting reported that they enjoyed hearing from and interacting with academics who specialize in these topics and who share the practitioners' goal of developing and improving sentencing policy; the paper writers enjoyed the opportunity to gain feedback from practitioners and contribute to their work.

The papers themselves demonstrate both the substantial fiscal and human impacts of policy choices on these issues, and the many ways in which decisions on one issue interact with decisions on the others. As the first two papers note, formal and informal risk assessments are made at many stages of criminal justice processing; it seems likely that the impact of formal assessments will only become greater as risk assessment technology continues to improve. But as John Monahan and Jennifer Skeem emphasize, the factors that should be included in a risk assessment instrument will depend on the particular decisions to which it is applied. And as Michael Tonry's paper cautions, risk predictions raise troubling normative issues that must be carefully addressed; a number of factors that predict high or low risk may need to be excluded or given limited weight for reasons of fairness or public policy.

Risk assessments are also a central issue, or should be, in the areas addressed by the two other NASC papers. Although criminal history enhancements are sometimes said to be based on "just deserts," that rationale is highly contested. In contrast, as Julian Roberts and Orhun Yalincak note, there is widespread consensus that such enhancements are justified by the higher recidivism risk of offenders with more extensive prior records. But almost no criminal history scores have been validated as risk assessment instruments; they can be, and they should be. At a minimum, sentencing commissions should revisit this fundamental and influential component of sentencing policy, to clarify its desert and/or crime control rationale(s) and evaluate the latter in light of experience and data on sentencing practices and impacts.

Similarly, Cecelia Klingele's paper shows why commissions should revisit and consider revising their policies on the setting and enforcement of conditions of release. Like criminal history enhancements,

such enforcement efforts—especially the ultimate sanction of revocation and incarceration—have a very substantial impact on the size and composition of jail and prison populations. Here too, improved risk assessment tools may assist courts in deciding which release conditions and sanctions are needed, and which have little crime-control value or even negative value.

Several overall themes emerge from these four papers:

- The papers underscore the critical importance of clearly defining, and finding ways to reconcile, the specific purposes that sentencing rules are designed to serve (which often conflict with each other), and the competing normative principles and limitations that must be respected.
- Given these competing goals and normative principles, there is clearly a need to take a hybrid approach to sentencing theory, and the limiting retributive model expressly or implicitly endorsed in these papers seems like the best choice. (It also appears to be the consensus view, adopted in some form by almost all modern sentencing systems and strongly endorsed in the revised Model Penal Code.¹) Under this model, the offender's blameworthiness sets an upper limit on sanction severity, and sometimes also a lower limit; within the range defined by those limits, courts and correctional officials may consider all other recognized punishment purposes and normative principles, including offender risk and needs, restorative justice goals, and resource limitations.
- To adequately address these goals and values it will be necessary to employ a comprehensive, state-wide policy framework guided by jurisdiction-specific data, in particular, data on offender risk, the effectiveness of particular release conditions in managing risk, and the actual operation of the system as it seeks to measure and manage risk. Some important normative concerns also raise critical empirical issues; for example, how much racial disparate impact results from the use of particular risk assessment tools, or from risk proxies such as criminal history?
- It also seems clear that state sentencing policy, even if comprehensive and data-driven, must be monitored and revised over time based on changed circumstances, new research, and experience gained once policies are put in place.
- State sentencing commissions, especially those charged with developing and monitoring sentencing guidelines, are the governmental bodies best suited to conducting the state-wide, data-driven, and continually evolving policymaking that is needed.

The remainder of this essay offers a brief synopsis of each of the four NASC 2013 commissioned papers, and reflections on some of the central issues they raise.

I. John Monahan & Jennifer Skeem, "Risk Redux: The Resurgence of Risk Assessment in Criminal Sanctioning"

This essay provides a useful overview of the current uses, potential, and inherent limitations of formal risk assessments in sentencing and paroling decisions. As the title indicates, the authors begin by placing the topic in an historical perspective: case-specific risk assessments seemed to have fallen out of favor during the late-twentieth-century shift away from indeterminate sentencing, but have recently received widespread support and application. Of course, highly discretionary judicial and parole board sentencing never entirely went away; indeed that model, with varying limits imposed by mandatory minimum and truth-in-sentencing laws, is still used by a majority of the states.² But the authors show that risk assessment is resurgent even in some determinate (guidelines) sentencing systems, three of which (Pennsylvania, Virginia, Utah) are highlighted. At the same time, the authors specify that such assessments should operate within a range of deserved punishment; to that extent, their normative stance embraces the proportionality concerns that underlie determinate sentencing reforms, and endorses the hybrid limiting-retributive model noted above.

After sketching the various uses of risk assessments in the three illustrative states, the authors provide a useful typology of four types of risk factors, and then show how these types relate to importantly different applications of risk assessment. Monahan and Skeem draw a distinction between decisions designed to predict and manage risk (e.g., by heightened supervision or denial of release), and applications designed to reduce risk (e.g., by assignment to treatment programs or other interventions). Risk reduction (program assignment) requires assessment of risk factors that have been proven (or at least, can be very plausibly assumed) to be causally related to recidivism, whereas a broader range of risk factors may (subject to legal and ethical limits) be applied when the goal is primarily to predict and manage risk by identifying higher- and lower-risk offenders. Finally, the authors sound several notes of caution: relatively few risk factors have been scientifically proven to be causally related to recidivism reduction; factors that predict risk may vary substantially from one jurisdiction to another; proven risk

factors in any given jurisdiction may become less predictive over time; even proven causal factors are of little utility if (as is often true) treatment is unavailable or insufficiently funded; and no risk assessment tool currently available is clearly superior, perhaps suggesting the inherent limits of this technology.

And there are further cautions for policymakers to keep in mind as they consider making broader use of risk assessment tools. In addition to the ethical objections addressed in Michael Tonry's essay, which I discuss next, there are potential legal difficulties. Monahan and Skeem chose to illustrate recent uses of risk assessments in sentencing and corrections decisions by examining three states, Pennsylvania, Virginia, and Utah, which seem to have gone further than most other states in this area. An early draft of their paper also examined the risk assessments formerly used by judges in Missouri. But these four jurisdictions share certain features that are not present in all guidelines systems: all four states have, either formally or de facto,³ "advisory" guidelines with little or no appellate review of sentences, and three of the four (all but Virginia) retain parole release discretion. It is perhaps not surprising that advisory guidelines systems have felt freer to try out new risk assessment tools at sentencing, since judges are free to use or ignore the assessment. But there is no inherent reason why these policy experiments could not lead to similar efforts in states with legally binding ("presumptive") sentencing guidelines. Sentencing commissions and appellate courts in those states will need to develop policies and rules specifying which instruments may be used, who does the assessment, and how assessment scores translate into recommended "typical case" sentences (from which, as in all guidelines systems, departures may be proposed, argued, and sometimes ordered by the court).

But then there is the *Blakely* problem: advisory guidelines aren't subject to *Blakely*'s reasonable-doubt and jury-trial requirements, and several lower courts have held that parole-retention presumptive guidelines aren't either.⁴ Can formal risk assessment be used in a parole-abolition, presumptive-guidelines system? The answer is yes, for two reasons:

First, *Blakely* only applies to facts permitting sentencing enhancement, not to facts that permit mitigation. Moreover, high-risk enhancements are—and should remain—much less common than low-risk mitigations. In other words, the use of risk assessments (like many other features of American criminal justice), is and should be strongly asymmetric.⁵ Virginia's use of its high- and low-risk assessments provides a good illustration of such asymmetry in practice: in 2012, the number of mitigations was 39 times the number of aggravations, and mitigations were also much more frequent as a percentage of cases where they might have been applied (22 percent vs 7 percent).⁶ In general, the experience of Minnesota and other presumptive guidelines states shows that *Blakely* compliance is not a major problem because most enhancements can be handled through plea negotiation, leaving a very small number of cases where contested enhancements require full application of *Blakely* procedural requirements.⁷

Second, if compliance is nevertheless deemed too burdensome, presumptive-guidelines states can further limit *Blakely* problems by widening sentencing ranges (grid cell widths), as Minnesota did, thus reducing the number of enhancements that qualify as departures triggering *Blakely*. And for categories of offenders where validated risk assessment tools provide justification for more extensive enhancements (again, such cases will be relatively few), a state could consider adopting a blend of advisory and presumptive guidelines: high-risk aggravations based on judge-found facts would operate within a broader offense-based range, and sentencing within that range would be discretionary (or would simply require a statement of reasons for departing from the grid cell); only sentences above or below the offense-based range would be deemed departures, subject to *Blakely* and other departure requirements.⁸

II. Michael Tonry, "Legal and Ethical Issues in the Prediction of Recidivism"

Professor Tonry's essay provides a valuable reminder of the important competing normative issues raised by the growing use of risk assessments. He points to the perennial problem of false positives—many offenders who are detained (or detained longer) because of their predicted high risk would not in fact have reoffended during the time they were detained. He particularly questions risk-based sentencing enhancements that yield sentences that are disproportionately severe relative to the seriousness of the conviction offense and the offender's degree of blameworthiness. For that reason, as well as because of their disparate impact on non-white offenders, he also critiques the heavy weight given—both in risk assessment tools and as a central feature of guidelines sentencing—to offenders' prior conviction records (discussed further below). Tonry further questions the use in risk assessment instruments of factors that reflect ascribed characteristics such as gender and age, over which the offender has no control, or that reflect personal characteristics such as education, employment, residential stability, marital status, and other family circumstances. Such socio-economic variables tend to be highly

correlated with race and ethnicity, causing risk assessments based on them to have a strong disparate impact on minority offenders. And in many cases (especially risk factors related to the offender's education level, employment record, and housing) these are matters over which the offender has little or no control. Even when they have control, Tonry argues, decisions about whether to go to school, marry, have a family, and maintain steady employment or housing are lawful life-style choices that people are entitled to make. And although he concedes that personal characteristics may at least sometimes be used to mitigate punishment, he also questions this distinction arguing that Virginia mitigation rules, making males and youthful offenders less likely to qualify for diversion from recommended prison sentences, are analytically indistinguishable from a sentence-enhancement rule making them eligible for the prison recommendation in the first place. Throughout his essay Tonry protests the "moral myopia" of risk-based policies that, he argues, depart from widely held values that have been reflected in sentencing reforms since the 1970s.

There are, of course, normative and practical arguments on the other side, some of which are sketched below. But Tonry has raised important issues, and we very much need to debate these complex questions of ethics and public policy.

As Tonry emphasizes, there is substantial consensus on a few points, especially the core, human rights-based principle that offenders should not be punished more severely than they deserve. He notes that this principle of "limiting" or "negative" retributivism was first strongly articulated by Norval Morris, and has also been accepted by numerous other writers. Morris's theory was based on his belief that desert is inherently imprecise, and that we can only reach consensus that certain punishments would clearly be unjustly severe or unjustly lenient, thus generating for any given case a range of "not-undeserved" punishment severity. My own theory of "asymmetric" desert⁹ likewise posits a range of deserved punishment severity, but seeks to define more precise upper limits of severity that the state is permitted but not required to impose; a lesser penalty (or conditional suspension of the fully deserved penalty) may be imposed if it would more efficiently serve crime control and other valid sentencing goals. But under either version of limiting retributivism (as well as under stricter, "positive" versions of desert theory), it is fundamentally unjust and an abuse of government power to punish an offender more than he or she deserves. And Tonry is right to suggest that this core principle is clearly violated by some high-risk sentence enhancements. In Virginia, for example, high-risk sex offenders can be given a prison term up to three times the normal guidelines sentence; yet the latter is, by definition, the just sentence for a typical case, and high-risk enhancements require no finding of enhanced culpability.

A second core value, on which there is substantial consensus (and which is closely linked to the idea that "desert" only defines a range of permissible penalties), is a principle that Norval Morris called "parsimony" (it is also known as the principle of necessity, narrow-tailoring, or least-restrictive means/least-restrictive alternative)¹⁰: a punishment is excessive if a less severe penalty would adequately serve all applicable sentencing purposes. Unnecessarily severe penalties waste limited public resources, and because the added severity is gratuitous, they are also unfair to offenders.

With these core principles in mind, here are some reflections on the concerns Tonry raises.

1. The Problem of False Positives. Given the presumption of innocence, and the high public and private costs of detention and other preventive measures, it is important to minimize the number of offenders detained because of their predicted high risk who would not, if released, have offended. And there is reason to believe that, as risk assessment technology improves, the proportion of false-positive predictions of risk will decline. (Although Monahan and Skeem's paper, discussed above, suggests that there may be inherent limits on our ability to improve such predictions, at least those based on the kinds of data that have been available up to now; perhaps the addition of DNA and/or brain-scan evidence will permit further improvements in predictive accuracy.) But so long as high-risk offenders are not punished more severely than they deserve (the limiting retributive principle noted above)—that is, so long as risk assessments are used primarily to mitigate punishments for medium- and low-risk offenders—concerns about false positives seem less compelling. (There remains a problem, discussed below, of ensuring that the baseline sentence has not been inflated in anticipation of widespread mitigation.)

Furthermore, in choosing a sentence within the range of deserved punishment for each case, we must also keep in mind the countervailing problem of false negatives—failure to detain or otherwise restrain offenders who do in fact reoffend. If our risk-assessment technology permits us to identify many of these offenders, do we not have the right or even the duty to apply that technology to prevent further crime by high-risk offenders? Do citizens have a *right* to be protected from foreseeable harm, at least if that harm is irreparable or very serious?¹¹ The latter qualification seems very important in striking

a proper balance between the interests of offenders and potential victims; as Tonry argues, recidivism predictions should target only serious crimes. If that is correct, then a critically important question about any proposed risk assessment tool, and one that all too often goes unasked, is: What outcome variables was it designed to predict? Does *any* crime count? Do arrests, release revocations, or other findings less formal than conviction count?

2. Gender, Age, and the Distinction between Mitigation and Enhancement. Tonry sharply criticizes the inclusion of gender and age factors in risk assessment tools, particularly the way in which these factors are used in Virginia. Yet mitigation for lower-risk offenders is consistent with and arguably required by the principle of parsimony. And although principles of equal justice might seem to require that gender and age, like race, play no role in setting sentence severity, such principles may justly apply differently in different contexts and for different ascribed characteristics. Norval Morris, whose writings Tonry cites with approval, viewed equality as only a “guiding principle” within the range of not-undeserved penalty severity—that is, a principle to be followed unless there are good reasons (such as public safety and parsimony) not to follow it. And it is not entirely clear why in other contexts (socio-economic variables, discussed below; parole release decisions) Tonry is willing to allow offender factors to be used to mitigate punishment severity. The most likely explanation for his rejection of gender and age as mitigating factors at sentencing appears to be that in his view, in these two contexts, there is no real distinction between mitigation and sentence enhancement (more on that below).

Let us begin by making an important distinction: gender and age are different from race or ethnicity, even though all are ascribed characteristics that offenders are powerless to change. Race is really in a class by itself. The history of de jure racial discrimination in the United States, and continuing de facto discrimination, make race a highly “suspect” criterion, especially when it is used to support policies that disfavor minorities and favor whites (which is the most likely scenario in the sentencing context)—there is an unacceptable risk that race-based policies will be animated by bias rather than sound policy, and that such policies will reinforce negative racial stereotypes and worsen racial inequality. For these reasons, race can never be given any formal role in issues of sentencing severity even if it is found to be correlated with and predictive of risk.

Gender and age are different. Although they are also sometimes the basis for bias, discriminatory treatment, and stereotyping, these problems are less acute in the context of risk-based sentencing. Since risk-based mitigation of sentences for women and older offenders results in more favorable treatment for groups that have traditionally been victims of discrimination, there is little reason to fear that differential treatment is motivated by bias or would worsen inequality; nor is the premise for such treatment—lower risk—likely to reinforce negative stereotypes about these groups. And although courts have found “reverse discrimination” unconstitutional in contexts such as employment and education, those contexts involve direct victims of the discrimination—the majority-race job and school applicants whose places were taken by the favored minority candidates. Unless one believes that crime victims have the right to insist on full punishment regardless of their offenders’ risk levels, it is difficult to identify any direct victim when sentencing mitigation is given to low-risk women and older offenders.

But are we really giving women and older offenders “mitigated” punishment, or are we giving males and younger offenders “enhanced” punishment, possibly even in excess of their just deserts? As noted, Tonry questions whether there is any valid mitigation/enhancement distinction; he argues that denying mitigation to males and younger offenders is equivalent to treating those characteristics as aggravating factors.

Similar issues arise in other jurisprudential contexts: is differential treatment to be seen as an offer of help or mitigation, or should it be seen as a threat of harm or enhancement? To take a concrete and very common example: are offenders who plead guilty being given “concessions,” or are those who are convicted after trial being “punished” for their exercise of constitutional rights? For most questions like this, the answer requires one to identify a baseline of fair and just treatment; in this case, the mitigation/enhancement distinction requires us to decide whether the higher sentence would still be deemed deserved and proportionate (at least relative to other crimes and offenders, in the context of the scale of punishment severity applied in this jurisdiction), or whether that sentence is excessive and may have been deliberately inflated in anticipation of widespread mitigation.

To return to the example of guilty plea versus trial conviction sentences: viewing the plea sentence as a mitigation or “concession”¹² requires us to assume that the trial sentence would be a deserved and appropriate penalty (or closer to it), but there is reason to doubt that assumption. In a system in which most defendants are provably guilty and expected to plead guilty, where prosecutors have strong

bargaining leverage (via severe authorized penalties), and where almost all defendants do in fact plead guilty, it seems likely that plea sentences will come to approximate what officials view as appropriate levels of sanction severity (or closer to it), with the relatively rare cases of trial conviction after refusal to plead guilty resulting in unjustly severe sanctions that are seen as justified by their plea-inducing power and by our dislike for guilty people who refuse to admit their guilt. In other words: plea bargaining probably does involve threatened and occasionally imposed trial “penalties” above the just sentencing level; sentences given to guilty-pleading defendants involve little real mitigation, or at least much less mitigation than defendants are told they are getting.

Applying the framework sketched above, do lower penalties given to women and older offenders because of their lower risk levels involve mitigation for these offenders, or sentence enhancement for males and younger offenders? I would argue that the mitigation theory is much more plausible here than it is for plea bargaining. Since women and older offenders (unlike those who plead guilty) are exceptional rather than typical defendants, it is unlikely that their risk-based lower sentences would come to approximate what officials view as the appropriate level of sanction severity. Those levels are defined by typical cases, which involve males and younger offenders.

But what counts as a “younger” or “older” offender? The “true-mitigation” conclusion above is on the firmest ground when a jurisdiction simply applies a “geezer” discount, mitigating penalties for a relatively small group of aging defendants who are likely to be past their peak-offending years (which means age 40 or more, for most kinds of offending). The conclusion is much weaker, and Tonry’s critique much stronger, when very young offenders are targeted for denial of mitigation, as in Virginia. The heavy weight given to young age in that state seems very likely to be functioning as an enhancement above what would be an appropriate sentence based on more typical (not-so-very-young) cases. And as Tonry argues, enhancing sentences for the youngest offenders, or even denying them mitigation, is particularly likely to result in punishment above these offenders’ degree of culpability given that many of them, even if legally adults, are still morally and cognitively immature.

3. Socio-economic Factors. Offender characteristics such as education, employment, residential stability, marital status, and other family circumstances are associated with higher or lower risk of reoffending, but as Tonry notes they are also strongly correlated with race and ethnicity. For that reason they may need to be excluded from risk assessment instruments, to avoid systematically adding to racial disproportionality in sentencing outcomes, further worsening the disadvantage of non-white offenders, their families, and their communities, and thereby further increasing their risk of further crime.¹³ In particular, such factors should probably be excluded when (as is most often the case) they would disadvantage a non-white offender. But these factors do occasionally benefit non-white offenders,¹⁴ suggesting lower risk than would otherwise be predicted. In such cases it may be permissible to take such factors into account. Here too, as with gender and age, because such cases are very exceptional and unlikely to have been contemplated when defining just penalties for typical cases, this is likely to be real mitigation, not (as in plea bargaining) the absence of enhancement. The much more common scenario involves a case of a white offender whose employment and/or other socio-economic characteristics suggest lower-than-average risk of reoffending. Although lowering such an offender’s sentence on this ground does not directly contribute to non-white disadvantage, it does contribute to troubling and persistent patterns of racial disproportionality among inmate populations.¹⁵

What about the use of socio-economic factors that work to the disadvantage of a white offender, suggesting higher risk? Tonry seems to rule out their use categorically (or at least whenever they would work to any offender’s disadvantage). Is it sufficient to say that these factors are matters over which the offender has little control, or that they reflect valid “lifestyle” choices? It is certainly true that, for some white offenders (and a much higher proportion of non-white offenders), limited education, poor employment history, and residential instability are not matters of choice or blame. One could even argue that such “bad luck” factors should, on retributive grounds, mitigate rather than enhance punishment severity. But the same or even stronger moral claims can be made by other offenders, particularly those addicted to alcohol or other legal substances or activities: should alcohol or gambling abuse likewise be excluded from risk assessments that affect sentence severity?

Offenders usually have more control over things like marital status and whether they live with and support their children and spouse or partner. It is true that failings in these areas are usually not viewed as illegal (although non-support may be), but are these choices really beyond the law’s power to consider when assessing risk of further criminal behavior? Such choices often combine with and compound other choices (drug use, gang associates) that Tonry would allow to be taken into account. (And they probably

also correlate with other risk factors that are less frequently measured.) Even without such interactions, some legal “choices” clearly cause or correlate with higher risk. I doubt if anyone thinks it’s wrong for companies to charge higher life insurance premiums to people who engage in dangerous hobbies. Is it really so much worse for sentencing courts to consider legal but risky behavior, at least as long as the enhanced penalties given to higher-risk offenders do not exceed their deserts?

4. What’s the alternative? Perhaps Tonry is correct, and we should exclude from risk assessment tools all factors associated with gender, age, and socio-economic status, at least when such tools are used to affect sentence type and length (as opposed to programming and security-level assignments) and are shown to have a strong disparate impact on non-whites. But this policy decision will not keep officials from taking such factors into account. Judges (and prosecutors) will probably continue to consider these factors informally, for example, when making determinations about whether an offender is “amenable” to probation. Such informal risk assessments are arguably worse than the formal assessments Tonry opposes—less transparent, less reliable (because lacking in empirical validation), and less consistent (because lacking in any legal guidance or structure). Finally, with respect to low-risk assessments, can we afford to renounce any major sources of mitigation, given our inflated American penalty scales and overbroad criminal laws?

III. Julian Roberts & Orhun Yalincak, “Revisiting Prior Record Enhancement Provisions in State Sentencing Guidelines”

An offender’s criminal history (record of prior convictions) is a major sentencing factor in all American sentencing systems, yet as the paper by Julian Roberts and Orhun Yalincak notes, this is a much neglected area of sentencing law and policy: scholars and most sentencing commissions have paid very little attention to why these enhancements are used at all, how criminal history formulas are computed, how the chosen formula relates to the purposes these enhancements are intended to serve, and what effects these choices have on sentences recommended, sentences actually imposed, and correctional populations.

Criminal history enhancements have a number of important and troubling impacts.¹⁶ As Roberts and Yalincak show, under some state guidelines offenders in the highest criminal history category have recommended executed prison sentences that on average are two to five times longer than the recommended sentences for offenders in the lowest criminal history category. (When broader measures are used, the average criminal history multiplier can be as high as 10, and for some offense severity levels, more than 30.¹⁷) Criminal history enhancements thus substantially increase the size and expense of prison populations. Such enhancements also have a very strong disparate impact on racial and ethnic minorities¹⁸; they undercut the goal of making sentence severity proportional to offense severity; and under many existing formulas, they undercut the goal of reserving limited and expensive prison space for violent offenders. The formulas and impacts of criminal history enhancements vary dramatically from one guidelines system to another, yet the rationales for and impacts of specific formulas have rarely been stated or evaluated.

As explained by Roberts and Yalincak, there are two principal rationales for criminal history enhancements, retributive and utilitarian (crime control). But the rationales of the former type are unconvincing and contradictory: some retributive theorists believe first offenders are less culpable and should receive a sentencing discount; other retributivists believe that an offender’s blameworthiness increases steadily in proportion to the number and seriousness of their prior convictions (this theory is the one most consistent with sentencing guidelines criminal history enhancements, except that the latter are almost always “capped”—at some point additional prior convictions have no further enhancing effect); a third group of retributivists argues that prior record is irrelevant to an offender’s deserved punishment for his or her latest crime—the offender has already been punished for the prior offenses, cannot now be punished more for them, and should be punished for the latest offense based solely on the seriousness of that offense.¹⁹

In contrast, utilitarian rationales provide much more plausible justifications for criminal history enhancements: research has repeatedly shown that, in general, offenders with more substantial records of prior conviction are more likely to commit further crimes; prior record thus serves as a useful proxy for offender risk. Higher risk, in turn, justifies more severe penalties under crime control-related punishment theories: deterrence of this and other high-risk offenders, incapacitation through detention or other risk-management measures, and rehabilitation (high-risk offenders must be treated in prison; low-risk offenders can be safely put into community-based rehabilitation programs).

But which kinds of prior crimes should be counted, and how far back in time? How should they be weighted relative to each other? And how much weight should the total criminal history score have relative to the nature and severity of the offender's current offense(s)? Even a cursory examination of guidelines criminal history formulas around the country reveals substantial variation on all of these points, and almost none of these formulas have been subjected to empirical validation as risk-prediction instruments. It seems unlikely that all of them are equally valid, and very likely that they are over-predicting some offenders' risks, while under-predicting risk for others.

Roberts and Yalincak are thus clearly correct in concluding that guidelines systems should reexamine their use of criminal history, including the rationales for these enhancements, the kinds of prior convictions that are counted, the weighting formulas and limitations applied, and the impacts of these rules on sentences imposed, correctional populations, and recidivism. A strong argument can be made, on both risk-prediction and retributive grounds, that very old convictions should be counted less or not at all; yet many guidelines systems have no or only offense-specific "decay" or "washout" rules that limit the prior record look-back period. A related but distinct issue is offender age; very few guidelines systems adjust their criminal history scores or weighting to provide reduced enhancement to older defendants whose rate of offending is likely to be declining. Research on criminal careers has repeatedly demonstrated the "age-crime curve"—for most offenders, the highest rate of offending is in their teens and twenties, and by the age of 40, their rate of offending is declining rapidly. Almost by definition, the offenders with the longest criminal records tend to be older; without an adjustment for age, the result is to send large numbers of aging offenders to prison, often for lengthy terms. Many of them will have been most recently convicted of property or drug crimes; yet any violent crimes in their criminal history, even crimes committed many years earlier, will usually be weighted heavily, greatly increasing their likelihood of being recommended for and receiving a long prison term. If guidelines states were to validate their criminal history scores and enhancement rules to make them more accurate as risk predictors, the results could be very substantial, saving prison beds by holding fewer low-risk offenders, and better promoting public safety by using those beds or some of them for high-risk offenders who are not accurately identified by existing criminal history scoring.

To summarize: guidelines commissions should revisit their uses of criminal history, beginning with a reassessment and clear statement of the purposes these enhancements are designed to serve. (As Roberts and Yalincak note, most guidelines systems are very unclear on this point.) Commissions should then examine the effectiveness of these enhancements in achieving their intended purpose(s). If at least one important goal of the criminal history score is to identify higher- and lower-risk offenders, then one of the most important research tasks is to measure the contribution, toward accurate risk prediction, of each component of the criminal history formula, the formula as a whole, and other risk-related factors (e.g., offender age, chemical dependency) for which data is commonly available at sentencing. Guidelines systems that have been collecting sentencing data for a number of years can use that data to determine what criminal history score components, and other factors known at the time of sentencing, significantly raise or lower the odds of later reoffending and reconviction (as measured by whether offenders sentenced in an earlier year reappear in sentencing data for later years).

Finally, sentencing commissions should examine the impacts of their criminal history enhancements on each of the following:

1. Proportionality of sentence severity relative to the seriousness of the offender's conviction offense(s): Do criminal history enhancements result in strongly overlapped sentencing ranges for offenses of differing severity, thus causing high-history offenders to be recommended for and be given prison sentences more severe than those applied to lower-history offenders who have committed much more serious crimes? Such overlaps violate retributive proportionality values, undermine the goal of more strongly deterring higher-severity crimes, and send contradictory messages about relative offense severity.
2. Size and expense of prison populations: How many prison beds are being used for offenders who would not be sent to prison were it not for their elevated criminal history score?
3. Priority use of prison beds for serious violent offenders: Are large numbers of prison beds being used for high-history offenders convicted of medium- or low-severity crimes?
4. Age composition and risk level of prison populations: How many prison beds are being used to hold high-history older offenders whose risk level is likely to be steadily declining while their medical costs are steadily rising?

5. Racial disproportionality in prison populations: Do non-white offenders have substantially higher average criminal history scores under the formula used in this system, and do these higher scores substantially increase racial disproportionality in prison populations?²⁰ If so, are higher non-white offender criminal history scores caused by particular kinds of prior convictions, and would it be appropriate to limit the maximum number of criminal history points that can be based on such crimes? (For example: non-white offenders are likely to have larger numbers of low-level drug-crime convictions, yet the nature and number of prior drug convictions is heavily dependent upon police and prosecution enforcement policies, and many offenders with multiple drug convictions have untreated but treatable addictions.)

Even without detailed research on each of the topics listed above, guidelines commissions should consider reducing the weight of prior record as a sentencing factor by, for example, specifying that the typical-offense (no-departure) sentencing ranges for adjoining offense severity levels should overlap only modestly.²¹ This simple change would immediately lower prison racial disproportionality, increase the proportionality of sentences relative to offense severity, and reduce the numbers of aging, high-history offenders being held under lengthy terms of imprisonment.

IV. Cecelia Klingele, “The Role of Sentencing Commissions in the Imposition and Enforcement of Release Conditions”

Like criminal history enhancements, policies and practices related to the imposition and enforcement of probation and post-prison release conditions have a major impact on jail and prison populations in almost all American sentencing systems. Yet as Cecelia Klingele’s paper shows, this is likewise a much neglected area of sentencing law and policy.

About 40 percent of all U.S. prison admissions, and as many as 70 percent in some states, result from revocations of probation or post-prison release, based on violation of release conditions and/or the alleged commission of a new crime with no new conviction and sentence. But sentencing guidelines tend to focus on decisions about the imposition and duration of prison sentences, providing relatively little guidance with respect to the choice and enforcement of noncustodial sanctions.²²

However, a number of states have now recognized the need to address these issues. Professor Klingele argues that state sentencing commissions are particularly well positioned to promote needed reforms by means of research and recommended guidelines and/or statutory changes. Specifically, she suggests four types of reforms to structure and reduce the frequency of prison as a sanction for release violations:

1. Except where probationary supervision is needed to manage risk, substitute unconditional discharge or, where needed to emphasize offender accountability and crime seriousness, impose a fine or day fine; for an offender who is not a viable candidate for a fine or supervision, use a short jail term.
2. Lower the duration of authorized and imposed supervision terms, and encourage early termination of supervision, to reduce the length of time offenders are subject to conditional release (and thus, to revocation). Most detected new offenses and risky behaviors occur within a short time after the release period begins, and lengthy supervision periods can interfere with the offenders efforts to establish or reestablish employment and family ties.
3. Eliminate mandatory and boilerplate release conditions, and avoid any condition that is not connected to the particular offender’s risk or that, even if violated, would not justify incarceration as a sanction.
4. Develop principles to guide revocation and other sanctions for violation of release conditions.

Each of these reforms would lessen the need to resort to costly and often counter-productive revocation sanctions, help states conserve supervision resources and deploy them more effectively to achieve offender rehabilitation and reintegration, and improve the consistency and fairness of decision making both at the time of sentencing and during execution of the sentence. The potential impact of such changes could be huge, given the high volume of revocations noted above, and the much larger volume of offenders placed on supervision—probation accounts for well over half of all felony sentences each year,²³ and most prison sentences are followed by a period of community supervision.

I find myself in substantial agreement with almost all of Klingele’s proposals, at least in general terms. Here are some thoughts about the always-devilish details along with a few other suggestions, some of which I’ve developed more fully in previous writings.²⁴

On the general idea that sentencing commissions can and should be more active in addressing community penalties, it is important to recognize why they haven't been very active up to now, despite the major resulting problems of wasted and misallocated resources. There are at least three problems in seeking to more closely regulate nonprison sentences, and although they are certainly not insuperable, they must be kept in mind and dealt with carefully:

1. Ambitious efforts to regulate community penalties would make guidelines sentencing more complex. Sentencing guidelines need to be kept fairly simple in order to lessen errors of application, limit adjudicative costs, and promote predictability and transparency.
2. Judges and correctional officials are naturally resistant to any attempt to take away a substantial portion of their remaining discretion and flexibility.²⁵
3. If much greater limits are placed on judges' powers to set and enforce conditions of release, some judges may be reluctant to grant release in the first place, potentially increasing prison commitments at initial sentencing.

Notwithstanding these problems, the costs of inaction are high, so guidelines states must and probably will in the future do more to regulate community sanctions and discourage custodial sanctions for violations of conditions. And as Klingele argues, sentencing commissions are the government agencies best situated to promote these changes.

Here are some thoughts and further suggestions, prompted by Klingele's four reform proposals:

1. Replacing Supervision with Unconditional Discharge, a Fine, or a Short Jail Term. An important assumption here (and probably a correct one) is that there are identifiable, low-risk offenders who cannot be fined and are unamenable to supervision, but whose serious crimes make unconditional discharge inappropriate; if so, it is unfair and wasteful to set such offenders up to predictably fail and then suffer revocation that could result in a longer period of confinement than the court would otherwise have imposed at sentencing. But how will these offenders be identified? Highly individualized assessments are likely to be unreliable and inconsistent; can such assessments be done on some actuarial basis, and if so, what predictive factors will be used? Here, again, we will face some of the difficult normative issues Michael Tonry addresses in this issue, in particular: if an unamenability finding is based in part on personal characteristics such as unstable living arrangements, does an order of immediate jail in lieu of supervision effectively "punish" the offender for having characteristics that predict their failure on probation?

Assuming such unamenable offenders can be accurately and fairly identified, judges will need guidance in deciding how much jail time to impose, and especially (under the limiting retributive framework all of these papers assume) how much would be too much. Indeed, unless the use of fines and jail time are restricted, judges will need such guidance in all cases where they do not impose an immediate executed prison term. In prior writings²⁶ I have promoted the idea (endorsed by previous writers and some sentencing systems) that sentencing guidelines commissions should develop equivalency scales setting a "punishment value" for each of the most common conditions of a nonprison sentence (e.g., one day fine or one day in jail equals one punishment unit); for each guidelines grid cell or other identifiable group of offenders, the guidelines should then specify the maximum number of punishment units, and separately the maximum number of jail days, that may be imposed without "departing" (triggering the requirement to state reasons, and increasing the odds of appellate review). Such equivalency scales serve several purposes: to validate the "punishment" value of noncustodial penalties, thus encouraging their broader use; to avoid sentencing disproportionality when such sanctions are used (especially in combinations); and to avoid release conditions so onerous that they cannot reasonably be complied with.

2. Imposing Shorter Periods of Supervision. As Klingele explains, shorter supervision periods are more cost effective. Although a lengthy probation period may have some expressive and norm-reinforcing value (especially when offense severity is much greater than the offender's level of risk), allowing the judge to make the symbolic statement, "here is how serious this offender's crime was," that goal can be served by means of a suspended-execution sentence²⁷ combined with probation.

As for post-prison supervision terms, their length raises an important sentencing-structure-design point: such a term should be independent of the length of the remaining prison term at the time of release. This is the approach endorsed by both the original (1962) and the revised Model Penal Code,²⁸

and some jurisdictions that take this approach have found they can set fairly short periods of supervision. (In North Carolina, for example, the period is generally nine or twelve months.²⁹) The alternative, more traditional approach sets the release term equal to the offender's remaining unserved prison term (reduced by good-time credits and/or parole discretion). But this approach has perverse results, giving offenders who "max out" (many of whom are high risk) no supervision period, whereas offenders released early (most of whom are lower risk) may face years of unneeded supervision.

3. Avoiding Conditions Unrelated to Offender Risk or Not Justifying Revocation-Incarceration. The first point here is related to the issue of supervision period length: extra conditions, like lengthy terms, almost guarantee eventual noncompliance; such conditions and lengthy terms should not be piled on merely to express crime seriousness (or to make general, posturing statements of "look how tough we are"), but rather should be used only when and to the extent they are needed for public safety (which again underscores the need to develop and deploy improved risk assessment tools). In general, a good rule of thumb, when setting conditions of release and especially probation conditions, would be to "start at zero"—presume that no conditions of release (other than remaining law-abiding) are needed, then add conditions as needed.³⁰

The second suggestion here—that judges should not impose a condition of release if they would not view jailing or imprisonment as a legitimate response to violation of that condition—is more contestable, or at least, different policy choices may be appropriate in some jurisdictions and/or for some crimes. There may very well be some cases where jail or prison would be disproportionate to the offender's blameworthiness in light of the conviction offense (and the condition violation, if that is seen itself as blameworthy and relevant to the proportionality assessment). I would agree that in such cases the court at the time of sentencing should, in effect, take jail or prison off the table, and should respond to release violations only with noncustodial sanctions and/or restructuring of release conditions. Those sanctions and restructured conditions might well be sufficient to enforce a condition that the judge has decided wouldn't merit incarceration; and if such a condition is needed for public safety, the judge should impose it. As for more serious crimes, even if a noncustodial sentence is preferable, there may be a need to retain the option of incarceration as a last resort (subject to strict substantive and procedural requirements) for those offenders who simply will not comply with essential (public safety-related) release conditions. Moreover, in some jurisdictions and/or for some crimes, it may be necessary to retain this option because, without it, judges will hesitate to grant probation in the first place.

4. Developing Principles to Guide Revocation and Other Sanctions for Release-Condition Violations. As noted just above, sanctions for violation of release conditions, especially the ultimate sanction of revocation of release, must be strictly regulated both in substantive terms (which kinds of violations justify which kinds of sanctions) and in terms of procedural requirements (hearing, standards of proof, and the like). Sentencing commissions in guidelines states are well positioned to develop these requirements, on their own or working with criminal rules committees and/or the legislature.

However, additional safeguards may be needed to discourage over-use of revocation sanctions. Here are two ideas that are more fully developed in my earlier work.³¹ Both of these suggestions respond to the same underlying problem: prison commitments at initial sentencing and via later revocation decisions allow local officials to spend state money without restraint or accountability—what Zimring and Hawkins termed the "correctional free lunch."³² Accordingly, states need to find ways to incentivize these local officials (judges, prosecutors, probation officers) to keep offenders in the community. Here are two ways to do this:

1. Provide state subsidies for local correctional programs to cover defined categories of offenders who, by state policy, should be kept in the community. (This will still save the state money, since such programs cost less than the state prison resources those offenders would consume.) Then, in subsequent years, use charge-backs against the subsidy for every offender in those defined categories who is sent to state prison at initial sentencing or by revocation.
2. Require, by state law, that whenever revocation is ordered at least partial credit against the jail or prison term must be given for any release conditions (especially very onerous conditions) that the offender has already completed (using the sanction-equivalency scales mentioned earlier). Such credit helps to avoid disproportionately severe aggregate penalty severity (initial custody term if any, plus conditions of probation complied with, plus custody imposed via revocation), while reducing the duration and thus the cost of revocation-imposed incarceration. Such credit may also discourage the imposition of unnecessary release conditions that can trigger revocation;

judges and prosecutors will know that each additional condition imposed will, if at least partially completed, reduce the length of the available revocation term, and thus reduce the deterrent effectiveness of the revocation threat.

V. Conclusion

The problems posed by the use of risk assessments, criminal history enhancements, and revocation sanctions for violation of release conditions are of huge importance in both human and budgetary terms. Each jurisdiction must wrestle with these practical and ethical challenges, and the solutions they find will not necessarily be the same. But at least the problems are now being recognized. And based on the discussions incited by these four papers at the 2013 NASC meeting, there is reason to hope that practitioners and scholars will increasingly work together to solve these problems, and that states will seek out and learn from each others' experiences. In working out these problems, state sentencing commissions can and should play a central role.

Notes

- ¹ See Richard S. Frase, *Limiting Retributivism*, in *The Future of Imprisonment* 83–119 (Michael Tonry ed., 2004) [hereinafter: Frase, *Limiting Retributivism*]; and Richard S. Frase, *Just Sentencing: Principles and Procedures For a Workable System* (2013) [hereinafter: Frase, *Just Sentencing*]. The advantages of the limiting retributive model, and the many ways in which the Minnesota sentencing guidelines have implemented that model, are discussed in Richard S. Frase, *Sentencing Principles in Theory and Practice*, 22 *Crime & Justice: A Review of Research* 363–433 (Michael Tonry ed., 1997).
- ² See Kevin R. Reitz, *The Disassembly and Reassembly of U.S. Sentencing Practices*, in *Sentencing and Sanctions in Western Countries* 222 (Michael Tonry & Richard S. Frase eds., 2001).
- ³ Pennsylvania's guidelines are effectively advisory in that the standard of review is highly deferential to trial courts, so that sentences are almost never reversed on substantive grounds. See Kevin R. Reitz, *Sentencing Guideline Systems and Sentence Appeals: A Comparison of Federal and State Experience*, 91 *Nw. U. L. Rev.* 1441 (1997).
- ⁴ See, e.g., *People v. Drohan*, 715 N.W.2d 778 (Mich. 2006), and *Commonwealth v. Smith*, 863 A.2d 1172 (Pa. Super. Ct. 2004), both holding that parole-retention guidelines systems are not subject to *Blakely*. But see *United States v. Alleyne*, 133 S.Ct. 2151 (2013), overruling an earlier case that the state cases cited above had relied upon.
- ⁵ For further discussion and policy arguments in favor of asymmetric standards, see Frase, *Just Sentencing*, *supra* note 1, at 14, 26–29.
- ⁶ See Virginia Criminal Sentencing Commission, 2012 Annual Report, at 26–29.
- ⁷ See, e.g., Richard S. Frase, *Blakely in Minnesota, Two Years Out: Guidelines Sentencing Is Alive And Well*, 4 *Ohio St. J. Crim. L.* 73 (2006).
- ⁸ A similar blend of advisory and presumptive guidelines is suggested in Frase, *Just Sentencing*, *supra* note 1, at 47.
- ⁹ Frase, *id.* at 14, 26–29.
- ¹⁰ See generally, E. Thomas Sullivan & Richard S. Frase, *Proportionality Principles in American Law: Controlling Excessive Government Actions* (2009). See also Frase, *Limiting Retributivism*, *supra* note 1; Frase, *Just Sentencing*, *supra* note 1.
- ¹¹ For further discussion of the pros and cons of basing severe punishments on the rights of potential crime victims, see Richard S. Frase, *Can Above-Desert Penalties be Justified by Competing Deontological Theories?*, in *Retributivism Has A Past. Has It A Future?* 169 (Michael Tonry ed., 2011).
- ¹² Cf. American Bar Association, *Aba Standards For Criminal Justice Pleas of Guilty*, (3d ed. 1997), standard 14-1.8, citing rationales for granting charge and/or sentence “concessions” to certain defendants who plead guilty.
- ¹³ This predictable result largely dispenses with the argument that, because most crime is intraracial, non-white offenders must be fully punished to keep them from victimizing other disadvantaged non-whites. For further discussion of the tendency of criminal penalties to increase crime by worsening social disadvantage, and how sentencing policies can address these problems, see Frase, *Just Sentencing*, *supra* note 1, at 15–16, 34–35, and 210–35.
- ¹⁴ See Debra Dailey, *Prison and Race in Minnesota*, 64 *U. Colo. L. Rev.* 761, 774 (1993) (black offenders were less likely than whites to be employed at sentencing, but among employed offenders, a higher percent of blacks received downward dispositional departures [probation in lieu of the recommended executed prison sentence]).
- ¹⁵ For a comprehensive study of these problems in one state, see Richard S. Frase, *What Explains Persistent Racial Disproportionality in Minnesota's Prison and Jail Populations?*, 38 *Crime and Justice A Review of Research* 201–280 (Michael Tonry ed., 2009).
- ¹⁶ For an illustration of these impacts using Minnesota sentencing data, see Richard S. Frase, “Impacts of Criminal History Enhancements Under Sentencing Guidelines: Examples from Minnesota,” paper presented at The National Association of Sentencing Commissions (Aug. 5, 2013), *visuals available at* http://thenasc.org/images/Criminal_History.Frase_CH_Presentation_4a_.pdf.
- ¹⁷ See Frase, *Just Sentencing*, *supra* note 1, ch. 3. The broader measure of criminal history enhancements used in the latter study takes into account almost all offense severity levels; it does this by including recommended suspended prison terms as well as executed terms, and by comparing cell midpoints to avoid omitting severity levels for which a high/low ratio cannot be computed because the lowest criminal history cell has a floor of zero.

- ¹⁸ See Frase, *supra* note 15.
- ¹⁹ For further discussion of various punishment theory rationales for criminal history enhancements (leading to the same conclusion reached by Roberts & Yalinca in this issue of *FSR*, that retributive rationales are inadequate), see Frase, *Just Sentencing*, *supra* note 1, ch. 4. See also Richard S. Frase, *Prior-Conviction Sentencing Enhancements: Rationales and Limits Based on Retributive and Utilitarian Proportionality Principles and Social Equality Goals, in Previous Convictions At Sentencing: Theoretical and Applied Perspectives* 177 (J. Roberts & A. von Hirsch eds., 2010).
- ²⁰ For an illustration of research methods suited to examining criminal history's disparate racial impact, see Frase, *supra* note 15.
- ²¹ For further discussion of the advantages of nonoverlapped sentence severity ranges, see Frase, *Just Sentencing*, *supra* note 1, at 48–50 and 191–92.
- ²² For a recent overview of U.S. sentencing guidelines systems, see Frase, *Just Sentencing*, *supra* note 1, ch. 3. See also Richard S. Frase, *State Sentencing Guidelines: Diversity, Consensus, and Unresolved Policy Issues, in Symposium: Sentencing: What's At Stake For the States?*, 105 *Colum. L. Rev.* 1190 (Special Issue 2005).
- ²³ See Bureau of Justice Statistics, *Felony Sentences in State Courts, 2006—Statistical Tables* (rev. Nov. 22, 2010), available at <http://www.bjs.gov/content/pub/pdf/fssc06st.pdf>.
- ²⁴ See Frase, *Just Sentencing*, *supra* note 1, at 57–69.
- ²⁵ Strong opposition from practitioners is one of the main reasons why non-imprisonment guidelines have never been adopted in Minnesota. See Richard S. Frase, *Sentencing Guidelines in Minnesota, 1978–2003*, 32 *Crime and Justice: A Review of Research* 169–70 (Michael Tonry ed., 2005).
- ²⁶ See Frase, *Just Sentencing*, *supra* note 1, at 57–62.
- ²⁷ For further discussions of the importance of the expressive purpose of punishment, and the use of suspended sentences to achieve it, see Frase, *id.* at 14–15, 19–20, 31–32, and 52–57.
- ²⁸ See American Law Institute, *Model Penal Code: Sentencing, Discussion Draft No. 5*, § 6.09 (April 18, 2013).
- ²⁹ See North Carolina Sentencing and Policy Advisory Commission, *Supplement to Structured Sentencing Training and Reference Manual* (Updated December 1, 2013), at 23.
- ³⁰ See Frase, *Just Sentencing*, *supra* note 1, at 52.
- ³¹ See Frase, *id.* at 58, 62.
- ³² Franklin Zimring & Gordon Hawkins, *the Scale of Imprisonment* 140, 211–15 (1991).