Back to the Future: The Influence of Criminal History on Risk Assessments

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I. INTRODUCTION

Evidence-based models for criminal justice reforms are in vogue. Empirically informed and objectively driven, evidence-based practices offer a welcome displacement of more ideologically oriented policies conditioned upon raw human presumptions about culpability, morality, and future dangerousness.[1] A prominent fixture in the evidence-based practices movement features contemporary risk assessment tools. These tools draw upon statistical methodologies and practices that purportedly permit officials to differentiate offenders at a higher risk of future dangerousness from those at a lower risk. Today, risk assessments inform a host of criminal justice outcomes across jurisdictions, such as the length of sentences, bail or parole eligibility, supervised release conditions, probation/parole revocation, institutional security level, and program assignment.[2] Forensic scientists encourage policymakers to recognize and to prefer robust evidence concerning recidivism risk in order to better allocate criminal justice resources and meet the criminogenic needs of offenders. Still, as a prominent criminologist warns, "the important feature in evaluating the 'evidence' is its quality—its errors, flaws in its application, and violations of the assumptions in the model being applied."[3]

Most critical attention towards the elements incorporated into risk assessment tools has focused on the potential unconstitutionality,

[1] Alfred Blumstein, *Some Perspectives on Quantitative Criminology Pre-JQC: And then some*, 26 J. QUANTITATIVE CRIMINOLOGY 549, 554 (2010).

[2] Michael Tonry, *Legal and Ethical Issues in the Prediction of Recidivism*, 26 FED. SENT'G REP. 167, 167 (2014); Paisly Bender, *Exposing the Hidden Penalties of Pleading Guilty: A Revision of the Collateral Consequences Rule*, 19 GEO. MASON L. REV. 291, 313 (2011).

[3] Blumstein, *supra* note 1, at 554.

statutory illegality, or ethically challenged use of factors that directly or indirectly measure sociodemographic or other immutable characteristics of individuals.[4] Nonetheless, a personal history of criminal conduct is the most common type of factor across risk assessment tools. Reliance upon criminal history in recidivism prediction has remained largely free of scrutiny in academic literature and court filings. This is because the tradition carries little political baggage and, unlike many of the sociodemographic variables that may represent extralegal factors in criminal justice determinations, criminal history is normally considered a legal factor—and thus viewed as an immanently appropriate consideration—in those same decisions.[5]

Since prior offense history is consistently and significantly correlated with recidivism,[6] the presence of such factors in risk adjudication appears reasonable. Realistically, the past has come to be viewed as a proxy to predicting the future. This article introduces and probes a host of issues with the now intersecting uses and consequences of criminal history and future risk ideologies in the criminal justice system. Thus, it entails an evaluation of the science of risk methodologies, its flaws in application, and the integrity of the models' assumptions regarding reliance upon prior offense records. The goal is to raise awareness of the issues so outlined and to instigate a debate about potential responses to ameliorate likely negative effects.

The analysis proceeds as follows. Section II provides a theoretical and historical account of past criminal record and future risk assessments, which have infiltrated and eventually shaped modern criminal justice policies and outcomes, both individually and collectively. The evidence-based practices movement has evolved into one that recycles criminal past as a substantive and procedural proxy for future risk prediction. Section III questions the multiplicative impact caused by risk assessments based on criminal history. The discussion shows that the same criminal history event may, through risk assessment

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[4] *Compare generally* Sonja B. Starr, *Evidence-Based Sentencing and the Scientific Rationalization of Discrimination*, 66 STAN. L. REV. 803 (2014), *and* Kelly Hannah-Moffat, *Actuarial Sentencing: An "Unsettled" Proposition*, 30 JUST. Q. 270 (2013), *and* J.C. Oleson, *Risk in Sentencing: Constitutionally Suspect Variables and Evidence-Based Sentencing*, 64 SMU L. REV. 1329 (2011), *with* Melissa Hamilton, *Risk-Needs Assessment: Constitutional and Ethical Challenges*, 52 AM. CRIM. L. REV. 231 (2015), *and* Tonry, *supra* note 2.

[5] James F. Nelson, *An Operational Definition of Prior Criminal Record*, 5 J. QUANTITATIVE CRIMINOLOGY 333, 333 (1998).

[6] *Infra* note 73.

tools, be counted over and over again. Criminal records often appear as well to represent an unofficial aggravator of punishment. This may be the case, for instance, if an increase in sanctions results from the combination of the present offense plus a criminal record. In addition, Section III raises questions about the sources of data upon which risk tools' criminal history factors are mathematically scored in relation to the tendency of including alleged offenses, acquitted conduct, and juvenile deviancy. In these ways, the critique employs the theme of the movie trilogy *Back to the Future*, starring Michael J. Fox.[7] Fox's character, Marty McFly, is reminded that, when offered a machine that can deliver him to his past life, any changes made during his revisit may alter the future. Here, the theme is useful in its symbolism to indicate a potential reconstruction of an individual's past that affects his future life.

Section IV explores several normative issues with the past-offense-to-future-prediction proxy relationship now existing in evidence-based systems. A sort of "unofficial recidivism aggravator" arguably presents past, present, and/or future consequences in that the result may represent punishment for the recidivist's status as a criminal or as exhibiting poor character. The currently imposed penalty might thereby become disproportionately severe and appear to symbolize a sanction for a hypothetical future crime. Additional issues addressed in Section IV include the potential that criminal history is an unfortunate proxy for race and social disadvantage and the general failure of risk assessment instruments to adequately consider patterns of desistance whereby a prior crime generally loses its empirical significance, particularly as an offender ages. Conclusions follow in Section V.

II. THE ROLES OF CRIMINAL HISTORY AND RISK ASSESSMENT

Contemporary criminal justice practices have incorporated and multiplied the impact of criminal history, as well as future risk prediction, on various decisions and actions by officials. Each of these practices entails its own theories to justify its utility and experienced its own historical trajectory. Still, considerations of individual criminal history and future predictions now often overlap. Today, policies and judgments to constrain dangerousness heavily depend upon past criminal history measures to adjudge future risk of correctional failure and recidivism. This section will begin with a relatively brief overview of the incorporation of and theoretical underpinnings for criminal history

[7] BACK TO THE FUTURE (Universal Pictures 1985, 1989, 1990).

measures in various criminal law and procedure contexts. The more recent and refined conceptualization of risk and the implementation of specific risk assessment strategies are outlined. It is critical to delineate how modernist risk methods have assimilated and amplified criminal history scores as a central component of predicting future behavior, and to recognize the significance of this intersection to various criminal justice outcomes. Consistent with the *Back to the Future* theme, one's (re)constructed past can dictate one's future.

A. Theories Underlying the Role of Criminal History

Consideration of an individual's criminal history has endured a long history in American justice. Officials often consider past offending as relevant to ascertaining culpability for a more current offense, determining a proportional punishment, and constructing correctional conditions considering potential future dangerousness. It is best conceptualized with the nomenclature of the "recidivist premium." The term primarily applies in the context of sentencing, where an increase in punishment for an index offense may be justified merely because the specific defendant had been convicted of a prior crime.[8] There is evidence that the idea of the recidivist premium in sentencing decisions is centuries old – accounts date back to the beginning of mankind through narratives in Biblical,[9] Hebrew, Roman, and other ancient texts.[10] In modern times, recidivist premiums in sentencing persist and are found in both formal policies and informal processes. Informally, decision makers with some discretionary capacity may consider past offending in an often casual manner in doling out sentences. Observers note that traditions for escalating penalties based on criminal history simply makes "common sense"[11] and remain "intuitively appealing."[12]

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[8] George P. Fletcher, *The Recidivist Premium*, 1 CRIM. JUST. ETHICS 54, 54 (1982).

[9] Alexis M. Durham III, *Justice in Sentencing: The Role of Prior Record of Criminal Involvement*, 78 J. CRIM. L. & CRIMINOLOGY 614, 616 (1987) (citing source).

[10] Julian V. Roberts, *The Role of Criminal Record in the Sentencing Process*, 22 CRIME & JUST. 303, 308 (1997) (citing sources thereto).

[11] David A. Dana, *Rethinking the Puzzle of Escalating Penalties for Repeat Offenders*, 110 YALE L.J. 733, 735 (2001); *see also* C.Y. Cyrus Chu et al., *Punishing Repeat Offenders More Severely*, 20 INT'L REV. L. & ECON. 127, 127 (2000) ("That repeat offenders are punished more severely . . . is a generally accepted practice"); Moshe Burnovski & Zvi Safra, *Deterrence Effects of Sequential Punishment Policies: Should Repeat Offenders Be More Severely Punished?*, 14 INT'L REV. L. & ECON. 341, 341 (1994) ("The concept of punishing repeat offenders more severely is strongly rooted. . . . It has been accepted as a major factor underlying the statutory punishment policy in the United States and other countries.").

Examples of official rules popular in recent decades that formally incorporate recidivist premiums include the following: so-called three-strikes laws which trigger mandatory minimums or supplemental increases in sentence length based on the existence of one or more previous convictions; guideline systems that recommend sentencing ranges at the intersection of severity of current offense and criminal history score; and career criminal or habitual offender sentence enhancements.[13]

While "recidivist premiums" traditionally indicates aggravating sentencing factors, this article enlists the term to apply more broadly. It will definitively adopt its use in the sentencing context while also enlarging the concept to incorporate other criminal procedure contexts. Notably, offense record considerations in recent years have influenced decisions in such criminal law areas as the availability of bail, probation conditions, parole release, security level determinations, intensity of programming, and requirements for criminal registries. To the extent that these results also inherently involve potential infringements upon liberty and privacy and are experienced as punishing and labeling, the idea of a premium or an additional price to pay for past behavior feels apposite.

At a high level of abstraction, the importance of a criminal record for various criminal justice decisions is its perceived utility as a useful proxy for adjudging both the individual's greater culpability in committing a newer crime and his risk of future recidivism.[14] The next subsections analyze recidivist premiums using more definitive theories underlying corrections policies. Indeed, the "widespread practical acceptance of recidivist premiums, notwithstanding the question of whether an offender's criminal history ought to affect her penalty for a current offense, has been the subject of heated theoretical debate dating back to Plato."[15]

1. Retribution

The theory of retribution in punishment philosophy is concerned

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[12] Mirko Bagaric, *The Punishment Should Fit* the *Crime — Not the Prior Convictions of* the Person *That Committed the Crime: An Argument for Less Impact Being Accorded to Previous Convictions in Sentencing*, 51 SAN DIEGO L. REV. 343, 345 (2014).

[13] Durham, *supra* note 9, at 617–19.

[14] Julian V. Roberts & Orhun H. Yalincak, *Revisiting Prior Record Enhancement Provisions in State Sentencing Guidelines*, 26 FED. SENT'G REP. 177, 178 (2014).

[15] Talia Fisher, *Conviction without Conviction*, 96 MINN. L. REV. 833, 844 (2012).

principally with blame and desert.[16] For classic retributivists, just punishment is measured by proportionality: the harshness of a punishment is dictated by the severity of the instant offense.[17] The theory of retribution is backward-looking, with no interest in the prevention of future harm. Thus, the retributive philosophy is unconcerned with deterrence, incapacitation, or rehabilitation.[18] Retribution permits punishment for the harm caused; punishment "cannot be inflicted as a means of pursuing some other aim."[19] Traditional retribution philosophy is also quite focused. Strict retributivists do not countenance any form of recidivist premium because they believe a punishment should only consider the current offense.[20]

Nonetheless, some modern just-deserts philosophers envision some role that prior offending history can properly play in determining a proportional punishment, though these scholars provide slightly different accounts to justify their positions. Some retributivists who embrace the

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[16] Douglas Husak, *"Broad" Culpability and the Retributivist Dream*, 9 OHIO ST. J. CRIM. L. 449, 449 (2012).

[17] Husak, *supra* note 16, at 453.

[18] Donna H. Lee, *Resuscitating Proportionality in Noncapital Criminal Sentencing*, 40 ARIZ. ST. L.J. 527, 551 (2008).

[19] Mirko Bagaric, *The Punishment Should Fit the Crime - Not the Prior Convictions of the Person That Committed the Crime: An Argument for Less Impact Being Accorded to Previous Convictions in Sentencing*, 51 SAN DIEGO L. REV. 343, 368 (2014). For retribution, "the justification for punishment does not turn on the likely achievement of desirable outcomes; it is justified even when 'we are practically certain that' attempts to attain consequentialist goals such as deterrence and rehabilitation 'will fail.'" *Id*.

[20] Fisher, *supra* note 15, at 845. "[S]ome scholars take the position that prior convictions should play no role at sentencing, since they are unrelated to the seriousness of the crime or the offender's culpability for the current offense." Roberts & Yalincak, *supra* note 14, at 177 (citing MIRKO BAGARIC, PUNISHMENT AND SENTENCING: A RATIONAL APPROACH (2001)).

> Repeat offender laws have long been challenged by retributivists on the grounds that they penalize an offender's insufficient obsequiousness and that they have nothing to do with the offender's present moral desert as they punish her not for the present act, but for another act already punished. A person who robs another of $ 20 at gun point is no more blameworthy simply because she had five years earlier been convicted of burglary. At most, that person can be said to have ignored the state's admonition five years ago not to engage in certain criminal behavior. Considering that modern retributivism arose from a distrust of what was perceived as rehabilitationism's affinity for hypocritical paternalism, it comes as a surprise that some desert theorists provide even modest support for what amounts to a penalty for recalcitrance.

Markus Dirk Dubber, *Recidivist Statutes as Arational Punishment*, 43 BUFF. L. REV. 689, 705 (1995) (citations omitted).

idea that criminal history deserves some relevance explain it not as a recidivist premium, but in terms of a discount for first-time offenders.[21] Several explanations exist for a first-offender allowance. One is a preference to infer that a defendant without a criminal past simply experienced an uncharacteristic and temporary lapse in judgment.[22] With evidence of prior offending, though, the supposition of a normally law-abiding character is eroded and the discount becomes undeserved.[23] A critique of the lapse theory is that judgments about character would have the unfortunate consequence of theoretically opening the door to evidence of law-abiding character outside of criminal history.[24] Of course, in effect, the first-timer discount operates to permit harsher punishment for recidivists.[25]

Other, nontraditional retributivists articulate a slight variation on the discount orientation. The "progressive loss of mitigation theory" clarifies that harsher consequences for repeat offenders are not explicitly tied to their prior offending. Instead, recidivists simply become disenfranchised from deserving the mercy given to offenders with minimal or no criminal past.[26] After a few transgressions, the individual depletes his entitlement to mitigation and thus deserves to be sentenced to the maximum proportional punishment for the instant offense.[27] In other words, the existence of prior convictions negates the potential for

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[21] Nora V. Demleitner, *Constitutional Challenges, Risk-Based Analysis, and Criminal History Databases: More Demand on the U.S. Sentencing Commission*, 17 FED. SENT'G REP. 159, 159 (2005).

[22] Thomas Mahon, *Justifying the Use of Previous Convictions as an Aggravating Factor at Sentencing*, 2012 CORK ONLINE L. REV. 85, 90 (2012).

> Andrew von Hirsch, the main proponent of the progressive loss of mitigation theory, claims that going soft on first offenders and offenders with a small number of previous convictions is justified by the notion of lapse, which is supposedly part of our everyday moral judgments. He believes that this has its genesis in the fallibility of human nature and the view that a temporary breakdown of human control is the kind of frailty for which some understanding should be shown. Martin Wasik and von Hirsch note that in sentencing, the "lapse is an infringement of criminal law, rather than a more commonplace moral failure, but the logic of the first offender discount remains the same—that of dealing with a lapse more tolerantly."

Bagaric, *supra* note 19, at 370 (citing Martin Wasik & Andrew von Hirsch, *Section 29 Revised: Previous Convictions in Sentencing*, 1994 CRIM. L. REV. 409, 410 (1994)).

[23] Mahon, *supra* note 22, at 90.

[24] *Id* at 93.

[25] Demleitner, *supra* note 21, at 159.

[26] Bagaric, *supra* note 19, at 369.

[27] *Id*.

moderating considerations.[28] Note, though, that the progressive loss of mitigation theory would not recognize any continued increase in punishment for reoffending and thus would not countenance recidivist premiums *per se*.[29] These theorists adhere to the idea that a just punishment must be proportional to the severity of the instant offense, and therefore, even for recidivists, the maximum cannot be higher than that justified solely by the present crime.[30] The difference is that these progressive loss theorists believe in some variation among offenders of similar crimes below that maximum, depending on the absence of a significant criminal history.[31]

Still, other retribution scholars embrace recidivist premiums, though they also provide differing accounts. One conceptualization centers on the retributive concern with an offender's culpability. Here, the argument is that the defendant's prior offenses are relevant to the extent that their existence can assist in arbitrating the offender's culpability for the instant crime.[32] Also, with a prior conviction, the person has been formally warned by the state of the consequences of disobeying the law, and his choice to disregard the law again justifies a greater penalty.[33] Hence, under this reasoning, the recidivist's failure to

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[28] Mahon, *supra* note 22, at 89; *see also Dir. of Pub. Prosecutions v. P.S.*, [2009] I.E.C.C.A. 1 ("Accepting that in relation to the previous offences the applicant has already been punished and should not on the occasion of sentencing for the present offences be punished again for those former offences and that previous offending will normally be regarded as an absence of a mitigating factor.").

[29] Bagaric, *supra* note 19, at 369; Mahon, *supra* note 22, at 90 ("The discount model described above could not justify the recidivist premium as themes such as mercy and forgiveness lie at its heart, as opposed to the idea of desert. The theory explains why there should be some differential treatment between first offenders and those with criminal records. However, it cannot explain the intuition that a recidivist *deserves more* punishment.").

[30] Bagaric, *supra* note 19, at 369; Andrew von Hirsch, *Proportionality and the Progressive Loss of Mitigation: Some Further Reflections*, *in* PREVIOUS CONVICTIONS AT SENTENCING: THEORETICAL AND APPLIED PERSPECTIVES 1, 1 (Julian V. Roberts & Andrew von Hirsch eds., 2010) ("[F]irst offenders and those with very limited numbers of previous crimes should receive a mitigated sentence, but that once this mitigation has been lost, sentence severity should be unaffected by additional convictions.").

[31] Bagaric, *supra* note 19, at 369.

[32] Lee, *supra* note 18; Aaron J. Rappaport, *Rationalizing the Commission: The Philosophical Premises of the U.S. Sentencing Guidelines*, 52 EMORY L.J. 557, 595 (2003).

[33] Fisher, *supra* note 15, at 845; Demleitner, *supra* note 21, at 159 ("[A] prior criminal conviction should lead to enhanced punishment because the offender has already been warned and has proven himself unable or unwilling to follow society's commands.").

curb his criminal proclivities suggests his heightened culpability for the later offense.[34] This justification has also been referred to as the omission theory. The omission liability perspective suggests that a person, once convicted by the state, is placed in a new position with respect to the law and society: he acquires an affirmative obligation to reform his life to avoid future criminality.[35] Extra punishment is warranted if he fails to desist from further offending.[36] Instead of a myopic view upon the instant offense, the omission theory observes the greater pattern of behavior, but still draws upon the retributive concern with culpability.[37]

While not focused on a distinctly retributivist rationale, it is still of import to note that the Supreme Court, in approving a recidivist premium statute, recognized that the state maintains a legitimate interest "in dealing in a harsher manner with those who by repeated criminal acts have shown that they are simply incapable of conforming to the norms of society as established by its criminal law."[38]

2. Utilitarian Concerns

In contrast to retribution's backward-leaning perspective, utilitarian concerns are prospective in nature. The utilitarian mindset considers the potential benefits and consequences to society that a penalty may produce.[39] While the retributivist condones punishment as constructive even to the offender himself, indeed advocating that a person who commits a crime is inviting a punitive consequence, the utilitarian does not necessarily view discipline as valuable for the

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[34] Youngjae Lee, *Repeat Offenders and the Question of Desert, in* PREVIOUS CONVICTIONS AT SENTENCING: THEORETICAL AND APPLIED PERSPECTIVES 49, 49 (Julian V. Roberts & Andrew von Hirsch eds., 2010). "Some authorities suggest the purpose of enhanced punishment statutes is to increase the punishment of persons who have failed to learn to respect the law after suffering the initial penalties and embarrassment of a conviction." John Kimpflen, *Habitual Criminals and Subsequent Offenders* § 2, 39 AM. JUR 2D (citing Hicks v. State, 595 So. 2d 976 (Fla. Dist. Ct. App. 1992); State v. Gallegos, 941 P.2d 643 (Utah Ct. App. 1997)).

[35] Mahon, *supra* note 22, at 91.

[36] *Id*.

[37] *Id*.

[38] Rummel v. Estelle, 445 U.S. 263, 276 (1980).

[39] Lee, *supra* note 18; Richard S. Frase, *Limiting Excessive Prison Sentences under Federal and State Constitutions*, 11 U. PA. J. CONST. L. 39, 43 (2008) ("Utilitarian (or consequentialist) purposes of punishment focus on the desirable effects (mainly, future crime reduction) which punishments have on the offender being punished, or on other would-be offenders, and on the costs and undesired consequences of punishments.").

offender.[40] For utilitarianism, however, punishment can be appropriate because of the ensuing benefits for the individual and society.[41]

The utilitarian classifications include theories involving deterrence, incapacitation, and rehabilitation. Deterrence includes three models. Specific deterrence permits disciplining an individual to dissuade that person from reoffending,[42] while general deterrence permits a penalty to inhibit others from committing a crime.[43] Both specific and general deterrence operate through fear and the human desire to avoid negative consequences.[44] The third variety represents a broader, societal mission. Sanctions are meant as expressive communications to establish and reinforce norms by acknowledging the harms caused by criminal violations and to situate an offense's seriousness within the scheme of collective human existence.[45]

More pointedly, criminal history information is relevant to specific deterrence because "individuals who have been convicted of one crime need enhanced penalties to be optimally deterred from re-offending, for by engaging in criminal behavior in the past, such individuals have revealed their proclivity for criminal activity."[46] Similarly, a recidivist premium is justified as the marginal utility of the deterrence value erodes for repeat offenders as compared to first offenders:

> [W]hen offenders have been subjected to prior criminal punishment, the formal sanction is eroded, resulting in a weaker deterrent effect than for first-time offenders. Individuals with criminal records have lower opportunity costs; the marginal cost of the first years behind bars is lower than the marginal cost of subsequent imprisonment years, and the additional reputation costs entailed in a greater number of convictions decrease as the number of convictions rises.[47]

Utilitarians can also be consequentialist in endorsing recidivist premiums. Extra penalties foster trust in the justice system by limiting the "revolving door" phenomenon in which a repeat offender recycles

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[40] Bagaric, *supra* note 19, at 346.

[41] *Id*.

[42] State v. Hearns, 961 So. 2d 211 (Fla. 2007); State v. Baker, 970 So. 2d 948 (La. 2007).

[43] *Baker*, 970 So. 2d at 948.

[44] Frase, *supra* note 39, at 43.

[45] *Id*. at 43.

[46] Fisher, *supra* note 15, at 844.

[47] *Id*. at 844-45.

through prison doors.[48]

Another utilitarian concern is the use of punishment for incapacitation purposes. Again, prior criminal history is viewed as a proxy for future offending,[49] and thus may signify a need to protect society from those considered likely to be undeterred by the threat of additional penalties. In this respect, recidivist premiums are designed to shield innocent citizens from potential harms by restraining career criminals.[50] From a law and economics vantage, the

> repeat offender has demonstrated by his behavior a propensity for committing crimes. Therefore, by imprisoning him for a longer time we can expect to prevent more crimes during his period of imprisonment than we would do if we imprisoned a first offender, whose propensities are harder to predict, for the same period. The same prison resources "buy" a greater reduction in crime.[51]

Importantly, the Supreme Court has approved the use of recidivist tariffs for deterrence[52] or incapacitation.[53]

The final utilitarian theory concerns rehabilitation. Criminal history is a critical component for rehabilitation models. On the one hand, prior offending is conceived as a surrogate for low rehabilitative potential.[54] On the other hand, the evidence-based practices movement has reintroduced the positive potential of rehabilitation for offenders who are amenable to change. Reliance upon evidence-based correctional programming may lower crime rates. In this new reincarnation, styled creatively as "neorehabilitation," past criminal history is re-envisioned as indicative of criminogenic needs that can be targeted in order to reduce recidivism.[55]

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[48] *Id.* at 845.

[49] BERNARD E. HARCOURT, AGAINST PREDICTION: PROFILING, POLICING, AND PUNISHING IN AN ACTUARIAL AGE 188 (2007).

[50] Kimpflen, *supra* note 34 (citing State v. Cornelio, 84 Haw. 476, 935 P.2d 1021 (1997)).

[51] Richard A. Posner, *An Economic Theory of the Criminal Law*, 85 COLUM. L. REV. 1193, 1216 (1985).

[52] Ewing v. California, 538 U.S. 11, 25 (2003).

[53] *Id.* at 24 (2003) ("Throughout the States, legislatures enacting three strikes laws made a deliberate policy choice that individuals who have repeatedly engaged in serious or violent criminal behavior, and whose conduct has not been deterred by more conventional approaches to punishment, must be isolated from society in order to protect the public safety.").

[54] Fisher, *supra* note 15, at 845.

[55] Jessica M. Eaglin, *Against Neorehabilitation*, 66 SMU L. REV. 189, 193 (2013).

B. History and Risk of Criminal Offending in Policy

In sum, various theories of punishment in correctional contexts either are retrospective in focus (e.g., retribution) or future-oriented (e.g., deterrence and incapacitation). Still, each theory, including rehabilitation, possesses the capacity to incorporate criminal history as a meaningful criterion in a host of criminal justice decisions. Indeed, there is a long tradition for employing criminal history measures to drive correctional policies and to determine individual consequences. More recently, the recent turn in penology[56] has incorporated more refined predictions of future risk into those same policies and decisions. Officials have appropriately engaged science to identify risk prediction technologies within modern evidence-based correctional schemes. Notably, risk technologies have, in turn, tended to rely heavily upon measures of criminal history in their recidivism prediction methods as studies support the correlation between antisocial background and future recidivism.[57] Still, in some sense criminal history is reified in the future risk technologies world. This subsection will briefly discuss the short history of risk assessment in criminal justice, summarize the role of prior offense record, and introduce some of the more popular actuarial risk assessment instruments.

1. Role of Risk in Criminal Justice Decisions

In the mid-twentieth century, the U.S. criminal justice system embraced what was then considered a progressive model that highlighted rehabilitation.[58] A normative turn in the 1980s emanating from political campaigns touting "law and order" justice altered public and legislative opinions and fundamentally reversed the tide away from the rehabilitative model toward tougher sanctions.[59] Another seismic shift has recently gained traction with the evidence-based practices

[56] Malcolm M. Feeley & Jonathan Simon, *The New Penology: Notes on the Emerging Strategy of Corrections and its Implications*, 30 CRIMINOLOGY 449, 450 (1992) (using the term to refer to the movement toward new discourses involving probability and risk, honing systemic internal processes, and deindividualizing techniques in correctional practices).

[57] Christopher Baird, *A Question of Evidence: A Critique of Risk Assessment Models Used in the Justice System*, NAT'L COUNCIL ON CRIME AND DELINQUENCY 7 (2009), http://nccdglobal.org/sites/default/files/publication_pdf/special-report-evidence.pdf.

[58] Douglas A. Berman, *Re-Balancing Fitness, Fairness, and Finality for Sentences*, 4 WAKE FOREST J. L. & POL'Y 151, 158 (2014).

[59] Michael Tonry, *Sentencing in America: 1975–2025*, 42 CRIME & JUST. 141, 146–47 (2013).

movement. The United States' economic woes and its world record incarceration rate have convinced numerous policymakers to adapt again and implement new strategies.[60] The contemporary approach seeks to achieve multiple goals: manage costs and resources, constrain overdependence on imprisonment, utilize effective alternative rehabilitative programming, reduce recidivism risk, and simultaneously improve overall public safety.[61] An evidence-oriented model aims to profit from the best data available via the empirical sciences—to identify and classify individuals based on their potential risk of reoffending and criminogenic needs and to manage offender populations accordingly.[62]

An additional balancing act must be respected. Well-informed policies are critical to achieving a proper balance among interests such as protecting the public and efficiently using government resources, while at the same time respecting individuals' liberty interests.[63] The ideology of risk is now considered at the heart of such a balancing act. Information about a defendant's risk of recidivism informs an expanding number and variety of criminal justice decisions.[64] The risk principle promotes correctional strategies for supervision and treatment that are finely attuned to the individual's risk level.[65] Risk-based philosophies now endorse a "preventive, future-oriented logic of risk."[66]

At least a majority of states currently use risk-based assessments in their sentencing systems.[67] Plus, almost all states use a risk

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[60] *Prison Reform: An Unlikely Alliance of Left and Right*, 408 ECONOMIST 24, 24 (Aug. 17, 2013).

[61] Berman, *supra* note 58, at 164–65.

[62] *Risk/Needs Assessment 101: Science Reveals New Tools to Help Manage Offenders*, PEW CTR. ON THE STATES 1 (2011).

[63] Michael L. Rich, *Limits on the Perfect Preventive State*, 46 CONN. L. REV. 883, 932 (2014); Jay P. Singh et al., *Measurement of Predictive Validity in Violence Risk Assessment Studies: A Second-Order Systematic Review*, 31 BEHAV. SCI. & L. 55, 55 (2013).

[64] Christopher Slobogin, *A Jurisprudence of Dangerousness*, 98 NW. U. L. REV. 1, 1 (2003) ("Dangerousness determinations permeate the government's implementation of its police power.").

[65] Christopher T. Lowenkamp et al., *The Risk Principle in Action: What Have We Learned from 13,676 Offenders and 97 Correctional Programs*, 52 CRIME & DELINQ. 77, 77 (2006).

[66] Mariana Valverde et al., *Legal Knowledges of Risks, in* LAW AND RISK 86, 116 (Law Comm'n of Canada ed., 2005).

[67] Shawn Bushway & Jeffrey Smith, *Sentencing Using Statistical Treatment Rules: What We Don't Know Can Hurt Us*, 23 J. QUANTITATIVE CRIMINOLOGY 377, 378 (2007).

assessment tool at some point in the criminal justice process.[68] The evidence-based movement initially centered on studies indicating that proper programming can assist high-risk offenders in reducing their recidivism rates.[69] In contrast, a more recent realization has highlighted the potential negative corollaries of over programming. According to numerous studies, providing low risk offenders with overly restrictive conditions of supervision, requiring intrusive programming, or placing them with higher-risk inmates can often be counterproductive in that those interventions actually increase recidivism rates in low-risk populations.[70] Thus, risk is considered the modern savior for criminal justice reform in multiple contexts.

2. Reliance Upon Criminal History

Importantly, criminal history is the "staple" of future risk strategies,[71] with the two now converging in critical ways. The situation felicitously imitates the philosophy rhetorically staged by William Shakespeare in his play *The Tempest* in which a major character declares: "[W]hat's past is prologue."[72] The key phrase here is based on the notion that past behavior is predictive of future behavior. Studies somewhat consistently show that prior offense history is predictive of future reoffending.[73] Still, the relationship is not perfect. Empirical work

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[68] Sheldon X. Zhang at al., *An Analysis of Prisoner Reentry and Parole Risk Using COMPAS and Traditional Criminal History Measures*, 60 CRIME & DELINQ. 167, 170 (2014) ("For political and pragmatic reasons, the criminal justice system must consider the likelihood of further violent and nonviolent behavior among those brought to its attention."); Memorandum from Vera Inst. of Just. to Delaware Just. Reinvestment Task Force 4 (Oct. 12, 2011), *available at* https://ltgov.delaware.gov/taskforces/djrtf/DJRTF_Risk_Assessment_Memo.pdf.

[69] Christopher T. Lowenkamp & Edward J. Latessa, *Understanding the Risk Principle: How and Why Correctional Interventions Can Harm Low-Risk Offenders*, TOPICS IN COMTY CORRS. 3, 6 (2004), *available at* http://www.yourhonor.com/dwi/sentencing/RiskPrinciple.pdf.

[70] Lowenkamp et al., *supra* note 65, at 90.

[71] Oleson, *supra* note 4, at 1356.

[72] WILLIAM SHAKESPEARE, THE TEMPEST act 2, sc. 1.

[73] William Rhodes et al., *Recidivism of Offenders on Federal Community Supervision* 12 (2012); U.S. SENTENCING COMMISSION GUIDELINES MANUAL 368 (2008) (indicating criminal history factors included in the Guidelines "are consistent with the extant empirical research assessing correlates of recidivism and patterns of career criminal behavior"); GARY B. MELTON ET AL., PSYCHOLOGICAL EVALUATIONS FOR THE COURTS: A HANDBOOK FOR MENTAL HEALTH PROFESSIONAL AND LAWYERS 316 (3d ed. 2007); Kevin I. Minor et al., *Recidivism Among Federal Probationers—Predicting Sentence Violations*, 67 FED. PROBATION 31, 35 (2003).

on repeat behaviors in general shows variations can occur. Among other mediating factors, opportunity and situational context also affect the replication of prior behavior.[74] For instance, a rapist may not reoffend simply because he is unable to find an available victim. Or, the evidence-based practices initiative may properly reduce risk by focusing on meeting the individual's criminogenic needs and changing his path toward pro-social choices.

The empirical correlation with prospective criminality appears to support recidivist premiums. Correctional guideline systems now commonly apply some type of supervisory enhancement to apply based on criminal record.[75] As a United States Sentencing Commission study released in 2004 concluded, the "empirical evidence shows that criminal history as a risk measurement tool has statistically significant power in distinguishing between recidivists and non-recidivists."[76]

Criminal history measures have become the bedrock of risk assessment practices, too. Criminal history anchors are among what have been referred to as the "big four" criminogenic risk factors for criminal recidivism; the others include pro-criminal attitudes, pro-criminal associates, and antisocial personality.[77] In forensic terms, criminal history is most often considered a static risk factor.[78] But Michael Tonry more appropriately describes criminal history as a "variable marker," which he describes as a fixed characteristic that may be subject to change.[79] Criminal history may be supplemented with additional criminal offending. Criminal history is also modifiable by correcting erroneous information (such as a mistaken notation of an arrest or correction for an official exoneration). This latter variation is consistent with the *Back to the Future* symbolism of reliving and retrofitting the past, albeit with the consequence of altering the future.

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[74] Judith A. Ouellette & Wendy Wood, *Habit and Intention in Everyday Life: The Multiple Processes by Which Past Behavior Predicts Future Behavior*, 124 PSYCHOL. BULL. 54, 61 (1998).

[75] Rappaport, *supra* note 31, at 588–89.

[76] *Measuring Recidivism: The Criminal History Computation of the Federal Sentencing Guidelines*, U.S. SENT'G COMM'N 15 (2004), http://www.lb5.uscourts.gov/ArchivedURLs/Files/08-10643%281%29.pdf.

[77] D.A. Andrews & James Bonta, *Rehabilitating Criminal Justice Policy and Practic*e, 16 PSYCHOL. PUB. POL'Y & L. 39, 46 (2010).

[78] *Id*. at 45.

[79] Tonry, *supra* note 2, at 172 (finding that other examples of risk factors that are often considered static but in reality are subject to change include age, religion, sexual identify, and sexual preference).

3. Risk Assessment Tools

The employment of mostly automated tools—fundamentally actuarial in nature—that capitalize on the ideology of risk is at its prime in terms of its influence across criminal justice domains.[80] The new penology movement has energized a legion of scholars and scientists alike to develop various risk assessment methodologies. Risk assessment as science and practice is presently a competitive industry with both governmental and for-profit businesses issuing a host of instruments that are either generic in nature or targeted to specific groups (e.g., men, children, mentally disordered) or offense types (e.g., sex offenders, domestic abusers).[81] The following concise description is apt: "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."[82] Some of the tools are proprietary, requiring license fees from users.[83] Others are in the public domain, available for use without additional costs.[84]

Actuarial risk methodologies derive statistical models from group samples. Vehicle insurance provides a recognizable illustration. The risk of concern with insurance is a policy claim. Thus, insurance agents are interested in predicting the likelihood of claims being made on the policy. Automobile insurance companies assign policy rates to individual applicants based on predictive statistics derived from historical, group-based claims data. For car insurance, the common relevant factors include age, gender, marital status, vehicle model, and driving record.[85] The general idea of actuarial rankings for any risk at issue is to identify those factors that correlate to the future event at issue. The rankings then attempt to assign appropriate weights to each factor based on the statistical recognition that some factors achieve greater

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[80] *Prediction and Risk/Needs Assessment*, NAT'L INST. OF JUST. 1 (May 2014), https://www.ncjrs.gov/pdffiles1/nij/243976.pdf.

[81] Leon Neyfakh, *You Will Commit a Crime in the Future*, BOS. GLOBE, Feb. 20, 2011, at K1.

[82] Tonry, *supra* note 2, 167.

[83] Susan Turner & Julie Gerlinger, *Risk Assessment and Realignment*, 53 SANTA CLARA L. REV. 1039, 1045 (2014).

[84] *Id*.

[85] John A. Fennel, *Punishment by Another Name: The Inherent Overreaching in Sexually Dangerous Person Commitments*, 35 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 37, 52 (2009).

predictive ability than others.[86] Thus, developers of actuarial instruments manipulate existing data in an empirical way to create rules. These rules combine the more significant factors, assign applicable weights, and create final mechanistic rankings.[87]

Understanding the group-based nature of actuarial assessment tools is crucial. When attempting to determine the relative risk for an individual, the assessor's final score for the person is compared to those in the population(s) upon which the actuarial model was based. The individual's risk level is ranked according to the frequency of the risk having been observed to occur in the development samples.[88]

To return to the automobile insurance example, the insurance agent would input a prospective customer's data into the actuarial model to obtain a comparative risk level based on the experiential claims data from those in the historical sample(s) with similar scores.[89]

Models for estimating recidivism risk are now in their fourth generation. First-generation assessment preceded the turn to the actuarial model and consisted of clinical judgments by mental health professionals.[90] Second-generation assessments introduced scoring instruments of variables that were statistically shown to correlate with recidivism.[91] The focus of second-generation instruments was on risk

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[86] *See* JOHN MONAHAN ET AL., RETHINKING RISK ASSESSMENT: THE MACARTHUR STUDY OF MENTAL DISORDER AND VIOLENCE 142 (2001) (making this conclusion with respect to propensity for violence).

[87] *See* Kevin S. Douglas & Jennifer L. Skeem, *Violence Risk Assessment: Getting Specific About Being Dynamic*, 11 PSYCHOL. PUB. POL'Y & L. 347, 352 (2005) (demonstrating how actuarial instruments use mechanistic algorithm to combine heavily weighted static variables relevant to making ultimate determination of risk).

[88] Fennel, *supra* note 85, at 52.

[89] The basic feature of actuarial risk assessment, as opposed to subjective evaluation, is the use of statistical algorithms to establish risk profiles associated with various groups of individuals that share certain characteristics. Analogous to the underwriting process of a life insurance policy, statistical methods are devised by researchers to weigh varied configurations of factors that are theoretically and empirically associated with reoffending, and then individual offenders are classified into different groups based on their shared similarities in terms of likelihood to reoffend.

Zhang et al., *supra* note 68, at 169.

[90] Tim Brennan et al., *Evaluating the Predictive Validity of the Compas Risk and Needs Assessment System*, 36 CRIM. JUST. & BEHAV. 21, 21 (2009) (noting the first generation "approach relied on clinical and professional judgment in the absence of any explicit or objective scoring rules").

[91] Tracy L. Fass et al., *The LSI-R and the COMPAS: Validation Data on Two Risk-Needs Tools*, 35 CRIM. JUST. & BEHAV. 1095, 1095–96 (2008).

(without consideration of rehabilitation needs), and they were intended to be brief and efficiently scored.[92] Examples of second-generation instruments are the Violence Risk Appraisal Guide (VRAG),[93] Static-99,[94] and the federal Pre-Trial Risk Assessment tool (PTRA).[95] VRAG remains the most popular tool to assess violent recidivism; it contains twelve factors, including age, marital status, and psychopathy.[96] Two factors in VRAG score on criminal history measures: nonviolent criminal history score and failure on prior conditional release.[97] Static-99 is the most widely used for sexual recidivism. It contains ten static factors, including variables respecting victim type, plus age and cohabitation history.[98] Five of the Static-99 variables index criminal offending events, such as number of prior sex offense charges, prior non-contact sex offenses, current non-sexual violence convictions, prior non-sexual violence convictions, and number of prior sentencing dates. A more recently created instrument (though it still qualifies within the second-generation genre) is the federal probation office's PTRA tool. Out of the eleven items that PTRA scores, six deal with prior criminal offenses: number of felony convictions, number of prior failures to appear, pending offenses, current offense type, current offense class, and age at probation interview.[99]

The third generation's scientific advancements entail: (a) a combined actuarial assessment with directed professional judgment, and

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[92] Brennan et al., *supra* note 90, at 22.

[93] Debra A. Pinals et al., *Violence Risk Assessment, in* SEX OFFENDERS: IDENTIFICATION, RISK ASSESSMENT, TREATMENT, AND LEGAL ISSUES 49, 55 (Fabian M. Saleh et al. eds., 2009).

[94] Georgia D. Barnett & Ruth E. Mann, *Good Lives and Risk Assessment: Collaborative Approaches to Risk Assessment with Sexual Offenders, in* GOOD PRACTICE IN ASSESSING RISK: CURRENT KNOWLEDGE, ISSUES AND APPROACHES 139, 140 (Hazel Kemshall & Bernadette Wilkinson eds., 2011).

[95] *Federal Pretrial Risk Assessment Instrument: User's Manual and Scoring Guide*, OFFICE OF PROBATION AND PRETRIAL SERVICES (2013), http://www.pretrial.org/download/risk-assessment/Federal%20Pretrial%20Risk%20Assessment%20Instrument%20User%27s%20Manual%20and%20Scoring%20Guide%20-%202010.pdf.

[96] Jennifer L. Skeem & John Monahan, *Current Directions in Violence Risk Assessment*, 20 CURRENT DIRECTIONS PSYCHOL. SCI. 38, 39 (2011).

[97] VERNON L. QUINSEY ET AL., VIOLENT OFFENDERS: APPRAISING AND MANAGING RISK 237 (1998).

[98] R. Karl Hanson & David Thornton, *Improving Risk Assessments for Sex Offenders: A Comparison of Three Actuarial Scales*, 24 LAW & HUM. BEHAV. 119, 133–34 app. I (2000).

[99] *Federal Pretrial*, *supra* note 95, at 5–10.

(b) integrated static with dynamic factors.[100] Static risk factors normally are historical, unchangeable, and generally not amenable to interventions.[101] Dynamic factors incorporate criminogenic needs, which are often mutable in nature, and therefore may become proper targets for rehabilitative interventions.[102] The Level of Service Inventory-Revised (LSI-R), a third-generation tool,[103] is a structured professional judgment instrument and is the most commonly used generic risk-needs tool across U.S. criminal justice agencies.[104] The LSI-R contains 54 items, ten of which represent various criminal record enhancements, such as prior convictions, prior incarceration, arrests before age 16, and supervision violations.[105]

In the latest iteration, fourth-generation assessments supplemented the risk-needs combination with responsivity principles and a longer perspective on case management (spanning from intake through case closure).[106] "Responsivity is defined as tailoring case plans to the individual characteristics, circumstances, and learning style of each offender."[107] Fourth-generation tools are often automated with technological applications employing algorithmic scoring. The federal probation system developed its Post Conviction Risk Assessment (PCRA) as a fourth-generation, software-based tool.[108] The PCRA scores a variety of static and dynamic factors, including education, employment, substance abuse, family problems, and pro-criminal attitudes.[109] More specifically, PCRA contains six separately scored criminal history items involving offense types, arrests, and supervision

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[100] Fass et al., *supra* note 91.

[101] *Id*. at 1096.

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

[103] Pinals et al., *supra* note 93, at 56.

[104] Memorandum from Vera, *supra* note 67.

[105] David J. Simourd & P. Bruce Malcolm, *Reliability and Validity of the Level of Service Inventory-Revised Among Federally Incarcerated Sex Offenders*, 13 J. INTERPERSONAL VIOLENCE 261, 264 (1998).

[106] Fass et al., *supra* note 91, at 1096.

[107] Winnie Ore & Chris Baird, Beyond Risk and Needs Assessments, NAT'L COUNCIL ON CRIME & DELINQ. 8 (March 2014), http://www.nccdglobal.org/sites/default/files/publication_pdf/beyond-risk-needs-assessments.pdf.

[108] Christopher T. Lowenkamp et al., *The Federal Post Conviction Risk Assessment (PCRA): A Construction and Validation Study*, 10 PSYCHOL. SERVICES 87, 88 (2013).

[109] James L. Johnson et al., *The Construction and Validation of the Federal Post Conviction Risk Assessment (PCRA)*, 75 FED. PROBATION 16, 26 app. 2 (2011).

failures.[110]

The following is a positive reflection upon the proposed value of the current state of risk-needs tools:

> Risk assessment tools now under consideration are more transparent, rely on data, and attempt to regularize th[e] instinct [to predict risk] and subject it to more scientifically rigorous examinations. Ensuring uniform application and the unbiased use of available data, these modern predictive tools are facilitated by the use of "structured, empirically-driven and theoretically driven" instruments.[111]

III. OBJECTIFYING CRIMINAL HISTORY

The general public might surmise that criminal justice officials would naturally represent fair and measured managers who efficiently expend governmental resources. Citizens expect legislatures, law commissions, and the judiciary to implement educated and balanced correctional systems that avoid over-penalization and primarily focus on higher risk defendants. Correctional professionals certainly have extensive experience with classifying and managing their populations with an eye on antisocial proclivity, which in turn may be predicated on prior offending.

Supporters might presume that measures meant to qualify and quantify prior criminal records are ascertainable, transparent, and impartial. As well, proponents might reckon that official records are readily available and constitute trustworthy sources of information. Despite these plausible expectations, the current state of sentencing and other correctional practices serve to objectify criminal history in concerning ways. Indeed, risk assessment tools commonly operate to conflate criminal past with future recidivism potential.

Several concerning issues are revealed in this section. Unfortunately, the criminal history-to-future risk combination has surreptitiously multiplied the impact of prior offending through the guise of what will be colloquially referred to as *n*-tuple counting and pseudo three-strikes policies. Additionally, risk assessment tools' translation of evidence sufficient to compute criminal history measures is questioned

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[110] OFFICE OF PROB. & PRETRIAL SERVS., FEDERAL POST CONVICTION RISK ASSESSMENT: SCORING GUIDE §§ 1.2–1.7 (2011).

[111] Jordan M. Hyatt et al., *Reform in Motion: The Promise and Perils of Incorporating Risk Assessments and Cost-Benefit Analysis into Pennsylvania Sentencing*, 49 DUQ. L. REV. 707, 725 (2011) (citation omitted).

herein. Popular risk instruments tend to accredit as a criminal record any *alleged* offenses, acquitted conduct, and juvenile deviance. As a result, criminal history as a construct is created, objectified, and magnified through systemic, risk-based procedures. This resonates with the movie *Back to the Future.* Marty McFly was warned that the changes he makes during his visit to his past might consequently alter his future.[112] Here, the theme is meant to suggest that officials revisit an offender's past—potentially reframe it incorrectly—and thereby constructively alter the future in terms of the criminal justice consequences to the individual.

A. The Exponential Ratchet of Criminal History

The prior section provided an overview of risk assessment tools and referred to the frequency with which recidivism risk instruments incorporate criminal history-related factors. An appropriate starting place to a critical analysis of these ramifications is the notion of duplication. This issue is based on the recognition that most jurisdictions already incorporated attributes of offense history into various criminal justice outcomes, whether formally or not. As an example, many states include recidivist premiums in their sentencing systems in some way. The sentencing result can occur as a direct component of sentence length determinations, via mandatory minimums, three-strikes laws, career criminal enhancements, or through incorporation of criminal history into sentencing recommendations. Prior convictions have an even longer tenure as an informal driver in discretionary decisions on penalty determinations.[113] Further, criminal history is heavily relied upon in

[112] BACK TO THE FUTURE (Universal Pictures 1985, 1989, 1990).

[113] A nineteenth century legal philosopher opined on these issues:

> The rules as nearly as they can be defined for dealing with old offenders may be thus stated. Careful inquiry should be made into the nature the former charge the length of time that has since elapsed what the prisoner has been doing during the interval if he has been pursuing an honest calling or otherwise in short if this second offence as well as the first wears the complexion rather of *accidental* or *occasional* than of *professional* or habitual crime so it shall prove then one more chance should be given to the convict but of course with a lengthened sentence of imprisonment and with emphatic warning that it is the last escape will have from penal servitude. If on the hand the history of the criminal before and the former conviction or the nature of that or of present crime indicates that he is a *professional* criminal mercy in such case is wasted upon him and is injustice to the community. The truest to both is to remove him for a long period from his habits haunts and associates and to relieve from the presence of one who would certainly continue to prey upon it while he is at large because crime is his profession because he knows

other correctional contexts. Criminal history resonates in responses spanning a defendant's time under correctional control—from pretrial bail decisions through post-sentence release conditions.[114] As a result, the impact of any prior offending behavior can become replicated and multiplied many times over. The replication can potentially lead to disproportionately severe punishment, unnecessary restrictions, or inappropriate programming. For instance, a prior violent offense may mean the defendant is denied bail, sentenced to prison and for a longer period, assigned a high risk security rating in the institution, prohibited from participating in educational and occupational opportunities, denied parole, and/or assigned a longer post-release supervision period with greater restrictions. Of course, these types of duplicative and overlapping outcomes have already been occurring, albeit largely without proper reflection and without measures to curb their multiplicative impacts. The key point here is that these problems are exacerbated when a risk penology regime independently tallies the same or similar criminal history measures and the risk prediction level increases accordingly. Such a reality has seemingly remained unnoticed across criminal justice domains.

1. N-Tuple Counting

The same prior criminal event may operate to lengthen the defendant's penalty both directly (with the criminal history score in guideline sentencing or other official recidivist premiums) and indirectly if the higher actuarial risk result is factored into an even longer sentence and/or other correctional restrictions. The issue is that criminal history may be double-counted. Triple-counting, quadruple-counting, quintuple-counting—and so forth—can also occur. Such an exponential result underlies what is meant herein by the term *n*-tuple. A parole system already formally considers a prior violent offense to be a negative factor in the parole decision. If that same prior violent crime is also computed in a risk assessment score, likely increasing the level of predicted risk result, the impact of the prior act of violence in terms of risk prediction is duplicated in the decision-making process. In other words, the effect of a single incident can be multiplied, albeit without the decision maker

> no other calling and because he prefers it with all its hazards to honest industry.

EDWARD WILLIAM COX, THE PRINCIPLES OF PUNISHMENT: AS APPLIED IN THE ADMINISTRATION OF THE CRIMINAL LAW BY JUDGES AND MAGISTRATES 147–48 (1877).

[114] Fass et al., *supra* note 91, at 1096.

necessarily being cognizant of the overlap. The risk prediction will likely be higher than appropriate and the consequences to the individual may also be magnified.

Another reason for the *n*-tuple effect arises within the risk technologies themselves. Many risk instruments assign points more than once for a single prior criminal event, particularly those that maintain numerous and overlapping criminal offending items in their scoring sheets.[115] For instance, six of the nine variables in a sexual recidivism risk tool with the acronym Mn-SOST developed in Minnesota (and used in other jurisdictions) may have overlapping consequences as all involve convictions, events in prison, and release conditions. A hypothetical offender convicted of stalking and forcing sexual contact with a male victim in a public place and who was released after serving time without supervision would be scored in six of the nine categories.[116] This risk scoring represents a sextuple effect of the same course of conduct.

Additional examples may provide further context for potential *n*-tuple effects. The federal post-conviction tool, PCRA, would double count a juvenile assault arrest.[117] The LSI-R may duplicate by scoring separate measures on prior adult convictions, arrests, charges, parole violations, and other official records of violence.[118] Static-99, the popular sexual recidivism instrument, tallies separately the number of prior sex offenses, any convictions of non-contact sexual offenses, number of prior sentencing dates, convictions for non-sexual offenses, and convictions of non-sexual violence.[119] The California Static Risk Assessment is an automated actuarial tool using rap sheets that is entirely based on a weighted counting of 18 criminal history factors, many of which overlap.[120]

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[115] OFFICE OF PROB. & PRETRIAL SERVS., FEDERAL POST CONVICTION RISK ASSESSMENT: SCORING GUIDE §§1.1-1.7 (2011) (scoring on juvenile arrests; prior misdemeanor and felony arrests; varied offending pattern; supervised release violation; institutional misconduct; age at first admission).

[116] *Minnesota Sex Offender Screening Tool – 3.1 (MnSOST-3.1) Coding Rules*, MINN. DEP'T. OF CORRS. 24 (2012), http://www.doc.state.mn.us/pages/files/large-files/Publications/MnSOST3-1DOCReport.pdf (scoring (1) predatory offense sentence, (2) felony sentence, (3) stalking, (4) unsupervised release, (5) male victim, (6) crime in a public place).

[117] OFFICE OF PROB. & PRETRIAL SERVS., FEDERAL POST CONVICTION RISK ASSESSMENT: SCORING GUIDE §§ 1.3, 1.7 (2011). This event would count a third time as a rated but not scored variable in PCRA. *Id*. at §1.1.

[118] N.S.W. DEP'T. OF CORRECTIVE SERVS., LSI-R TRAINING MANUAL 13–15 (2002).

[119] Hanson & Thornton, *supra* note 98, at 122.

[120] Turner & Gerlinger, *supra* note 83, at 1040.

A state-specific risk model developed in Pennsylvania, one designed for use in sentencing and by parole authorities, adopts another form of double-dipping in which a former arrest can count twice (e.g., in the total number of prior arrests factor and then again, if applicable, in the queries about prior drug arrests or prior property arrests).[121] Pennsylvania's state sentencing commission has at least flagged a potential problem with this result. In an interim report, issued during the agency's current efforts to establish the state's own risk-based regime for sentencing and parole guideline purposes (as required by recent legislation), the Pennsylvania Commission on Sentencing posited:

> [I]s it appropriate to consider factors that are closely linked to those already considered by the guidelines? . . . The issue for utilizing prior arrests is primarily whether counting both prior arrests and prior convictions would be considered "double dipping" and potentially punishing an offender twice for the same conduct (i.e., a prior arrest and prior conviction for the same crime).[122]

Nonetheless, there is no evidence in the public domain that the state commission has further considered, much less resolved, the query agency officials properly raised.

In sum, with current risk assessment actuarial models, the impact of the same criminal history event(s) can become distorted by producing exponential effects. Surely, the resulting risk predictions can, as a result, become unduly inflated without proper attention. Then the responding criminal justice outcome might become more serious or restrictive. Through this guise, the criminal record is reimagined (as in *Back to the Future*) and negatively alters the individual's future. A variation on the theme of a ratchet of future consequences from criminal history is next theorized in the form of unofficial recidivist premiums.

2. Pseudo Three-Strikes Penalties

Outside the context of risk assessment tools, commentators and litigants have challenged the constitutionality of three-strikes type sentencing statutes and career criminal sentence enhancements. These provisions "commonly double, triple, or quadruple the punishment

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[121] John Monahan & Jennifer L. Skeem, *Risk Redux: The Resurgence of Risk Assessment in Criminal Sanctioning*, 26 FED. SENT'G REP. 158, 163 app. 2 (2014).

[122] *Factors that Predict Recidivism for Various Types of Offenders*, PA. COMM'N ON SENT'G 12 (2011), http://pcs.la.psu.edu/publications-and-research/research-and-evaluation-reports/risk-assessment/interim-report-3-factors-that-predict-recidivism-for-various-types-of-offenders/view.

imposed on repeat offenders."[123] It is the case that the Supreme Court has on several occasions ruled that a double jeopardy violation does not occur when the sentence for the instant offense is increased because of prior offending, even when the defendant had previously been convicted and punished for the prior offense.[124] Nonetheless, the Court's reasoning is rather nimble in this regard.

> In repeatedly upholding such recidivism statutes, we have rejected double jeopardy challenges because the enhanced punishment imposed for the later offense is not to be viewed as either a new jeopardy or additional penalty for the earlier crimes, but instead as a stiffened penalty for the latest crime, which is considered to be an aggravated offense because a repetitive one.[125]

Thus, the Court uses rhetorical devices to discount the attribution of additional *punishment*, even though the sentence enhancement is a direct repercussion of the prior conviction.[126] Instead, the supplemental sentence is characterized as representing merely an *aggravator* to the current offense, albeit triggered by the prior offense acting as evidence of a propensity for crime.[127] This justification harkens to the more flexible retributivist argument that prior offending may be appropriately considered as evidence of enhanced culpability for the latter crime. In any event, it is difficult to digest the idea of formal recidivist premiums not qualifying as extra punishment for the former conviction.[128] It is quite possible the Court was concerned with the

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[123] Paul H. Robinson, *Punishing Dangerousness: Cloaking Preventive Detention as Criminal Justice*, 114 HARV. L. REV. 1429, 1435 (2001).

[124] Witte v. United States, 515 U.S. 389, 398 (1995) ("[W]e specifically have rejected the claim that double jeopardy principles bar a later prosecution or punishment for criminal activity where that activity has been considered at sentencing for a separate crime.").

[125] *Id*. at 400 (internal quotation marks omitted).

[126] *Id*. at 400–01 ("[B]y authorizing the consideration of offender-specific information at sentencing without the procedural protections attendant at a criminal trial, our cases necessarily imply that such consideration does not result in 'punishment' for such conduct.").

[127] Kimpflen, *supra* note 34 ("Recidivist statues do not violate the ex post facto clauses of the U.S. Constitution, because they do not punish a defendant for his or her prior convictions, but instead punish the defendant for his or her latest offense on the basis of a demonstrated propensity for misconduct.").

[128] Bender, *supra* note 2, at 314; *see also* Mahon, *supra* note 22, at 95–96 ("Evidence of recidivism alone cannot justify an increase in punishment. What is it about recidivist offending that justifies the increased punishment? Obviously to punish a person twice is unjust and it violates two key virtues of the criminal justice system-that of certainty and

slippery slope. For example, the Court's majority opinion in one of these cases had noted the long history of considering prior antisocial behaviors, whether or not they resulted in formal convictions, when determining sentences: "sentencing courts have not only taken into consideration a defendant's prior convictions, but have also considered a defendant's past criminal behavior, even if no conviction resulted from that behavior."[129] If formal recidivist premium laws would be overturned, all consideration of prior offense history might then be off limits.

Thus, the Supreme Court has sanctioned the idea of formal and informal recidivist premiums. Considering that a prior *conviction*, for which the person has already been punished, and entailing a process which earns a high level of substantive and procedural process,[130] fails to violate double jeopardy in the context of sentencing, then surely the reliance on criminal history for other correctional outcomes does not either. Nonetheless, it remains important to emphasize that the employment of criminal history criteria to increase risk assessment scores may unwittingly be acting as *unofficial* and clandestine three-strikes or habitual offender enhancement. As previously outlined, correctional sanctions escalate in the individual's current situation based, directly or indirectly, on evidence of prior bad acts by driving up risk prediction scores. The term "pseudo three-strikes" is meant to characterize this issue generally. The pseudo three-strikes result is a supplemental form of recidivist premium acting through the *medium* of risk assessment practices.

The potential for an exponential ratchet for prior behaviors through the guise of risk predictions endures, though it is largely overlooked and, therefore, unregulated. Plus, as with the *n*-tuple counting previously posited, the consequences to the individual are real. Society may suffer too, as the cost to the state will unnecessarily rise. Indeed, it is troubling that criminal justice officials, policymakers, academics, and forensic science professionals working with risk assessment have seemingly remained largely oblivious of the *n*-tuple counting and potential pseudo three-strikes effects of combining direct

finality."); GEORGE P. FLETCHER, RETHINKING CRIMINAL LAW 466 (2000) (noting "serious ethical issues in punishing a person more severely on the basis of past crimes already once punished").

[129] Nichols v. United States, 511 U.S. 738, 747 (1994).

[130] Carissa Byrne Hessick & F. Andrew Hessick, *Recognizing Constitutional Rights at Sentencing*, 99 CALIF. L. REV. 47, 53–55 (2011).

criminal history measures with risk predictions, considering the replication possibilities. Probable fallouts are legion and should be more formally considered and debated in the future, including the potential for the following broad concerns: excessive risk attributions; disproportionality in sanctions; lack of transparency; inefficient resource allocation; and unjustified infringement on liberty and privacy interests. In sum, the evidence-based practices movement—meaning the lawyers, policymakers, correctional professionals, and scientists working therein—may be missing important opportunities to critically assess potential flaws in their methodologies and applications and to institute appropriate corrective measures.

3. Ancillary Unintended Consequences

In spite of continued adherenece for various recidivist premiums amongst conservative groups, little empirical evidence exists to support that they function as expected in the first place. There is insufficient confirmatory data that increasing sentence length or using imprisonment to deter and incapacitate offenders predicted to be at high risk are effective at reducing recidivism or crime rates.[131] Further, there is a paucity of empirical research to validate the efficacy of recidivist premium sanctions,[132] which makes their use questionable in a purportedly evidence-based practice system.

Moreover, potential unintended consequences of recidivist premiums have been noted. First, instead of enhanced penalties to deter repeat offenders, they may encourage repeat offenders to employ violent methods to avoid capture.

> [T]here is some evidence that the hefty recidivist premium mandated by the new recidivist laws may encourage the violent behavior it is meant to deter. As police officers from states with

[131] Roberts & Yalincak, *supra* note 14, at 278 n.12 (listing sources); Cassia Spohn & David Holleran, *The Effect of Imprisonment on Recidivism Rates of Felony Offenders: A Focus on Drug Offenders*, 40 CRIMINOLOGY 329, 352 (2002) (finding defendants "sentenced to prison failed more often and more quickly than offenders placed on probation").

[132] Roberts & Yalincak, *supra* note 14, at 278 (citing Lila Kazemian, *Assessing the Impact of a Recidivist Sentencing Premium on Crime and Recidivism Rates*, *in* PREVIOUS CONVICTIONS AT SENTENCING: THEORETICAL AND APPLIED PERSPECTIVES 227 (Julian V. Roberts & Andrew von Hirsch eds., 2010) ("[W]hile this policy [a repeat offense premium] is intended to serve a utilitarian function, the empirical evidence on the incarceration-reoffending link has suggested that cumulative sentencing policies do not fulfil [sic] this mandate.")).

> harsh and wide-ranging recidivist statutes report, an offender who otherwise would not have intended to use violence may change her mind and kill her victim, a police officer, or even a witness to avoid apprehension and a mandatory life sentence without the possibility of parole.[133]

Second, critics have recognized, with the support of research studies, that incarceration often is criminogenic itself, and thus may actually exacerbate recidivism risk.[134] Other experts acknowledge the likely diminishing returns of the increased rate of imprisonment with reductions in crime.[135] At the same time, recidivist premiums may operate to increase the risk of future reoffending by interfering with successful reentry.[136]

> Consider the case of likely recidivists who are disproportionately denied parole or sentenced under enhanced statutes and are therefore disproportionately represented in prisons. The symbolic message associated with this disproportionate representation- that is, with the correct perception that prisons are "filled with recidivists" - is the following: "If you offend once, you are likely to offend again; if you offend twice, it's all over." The result is a powerful symbolic message that turns convicts into even worse offenders-in the public imagination, but also in the reentry context. This too will have the effect of a *self-fulfilling prophecy*, reducing employment and education opportunities upon reentry.[137]

Finally, habitual offender policies are considered partly responsible for the increase in prison population sizes in the United States.[138] These policies contribute to the country's current state of mass

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[133] Dubber, *supra* note 20, at 708.

[134] *See* Francis T. Cullen et al., *Prisons Do Not Reduce Recidivism: The High Cost of Ignoring Science*, 91 PRISON J. 48S, 48S (Supp. 2011) (reviewing studies, concluding "the use of custodial sanctions may have the unanticipated consequence of making society less safe"); Daniel P. Mears et al., *Gender Differences in the Effect of Prison on Recidivism*, 40 J. CRIM. JUST. 370, 375 (2010) (finding imprisonment produced modest criminogenic effect); Robert DeFina & Lance Hannon, *For Incapacitation, There is No Time Like the Present: The Lagged Effects of Prisoner Reentry on Property and Violent Crime Rates*, 39 SOC. SCI. RES. 1004, 1013 (2010) (concluding "any crime-reducing benefits of increased incarceration are completely wiped out by the crime-promoting effects associated with the increasing prevalence of ex-inmates").

[135] FRANKLIN E. ZIMRING, THE GREAT AMERICAN CRIME DECLINE 51–52 (2007); Anne Morrison Piehl & Bert Useem, *Prisons*, *in* CRIME AND PUBLIC POLICY 532, 542 (James Q. Wilson & Joan Petersilia eds., 2011).

[136] HARCOURT, *supra* note 49, at 164.

[137] *Id*. at 30 (emphasis added).

[138] Robert Weisberg, *Reality-Challenged Philosophies of Punishment*, 95 MARQ. L.

incarceration in that "once incarceration reaches a critical level, the criminogenic nature of the prison experience and the resilience of American institutions of criminal justice in reabsorbing and recycling recidivists (*'net-widening'*) reinforce the phenomenon."[139]

B. Nonadjudicated Criminal History

Formal recidivist premiums usually require official convictions to trigger them. Most risk tool measures of past offending do not limit themselves to convictions. Depending on the instrument, a variety of measures are counted, including arrests,[140] charges,[141] parole/probation revocations,[142] other types of supervision violations,[143] incarceration,[144] other official records,[145] or self-report.[146] Generally, coding rules for many instruments do not exclude counting any of the aforementioned even if the individual was otherwise officially exonerated, such as via an acquittal, police decision not to arrest, or prosecutorial declination based on insufficient evidence. In other words, risk instruments tend to

REV. 1203, 1211, 1252 (2012).

[139] *Id*. at 1252 (emphasis added).

[140] Johnson et al., *supra* note 109; N.S.W. DEP'T. OF CORRECTIVE SERVS., *supra* note 118, at 19–20; QUINSEY ET AL., *supra* note 97, at 239.

[141] *Federal Pretrial*, *supra* note 95, at 7; *Minnesota Sex Offender Screening Tool*, *supra* note 116; *Validation of Risk Scale*, PA. COMM'N ON SENT'G 6 tbl. 1 (2013), http://pcs.la.psu.edu/publications-and-research/research-and-evaluation-reports/risk-assessment/interim-report-7-validation-of-risk-scale/view; Hanson & Thornton, *supra* note 98.

[142] N.S.W. DEP'T. OF CORRECTIVE SERVS., *supra* note 118, at 15; QUINSEY ET AL., *supra* note 97, at 238; CHRISTOPHER D. WEBSTER ET AL., HCR-20: ASSESSING RISK FOR VIOLENCE 11 (1997).

[143] Johnson et al., *supra* note 109; Thomas Blomberg et al., *Validation of the Compas Risk Assessment Classification Instrument*, CTR. FOR CRIMINOLOGY AND PUBL. POLICY 15 (2010), http://criminology.fsu.edu/wp-content/uploads/Validation-of-the-COMPAS-Risk-Assessment-Classification-Instrument.pdf; N.S.W. DEP'T. OF CORRECTIVE SERVS., *supra* note 118, at 19–20; QUINSEY ET AL., *supra* note 97, at 238.

[144] N.S.W. DEP'T. OF CORRECTIVE SERVS., *supra* note 118, at 19–20.

[145] *Federal Pretrial*, *supra* note 95; OFFICE OF PROB. & PRETRIAL SERVS., FEDERAL POST CONVICTION RISK ASSESSMENT: SCORING GUIDE §1.1 (2011) ("Count all contact with law enforcement resulting from criminal conduct or status offenses (truancy, curfew violations, run-away). Count arrests and referrals to court for all offenses (including traffic). Consider official records and self-report."); N.S.W. DEP'T. OF CORRECTIVE SERVS., *supra* note 15.

[146] Shannon Toney Smith et al., *Adapting the HCR-20^{V3} for Pre-trial Settings*, 13 INT'L J. FORENSIC MENTAL HEALTH 160, 169 (2014); *Federal Pretrial*, *supra* note 95, at 7; OFFICE OF PROB. & PRETRIAL SERVS., FEDERAL POST CONVICTION RISK ASSESSMENT: SCORING GUIDE §1.3 (2011).

presume that any evidence—even circumstantial—of prior offending behavior must be truthful and accurate as proving the occurrence of such behavior, and accordingly deserves to be tallied to increase the risk profile. This scenario is generally the case regardless of the evidence actually obtained and/or events occurring afterward that might refute such allegations.

Three main problems result. An initial and overarching issue is that such an assessment violates the espoused tenet of western criminal law systems that a person is assumed innocent until proven guilty. As a result, there is a strong argument that evidence of criminality outside of convictions ought not to be relied upon in legal decisions, particularly those that result in significant infringements upon liberty and privacy. Nevertheless, risk instruments generally permit coding for criminal history measures without requiring convictions. Hence, the potential for weak, if not entirely inaccurate, information to guide risk assessment outcomes is real. Add to this vulnerability the prospect that the alleged prior offending may simply replicate discriminatory practices already existing in criminal investigation processes. The latter two concerns are further discussed below.

1. Evidentiary Inadequacy

As the coding for criminal history in actuarial tools often does not require a formal conviction, individuals may score positively for criminal acts that they did not commit. In the law, a simple arrest is insufficient proof that the arrestee actually committed the criminal offense alleged.[147] Arrests frequently "happen[] to the innocent as well as the guilty."[148] A question of reliable evidence also exists with respect to the completeness of records. Convictions typically are well-documented and files kept relatively complete for long periods of time. Outside of conviction data, recordkeeping can be sketchy or the evidence too thin to reasonably score as criminal history events. Thus, counting anything other than convictions when the legal and practical consequences to the defendant may be significant renders risk instrument coding for criminal history variables as subjective, unreliable, and unjust.[149]

The perception that information not rising to the level of

[147] Michael Edmund O'Neill et al., *Past as Prologue: Reconciling Recidivism and Culpability*, 73 FORDHAM L. REV. 245, 267 (2004).
[148] United States v. Zapete-Garcia, 447 F.3d 57, 60 (1st Cir. 2006) (citations omitted).
[149] O'Neill, *supra* note 147.

requiring a conviction is an insufficient source of data concerning criminal history has been forthrightly recognized in sentencing law. As a general rule, "[f]actual matters considered as a basis for sentence must have 'some minimal indicium of reliability beyond mere allegation.'"[150] Also, to meet due process requirements, the sentencing procedure must afford a defendant the opportunity to deny, dispute inaccuracies, or explain the information considered in determining the appropriate sentence.[151]

In terms of criminal history, federal courts in sentencing hearings require independent substantiation of allegations of past offenses, even if the evidence is founded upon official reports.[152] Consistent therewith, the United States Sentencing Commission early in its promulgation of guidelines in the mid-1980s determined that an arrest was insufficient to officially count as prior criminal history for purposes of penalty recommendations.[153] An agency report issued at the time explained that "information on the circumstances underlying past arrests not leading to conviction is frequently not available, and even where it is available it might not be sufficient to withstand legal challenge."[154] A 1991 report by the same federal sentencing agency marked the Commission's continued belief that "there would appear to be serious constitutional obstacles to the use of an arrest record, by itself, to enhance a criminal history score."[155] The federal sentencing institution's

[150] United States v. Matthews, 773 F.2d 48, 51 (3d Cir. 1985) (quoting United States v. Baylin, 696 F.2d 1030, 1040 (3d Cir.1982)).

[151] State v. Hardy, 489 A.2d 508, 512 (Me. 1985); United States v. Leonard, 455 F.2d 949, 951 (9th Cir. 1972); *see also* United States v. Gonzalez-Castillo, 562 F.3d 80, 83 (1st Cir. 2009) (overturning a sentence when the assumption of prior criminal history, which convinced the court to issue a longer sentence for deterrence purposes, was not supported by any evidence); United States v. Jackson, 923 F.2d 1494, 1496–97 (11th Cir. 1991) ("[S]entencing—a critical stage of the proceedings against the accused—the defendant has an opportunity to challenge the accuracy of information the sentencing judge may rely on, to argue about its reliability and the weight the information should be given, and to present any evidence in mitigation he may have.").

[152] *See* United States v. Berry, 553 F.3d 273, 284 (3d Cir. 2009) (listing cases).

[153] U.S. SENTENCING GUIDELINES MANUAL § 4A1.3, at 4.9 (1978) (ordering that "a prior arrest record itself shall not be considered" in criminal history category determinations).

[154] *Criminal History Working Group Report*, U.S. SENT'G COMM'N. 6 (1989), http://www.ussc.gov/sites/default/files/pdf/research-and-publications/working-group-reports/miscellaneous/121989_Criminal_History.pdf.

[155] *Criminal History Working Group Report: Category 0, Category VII, and Career Offender*, U.S. SENT'G COMM'N at 8 (1991), http://www.ussc.gov/sites/default/files/pdf/research-and-publications/working-group-

official position remains the same today.[156] Additionally, courts have ruled that supplemental substantiation is required even if the prosecution has proof from government records that the sentencing defendant had been officially charged[157] or indicted[158] for prior offenses.

Sentencing expert Michael Tonry thus asserts that the "[u]se 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."[159] For the same reason, the incorporation of criminal history factors via risk assessment results should be subject to similar evidentiary standards because it offers a backdoor to the entry of unreliable criminal history information into other justice decisions.

2. Reflecting Investigatory Practices

A complementary reason that official records should not always represent factual substitutes for criminal history in risk assessment practices concerns a history of profiling known criminal offenders. Researchers have noted that "[r]earrests are more reflective of police activities than of the offender's actual criminal involvement. In other words, official records are an imprecise proxy for actual criminal activity."[160] Bernard Harcourt has similarly reflected upon an economic model of criminal law in which profiling based on past offending can elicit efficiencies in policing; law enforcement officials conducting stop and search routines are encouraged to focus attention on higher risk offenders—notably, identified by their past criminal history—to yield expectedly higher arrest rates.[161]

Anecdotal stories signal institutional practices of police harassing known ex-offenders by making questionable arrests as a

reports/miscellaneous/101991_Criminal_History.pdf.

[156] U.S. SENTENCING GUIDELINES MANUAL § 4A1.3(a)(3) (2014).

[157] Townsend v. Burke, 334 U.S. 736, 740 (1948); United States v. Juwa, 508 F.3d 694, 701 (2d Cir. 2007).

[158] *Juwa*, 508 F.3d at 701 ("We therefore adhere to the prescription that at sentencing, an indictment or a charge within an indictment, standing alone and without independent substantiation, cannot be the basis upon which a criminal punishment is imposed. Some additional information, whether testimonial or documentary, is needed to provide evidentiary support for the charges and their underlying facts.").

[159] Tonry, *supra* note 2, at 173.

[160] Zhang et al., *supra* note 68, at 184.

[161] HARCOURT, *supra* note 49, at 165–67.

means of encouraging them to move permanently from the jurisdiction.[162] Similarly, when crimes occur, it is a common investigatory tactic to "round up the usual suspects" for questioning by mining official databases with information on like offenders.[163] As a consequence, counting events outside conviction as indicating prior history can result in a high rate of false positives (constituting type I errors in scientific parlance). The potential for erroneous predictions of recidivists should be a concerning phenomenon from a scientific perspective for evidence-based practice enthusiasts.

Several researchers have focused on the profiling consequences for the group of offenders who are uniquely reviled and also presumed by the public to pose intolerably high risk of recidivism—sex offenders. Still, this evidence can be informative in other contexts. Investigators have noted that using arrest information for risk assessment purposes is particularly problematic for samples of known sex offenders as police are more likely to make arrests based on lesser evidence than typically required due to their presumption of the repeat sex offender.[164] For instance, a study of police arrests found evidence that officers were far more likely to take official action when a particular suspect was believed to have a prior history of sex offenses.[165] Overall, there is substantial evidence that criminal justice authorities introduce a distorted and unrepresentative picture of "officially" known sex offenders when using mere arrest data to indicate recidivism risk.[166] Risk assessments reliant upon official data thereby "inherit the partial or distorted sample of offenders produced by criminal justice systems. Recidivism and risk assessment research cannot produce reliable information about those who commit sex offenses."[167] Instead, this research supports the idea that tallying allegations of past offending, particularly of nonadjudicated crimes, may not represent true criminal history and may instead replicate biased practices of victims, police, and prosecutors, and perhaps, indeed, of society in general.

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[162] MICHAEL D. MALTZ, RECIDIVISM 57 (1984).

[163] *Id*.

[164] Keith Soothill, *Sex Offender Recidivism*, 39 CRIME & JUST. 145, 160 (2010).

[165] Wendy Larcombe, *Sex Offender Risk Assessment: The Need to Place Recidivism Research in the Context of Attrition in the Criminal Justice System*, 18 VIOLENCE AGAINST WOMEN 482, 490 (2012).

[166] *Id.* at 494.

[167] *Id*.

C. Acquitted Conduct

Just discussed was the problematic practice of counting crimes not fully adjudicated in light of potential evidentiary weakness. Perhaps even more disconcerting is that risk assessment instruments often integrate into criminal history measures offenses for which the defendant was officially acquitted after a trial on the merits.[168] This practice is even more dubious in nature because the defendant's charges were subject to formal adjudication and he was found not guilty.

To be sure, an acquittal does not necessarily indicate factual innocence. Some facts supporting guilt may have been present. A not guilty verdict may simply have resulted for other reasons. The prosecutor may not have met the highest evidentiary burden of proof beyond a reasonable doubt, the exclusion of otherwise relevant evidence for constitutional reasons or rules of evidence, or jury nullification, to name a few. In such recognition, even in the formal proceeding of sentencing on a different offense, judges sometimes will consider the allegation of a prior crime for which the defendant was acquitted as long as there is proof at the lower threshold of a preponderance of the evidence.[169] In contrast, risk tools generally will score acquitted conduct as a criminal event without dictating any evidentiary threshold at all and without requiring any additional confirmation of the allegations underlying the (failed) prosecution. The risk assessment system therefore is set up to bolster criminal history scores across the board. Rather than presume that an acquittal negates the allegation, the tools concretize them. Clearly, imbedded therein is an appetite to absorb false positives (which, again, in empirical terms represent Type I errors), evidently in an effort instead to minimize false negatives.

D. Juvenile Records

Many of the instruments score juvenile offenses on similar terms

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[168] Andrew Harris et al., *STATIC-99 Coding Rules: Revised – 2003*, STATIC-99 18 (2003) (expressly scoring acquittals and successful conviction appeals), http://www.static99.org/pdfdocs/static-99-coding-rules_e.pdf. Many instruments render this result through the absence of instructions to exclude acquitted conduct or conviction reversals. *Federal Pretrial*, *supra* note 95, at 5; OFFICE OF PROB. & PRETRIAL SERVS., FEDERAL POST CONVICTION RISK ASSESSMENT: SCORING GUIDE §1.1-1.7 (2011); QUINSEY ET AL., *supra* note 97, at 50–52. In few instances, though, an instrument expressly excludes acquittals. *See* N.S.W. DEP'T. OF CORRECTIVE SERVS., *supra* note 118, at 13 ("If a conviction is appealed it should still be counted unless the current criminal history shows the appeal was successful.").

[169] United States v. Watts, 519 U.S. 148, 156 (1997).

as adult crimes.[170] Indeed, a few instruments retain independently scored variables specifically to add points for juvenile deviance.[171] The introduction of criminal history via risk assessment into decision-making is a virtual backdoor to the use of juvenile offense data as well. This practice would seem to contradict any state law or policy that seeks to shield juvenile records, to limit future consequences for childhood malfeasance, or foster rehabilitative efforts by limiting labeling effects. Moreover, there may be reason to believe the juvenile adjudication process offers even less assurance of factual credibility than adult convictions and can lead to disparities because of conflicting expungement practices.

1. Juvenile Adjudications Versus Adult Convictions

Some commentators contend that there is nothing inherently wrong with counting juvenile convictions in computing an adult's criminal history score.[172] Indeed, studies typically show that young age at the onset of criminal behavior is a positive predictor of future recidivism.[173] One commentator argues that the practice provides certain benefits. Recognizing juvenile crimes beyond childhood may deter juvenile offenders from reoffending as adults because of the increase in the potential punishment and encourages counsel defending juveniles to be more diligent in their representation to counter the increased stakes later in the client's potential criminal life.[174]

However, other experts have alleged that critical discrepancies regarding the procedural necessities between juvenile and adult courts

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[170] *Minnesota Sex Offender Screening Tool*, *supra* note 116; OFFICE OF PROB. & PRETRIAL SERVS., FEDERAL POST CONVICTION RISK ASSESSMENT: SCORING GUIDE §1.3-1.7 (2011); N.S.W. DEP'T. OF CORRECTIVE SERVS., *supra* note 118, at 13–14; QUINSEY ET AL., *supra* note 97, at 239.

[171] OFFICE OF PROB. & PRETRIAL SERVS., FEDERAL POST CONVICTION RISK ASSESSMENT: SCORING GUIDE §1.7 (2011); N.S.W. DEP'T. OF CORRECTIVE SERVS., *supra* note 118, at 14; WEBSTER ET AL., *supra* note 142.

[172] *See* United States v. Davis, 48 F.3d 277, 279 (7th Cir. 1995); United States v. Johnson, 28 F.3d 151, 154–55 (D.C. Cir. 1994).

[173] Alfred Blumstein & Kiminori Nakamura, *Redemption in the Presence of Widespread Criminal Background Checks*, 47 CRIMINOLOGY 327, 350 (2009) ("Younger starting age generally points to a longer time necessary to become comparable with a person of the same age from the general population.").

[174] Benjamin Price, *The Sixth District of the California Court of Appeal Throws a Curveball: The Use of Juvenile Adjudications as Strikes in California Post*-People v. Nguyen, 12 CHAP. L. REV. 107, 124 (2008).

render juvenile adjudications less reliable.[175] Children are provided no constitutional right to a jury trial,[176] and "[j]uvenile courts often follow evidentiary and procedural rules less rigorously; proceedings are characterized by more frequent procedural errors and are less adversarial than criminal court proceedings."[177] Courts have disagreed whether juvenile adjudications are less fair or reliable despite not enjoying identical protections. Still, the general consensus from state and federal courts is that juvenile proceedings are substantially similar to adult adjudications in the most relevant aspects to qualify as criminal history events to increase punishment.[178] Nonetheless, there is queasiness about placing importance on juvenile deviancy; significant legal consequences may follow. This is exemplified by the commonality of state policies that permit the expungement of juvenile records.

2. Inconsistency Due to Variances in Expungement Practices

The official erasure of a past criminal justice event can apply to adults, but it is more frequently applied in the case of children. The juvenile system, more so than the adult regime, is often designed to focus on rehabilitation as a primary philosophy, and children are commonly viewed as immature offenders with a greater chance of reformation. Thus, it seems appropriate to discuss the potential impact of the expunging or sealing of records on risk assessment practices within the juvenile context.

Jurisdictions vary dramatically in their policies of expunging or sealing juvenile records. These include such issues as age of eligibility, type of qualifying offenses, and the required length of an offense-free period.[179] Such differences can lead to disparities across jurisdictions in accounting for criminal history in risk assessment tools among otherwise similarly-situated defendants.[180] On the other hand, risk tools generally do not call for excluding evidence of prior offenses from their rated

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[175] Richard E. Redding, *Using Juvenile Adjudications for Sentence Enhancement under the Federal Sentencing Guidelines: Is it Sound Policy?*, 10 VA. J. SOC. POL'Y & L. 231, 233 (2002).

[176] McKeiver v. Pennsylvania, 403 U.S. 528, 545 (1971).

[177] Redding, *supra* note 175, at 243.

[178] United States v. Orona, 724 F.3d 1297, 1303–05 (10th Cir. 2013) (citing state cases); State v. Parker, No. 97841, 2012 Ohio App. LEXIS 4154 (Ohio Ct. App., Oct. 11, 2012); People v. Nguyen, 46 Cal. 4th 1007, 1020 n.10 (2009) (citing federal cases).

[179] Redding, *supra* note 175, at 253.

[180] *Id*. at 254.

factors despite being officially sealed or expunged.[181] Indeed, the federal Post-Conviction Risk Assessment user guide specifically instructs raters to be flexible in the data used to discover juvenile offenses, warning that drawing on "[c]ollateral contacts will be important, since juvenile records are often not available."[182] But this inclusion of prior record data, despite laws that otherwise seek to shield them, is an additional unfortunate consequence to risk tool practices.

This section addressed concerns with how criminal history is objectified in risk assessment practices. Whereas criminal justice outcomes across a variety of realms already rely upon prior offending behavior, the recent incorporation of risk assessment ratings serves as a clandestine means for criminal history to cause a ratchet effect in terms of its potential exponential significance. The analysis also highlighted potential flaws with how risk tools recognize and itemize prior criminal events in terms of evidentiary lapses and the probability of increasing false positives. The next part reveals additional reasons to suggest that officials should reassess their risk assessment practices. Certain normative controversies with the evidence-based practices movement as related to its emphasis on criminal history are outlined, and empirically-based concerns are also embedded therein.

IV. NORMATIVE ISSUES WITH HISTORY LEADING RISK ASSESSMENT

Recent debates within practitioner and academic circles about the current state of risk factors in criminal justice often orient toward the issue of basing risk predictions in part on immutable characteristics. Commentators have contested or ceded to risk assessment tools to the extent they score on variables directly or indirectly involving demographic factors (e.g., race, gender, age, family background) or that otherwise entail characteristics over which an individual is perceived to maintain little control (e.g., mental disorder, neighborhood conditions,

[181] OFFICE OF PROB. & PRETRIAL SERVS., FEDERAL POST CONVICTION RISK ASSESSMENT: SCORING GUIDE §1.1 (2011) ("Count all contact with law enforcement resulting from criminal conduct or status offenses (truancy, curfew violations, run-away). Count arrests and referrals to court for all offenses (including traffic). Consider official records and self-report."); Hanson & Thornton, *supra* note 98, at 134 App. A note a; QUINSEY ET AL., *supra* note 97, at 253–54. Still, juvenile arrests are rated, not scored, in PCRA assessments. OFFICE OF PROB. & PRETRIAL SERVS., FEDERAL POST CONVICTION RISK ASSESSMENT: SCORING GUIDE §1.1 (2011).

[182] OFFICE OF PROB. & PRETRIAL SERVS., FEDERAL POST CONVICTION RISK ASSESSMENT: SCORING GUIDE §1.1 (2011).

social class).[183] In addition, a few academics have taken aim at the potential deficiencies in reliability and validity measures of current risk assessment tools considering the significant fallout that decisions reliant upon them can have for individual defendants.[184] Still, with few exceptions, others have not challenged the forthright repurposing of criminal history in risk assessment methodologies. Indeed, many presume that prior offending factors remain constitutionally justifiable.[185] Two exceptions arise with prominent scientists conversant in risk assessment who ethically object because criminal record operates as a proxy for race.[186] This section will briefly recount the potential implications on race and social disadvantage that both risk assessment and criminal history engender. Before then, this part takes up the gauntlet by identifying and exploring additional normative issues with the conflation of criminal history and future risk in risk-based practices which have received less recent attention by legal, policy, and scientific professions. The issues herein entail proportionality of penalties, the harbinger of punishing status, failing to adequately account for patterns of desistance, and the combination of criminal history and future risk for representing proxies for demographic characteristics.

A. Proportionality

Policies to increase sanctions for past criminal acts may violate proportionality norms.[187] In sentencing, criminal history enhancements that substantially augment sentences can operate to destabilize normative messages on the relative severity of crimes. "What a

[183] *Supra* note 4 and sources cited therein.

[184] *See generally* Melissa Hamilton, *Adventures in Risk: Predicting Violent and Sexual Recidivism in Sentencing Law*, 47 ARIZ. ST. L. J. 1 (2015) (enumerating empirical issues with popular risk assessment instruments for violent and sexual recidivism, namely Static-99 and VRAG); Kelly Hannah-Moffat, *Actuarial Sentencing: An "Unsettled" Proposition*, 30 JUST. Q. 270 (2013) (discussing logical and methodological limitations with risk tools); Melissa Hamilton, *Public Safety, Individual Liberty, and Suspect Science: Future Dangerousness Assessments and Sex Offender Laws*, 83 TEMP. L. REV. 697 (2001) (reviewing scientific flaws and adversarial bias in sexual recidivism risk assessment tools).

[185] Dawinder S. Sidhu, *Moneyball Sentencing*, 56 BOSTON COLL. L. REV. 671 (2015); Starr, *supra* note 4, at 872.

[186] Tonry, *supra* note 2, at 171 ("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."); *see generally* HARCOURT, *supra* note 49 (criticizing predictions based on criminal history for constituting a proxy to race).

[187] Tonry, *supra* note 2, at 171.

community chooses to punish and how severely tells us what (or whom) it values and how much."[188] If a defendant convicted of a minor offense receives a harsher sentence than one convicted of a heinous felony due only to a differential in criminal history category, the apparent imbalance may appear to the public paradoxical.[189] Similarly, if two defendants convicted of the same offense draw dramatically divergent sentences, the system would seem to undermine the goals of general deterrence by sending mixed messages concerning the potential punishment for committing that offense.

Sentence length and supervisory restraints in the American criminal justice system are already criticized as overly severe.[190] The evidence-based movement, which in reality works to enhance those same negative attributes, can easily turn irrational. A strong cultural backlash to maintaining an overbearing criminal justice system may erupt that can also harm a country's reputation.

> State punishment that disregards its rational limitations turns the state's punishment power against itself because it violates the public norms embedded in the very criminal law it purports to enforce. Unjustified punishment for crime is itself a crime because unjustified state violence violates the criminal law's norms against illegitimate violence as does any other form of violence.[191]

America might well stand virtually alone in employing high recidivist premiums in its criminal justice system. Other common law countries either do not incorporate similar enhancements or strictly constrain them.[192]

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[188] Dan M. Kahan, *Social Meaning and the Economic Analysis of Crime*, 27 J. LEGAL STUD. 609, 615 (1998).

[189] 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.

Richard S. Frase, *Recurring Policy Issues of Guidelines (and* Non-*Guidelines) Sentencing: Risk Assessments, Criminal History Enhancements, and the Enforcement of Release Conditions*, 26 FED. SENT'G REP. 145, 152 (2014).

[190] Tonry, *supra* note 59, 80; A.B.A., *Commission on Effective Criminal Sanctions*, 22 FED. SENT'G REP. 62, 63 (2009).

[191] Dubber, *supra* note 20, at 692.

[192] Roberts & Yalincak, *supra* note 14, at 181 ("[A]cross a range of common law jurisdictions prior convictions are less important than in most state guidelines.");

B. Sanctioning Hypothetical Crime

Critics of a risk-based criminal justice system, one in which predictions can dictate sanctions or restrictions, charge that such a system inherently results in punishing an individual for potential future behavior.[193] That is, it might be considered to constitute a criminalization of the hypothetical crime (i.e., a precrime). And with risk technologies being developed on group-based data, and thus de-individualized, the scheme has been described by a reporter in the *Boston Globe* as merely representing "mechanical crime prediction."[194] The same reporter titled his article "You Will Commit a Crime in the Future" and analogized the practice of risk assessment to the science-fiction world of the film *Minority Report*.[195] The plot of the movie involves the detection of precognitions of crime and the prosecution and punishment of the individual for his thought crime even though he might not have then been consciously aware of his future plan.[196]

Supporters of interventions based on future recidivism risk assessment, though, contend that it is not punishment *per se* that officials are pursuing, but merely an exercise of the state's duty to protect the public by implementing preventive detention options.[197] Critiquing the use of risk assessment to sanction hypothetical future crime is appropriate as a general matter. Nonetheless, this discussion will be tuned more specifically to risk assessment as informed by criminal history.

1. Preventive Detention

Risk assessments are used in punitive determinations such as

Michael Tonry, *Race, Ethnicity, and Punishment, in* THE OXFORD HANDBOOK OF SENTENCING AND CORRECTIONS 53, 77 (Joan Petersilia & Kevin R. Reitz eds., 2012) (noting that unlike most countries which increase sentences for new crimes by a few months for prior convictions, the United States' recidivist premiums often double or triple sentences); JULIAN V. ROBERTS, PUNISHING PERSISTENT OFFENDERS: EXPLORING COMMUNITY AND OFFENDER PERSPECTIVES 116 (2008) (comparing sentencing laws in several other countries where prior offenses lead to much smaller increases in punishment).

[193] Hannah-Moffat, *supra* note 184, at 277; Michael Marcus, *MPC—The Root of the Problem: Just Deserts and Risk Assessment*, 61 FLA. L. REV. 751, 753 (2009); MODEL PENAL CODE, Sentencing § 6B.09(2) comment e (Discussion Draft No. 4, 2012).

[194] Neyfakh, *supra* note 81.

[195] *Id*.

[196] *Id*.

[197] Michael H. Marcus, *Sentencing in the Temple of Denunciation: Criminal Justice's Weakest Link*, 1 OHIO ST. J. CRIM. L. 671, 675–76 (2004).

whether to incarcerate, lengthen a sentence, deny parole, enhance restrictions, or require registration. Yet critics argue that it seems unfair to penalize a person just for the *potential* of future behavior.[198] From a theoretical perspective, these future risk-based practices deny the specific deterrence ability of the immediate conviction, sentence, or programming. They tend to negate broader notions of free will as well. Humans are fundamentally unpredictable. There can be no certainty as to whether a person will or will not commit some speculative future act. A policy that permits aggravated discipline for a hypothetical, future offense is akin to an informal scheme of inchoate crimes. Imperfectly, such a policy disregards criminal law's otherwise fundamental elements of proving a culpable mental state (*mens rea*) coupled with voluntary conduct (*actus reus*). The crime is merely hypothetical; the consequences to the individual, however, are very real. A commentator has observed:

> [D]ecisions to impose restrictive sanctions of one type or another on convicted offenders who have completed their sentence can result in wrongful "convictions" in a practical sense. It matters little to such offenders whether they are technically convicted of a new offence when subject to further incarceration or other punitive sanctions at the conclusion of the index sentence. In this situation they are still incarcerated or have their liberty curtailed in other ways. The same argument applies to those convicted of offenses who are denied parole on the basis of the judgments of parole boards that they pose an unacceptable risk to the community should they be released on parole.[199]

In contrast, advocates for enhanced responses to potential future offenders prefer to use different wording in which they isolate the scheme from criminal law, along with procedural requirements attendant to criminal prosecution. Again, notice the use of a preventive detention regime substituting for punishment. A state judge, who is a strong defender of risk assessments, does not conceptualize the use of incapacitation for high-risk offenders as punishment for future crimes.[200] Instead, he supports preventive detention as capitalizing upon the existence of a past criminal offense. He also supports utilizing risk assessment results to manage those prisoners who pose an unacceptable

[198] Hannah-Moffat, *supra* note 184, at 277; Marcus, *supra* note 193, at 754.

[199] Ian R. Coyle, *The Cogency of Risk Assessment*, 18 PSYCHIATRY, PSYCHOL. & L. 270, 270 (2011) (internal citations omitted).

[200] Marcus, *supra* note 193, at 754.

threat to the community if freed.[201] Further, advocates of incapacitation in the form of preventive detention openly support the adoption of criminal history as a proxy for future dangerousness.[202]

Despite engaging the guise of preventive detention, officials disregard other procedural and substantive mechanisms that ought to accompany such a regime. A critic of preventive detention policies helpfully points out additional requirements that should be implemented with such a scheme:

> First, if the justification for detention is dangerousness, then logically the government ought to be required periodically to prove the detainee's continuing dangerousness. If the dangerousness disappears, so does the justification for detention. However, if the detention is characterized as deserved punishment for a past offense, there is little reason to revisit the justification for the detention . . . . Second, if a person is detained for society's benefit rather than as deserved punishment, the conditions of detention should not be punitive . . . . Third, prevention-justified restraint should logically be limited to the minimum required to ensure the community's safety . . . . Finally, consistent with the preventive detention principle of minimum restraint, a detainee should be entitled to treatment if it can reduce the length or intrusiveness of the restraint.[203]

Further, preventive detention offers the regrettable potential for a slippery slope. Paul Robinson, a former commissioner with the U.S. Sentencing Commission, has observed that "if incapacitation of the dangerous were the only distributive principle, there would be little reason to wait until an offense were committed to impose criminal liability and sanctions; it would be more effective to screen the general population and 'convict' those found dangerous and in need of incapacitation."[204] Preemptive programming could be enforced if the preventive detention scheme is purported to be based on a rehabilitation model. Although as Robinson further suggests, this might be a slippery slope: "Screening of the [general] population would determine those people likely to commit future offenses absent rehabilitative treatment, followed by the imposition of liability and sanctions to compel the

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[201] *Id.*

[202] Ted Sampsell-Jones, *Preventive Detention, Character Evidence, and the New Criminal Law*, 2010 UTAH L. REV. 723, 727 (2010).

[203] Robinson, *supra* note 123, at 1446–47.

[204] *Id.* at 1439–40.

required treatment and thereby to avoid the anticipated crime."[205] The potential future of preventive models just outlined becomes too close to the irrational world encapsulated in the pre-crime criminal justice system embodied in the movie *Minority Report*.

It should be noted that the guise of the preventive detention regime to justify incapacitating those viewed as high-risk for hypothetically offending violates evidence-based practices for an additional reason. As appropriately recognized, "at present there is no empirical data to [justify] 'sacrific[ing] one offender's liberty in the hope of increasing the future safety of others."[206] Preventive incapacitation, then, may become simply too subjective, value-laden, and preemptory.

2. Group-Based Attributions

Additional impediments arise whereby recidivism risk assessment tools were normed on the groups the researchers studied.[207] As a result, group-based data, fundamentally, cannot reliably provide information about the individual's risk.[208] The reason for the potential mismatch is what has been nicknamed the "group to individual" or "G2*i*" challenge.[209] The "G" represents the discipline of science that studies a phenomenon at the group level; the "*i*" indicates that the law, conversely, seeks to use science to understand an individual.[210] The misapplication in an attempt to connect the two, the G2*i* trajectory, is not entirely understood by legal practitioners. Therefore, law-oriented professionals often place too much emphasis on the risk tool results in judging the individual level of risk. Group-based data can provide inferences about the group(s) upon which it was derived, but cannot diagnose any specific individual.[211]

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[205] *Id.* at 1440 n.41.

[206] Orhun Hakan Yalincak, *Critical Analysis of Acquitted Conduct Sentencing in the U.S.: "Kafka-Esque, "Repugnant," "Uniquely Malevolent" and "Pernicious"?*, 54 SANTA CLARA L. REV. 675, 706 (2014) (citing ANDREW ASHWORTH, SENTENCING AND CRIMINAL JUSTICE 85 (5th ed. 2010)).

[207] Hamilton, *supra* note 184, at 37.

[208] Christopher Slobogin, *Prevention as the Primary Goal of Sentencing: The Modern Case for Indeterminate Dispositions in Criminal Cases*, 48 SAN DIEGO L. REV. 1127, 1147 (2011).

[209] David L. Faigman et al., *Group to Individual (G2i) Inference in Scientific Expert Testimony*, 81 U. CHI. L. REV. 417, 420 (2014).

[210] *Id*.

[211] Brad Johnson, *Prophecy with Numbers: Prospective Punishment for Predictable*

Another scientific reality regarding risk assessment methodologies is also typically not appreciated in the law. The risk *prediction* tools were based on research that itself was not designed with a *future* orientation. In other words,

> [v]irtually all research that presents a scheme to predict dangerous behavior (be it future offending, violence, substance use, or another undesirable outcome) is not technically predictive. Rather, . . . these are better thought of as "post-diction" studies, in which offenders are retrospectively classified into groups based on measures of past behavior.[212]

Another statistical impediment exists: the G2*i* challenge of exploiting actuarial risk results to arbitrate the individual defendant's own risk position.

> The actuarial method compares similarities of an individual's profile to the combined knowledge of the past events of a convicted group of . . . offenders. An individual may share some, but typically not all, of the characteristics of the original sample. Hence, applying the results of an actuarial scale to an individual can have the effect of reducing the predictive accuracy of the scale. This is known as the "statistical fallacy effect."[213]

A related complaint regarding the G2*i* challenge applies to criminal justice penalties based on risk: the person is not necessarily being sanctioned on his own merits. Penalizing a person via risk assessment derived from group data means that punishment becomes situated on shared group characteristics and thereby is too de-individualized.[214] The scheme is akin to punishing someone for what other, purportedly statistically-matched persons have done.[215]

C. Punishing Status

An alternative construction to framing the idea of sanctioning the hypothetical crime via the proxy of criminal history is to conceive of the issue as one of penalizing an individual for his status. Here, the criminalizing status is one presumed to be indicative of future dangerousness. A couple of overlapping frames can be explored in this

Human Behaviour?, 7 UTS L. REV. 117, 129 (2005).

[212] Kathleen Auerhahn, *Conceptual and Methodological Issues in the Prediction of Dangerous Behavior*, 5 CRIMINOLOGY & PUB. POL'Y 771, 772 (2006).

[213] Leam A. Craig & Anthony Beech, *Best Practice in Conducting Actuarial Risk Assessments with Adult Sexual Offenders*, 15 J. SEXUAL AGGRESSION 193, 203 (2009).

[214] Hannah-Moffat, *supra* note 184, at 277.

[215] Oleson, *supra* note 4, at 1390.

idea of exploiting incapacitating options based on perceived status. The status-oriented perspectives are that of a "criminal" or one based on his (assumed) deviant character. Each potential status is formed on the existence of past offending behavior, is presumed causative of future antisociality, and is deemed fixed in nature.

1. Being a "Criminal" – A Status Offense?

Two constitutional issues arise with criminalizing an individual for his status. The United States Supreme Court in the case of *Robinson v. California* held that it was constitutionally impermissible to impose criminal punishments based on mere status.[216] Robinson had been convicted of a California statue that rendered it a criminal offense to "be addicted to the use of narcotics."[217] One of the Court's aversions appeared to be the state's concession that a person could be continuously guilty of a criminal offense that targeted one's chronic status.[218] The second potential impediment is the Double Jeopardy Clause of the Fifth Amendment, which prohibits re-punishing an individual for the same offense. Despite recidivist premiums and risk-based correctional interventions triggered by criminal history, supporters simply reframe the argument. Thus, in defense of the decisions that remove recidivist premiums from double jeopardy territory, the status formulation has been described as follows:

> Statutes imposing enhanced punishment on recidivists do not create a substantive offense, nor do they enhance the punishment of one of the prior crimes used as a basis for treating the offender as a habitual offender. They merely create a status which is a vehicle used to enhance the criminal punishment that otherwise would be imposed for the specific crime the accused is now charged with committing.[219]

Consequently, the role of the prior conviction in increasing a sentence is explained as merely additional, justifiable punishment for the current offense. Further exploiting the careful selection of words and their relevant connotations to justify imposing increased restrictions on those considered at high future risk—based largely on past behavior—is this rephrasing: "One can 'restrain,' 'detain,' or 'incapacitate' a

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[216] Robinson v. California, 370 U.S. 660, 666–67 (1962).
[217] *Id*.
[218] *Id.* at 666.
[219] Kimpflen, *supra* note 34.

dangerous person, but one cannot logically 'punish' dangerousness."[220]

Still, others see through the pretense exercised to avoid constitutional issues. Critics contend that recidivist premiums inherently criminalize status in order to extend the state's ability to punish, coerce, and dominate.[221] It appears more reasonable to submit that:

> [I]t is not clear whether the courts' refusal to apply status-crime jurisprudence to sentencing is judicially well-founded. This is particularly true where the issues of status used in sentencing extend far beyond the crime for which the defendant is ostensibly being sentenced. Certainly, the same rule of law-based concerns that disfavor the outright criminalization of status—the inherent threat to legal generality and its ancillary norms and the concomitant ability of the state to use this mechanism to individuate its sovereign power -are just as operative where status is used in punishment. In fact, they may be more operative at the point where punishment is actually imposed. Again, in this context it is not simply that status is made relevant to punishment; with habitual offender laws status is completely decisive without any rational inquiry into the circumstances of the prior conviction. In other words, there seems to be no functional difference between giving the status of being a criminal enormous marginal relevance in sentencing, as is the case with habitual offender laws, and embracing more forthrightly that these statutes make it a crime to be a criminal.[222]

Practices that amount to punishing the status of being a criminal, without admitting to making this status a crime, is even more troubling. The intentional blurring of the lines in traditional criminal law frees officials from the procedures normally attendant to a criminal prosecution.[223] The apprehension cited in *Robinson* should be equally unsettling in this context – where the crime of being a criminal based on prior record would seem to constitute a continuous offense.

The rhetoric of the political campaign to adopt recidivist premium laws supports the underlying desire to further censure one for his socially-constructed master status—being a criminal. The history of the movement shows that those targeted for recidivist premium laws "were always objectified as criminals. At best they were felons, repeat offenders. More often they were predators or 'dirtbags.' Never did they

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[220] Robinson, *supra* note 123, at 1432.

[221] Ahmed A. White, *The Juridical Structure of Habitual Offender Laws and the Jurisprudence of Authoritarian Social Control*, 37 U. TOL. L. REV. 705, 707 (2006).

[222] *Id.* at 735–36.

[223] *Id*. at 736.

have a human identity beyond their criminal record."[224] Moreover, in enhancing consequences for a criminal record, the government exalts its power and mastery, whereby

> the state essentially arrogates to itself the right to cast criminality, and with this, the parameters of its license to assert its most salient powers of coercion, as a matter of status. Criminality is keyed to the phenomenological condition of being a criminal type. In this scheme, particular acts or transactions are reduced from forming the essential basis of criminal liability and the boundary of criminal sanction to merely providing a mechanism for confirming such a condition.[225]

2. A Character-Based Approach

A similar conceptualization to consider is whether punishing a status based on criminal record represents a character-based attribution. American criminal justice in various ways has seemed to refocus from illegal actions to dangerous individuals.[226] Further, as the orienting dogma of this article should attest, a person with a criminal record is presumed dangerous, one especially deserving contempt and fear. The criminal is conceived "in terms of degeneracy, avarice, malice, and lust."[227] He engenders in others "a more primal or organic repulsion, having to do with the dirtiness and degeneracy of the recidivist."[228]

Justice Stevens previously approved this type of character-based doctrine, opining that:

> [A] person who commits two offenses should . . . be punished more severely than one who commits only one, in part because the commission of multiple offenses provides important evidence that the *character* of the offender requires special punishment, and in part because the character of the offense is aggravated by the commission of multiple offenses.[229]

A debate among retributivists exists on the legitimacy of this character-based approach. A prominent retribution theorist suggests that a second-time offender bears greater culpability by demonstrating a

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[224] *Id.* (citing Samuel H. Pillsbury, *A Problem of Emotive Due Process: California's Three Strikes Law*, 6 BUFF. CRIM. L. REV. 483, 515 (2002)).

[225] White, *supra* note 221, at 739.

[226] Sampsell-Jones, *supra* note 202, at 723.

[227] HARCOURT, *supra* note 49, at 190.

[228] *Id*.

[229] Witte v. United States, 515 U.S. 389, 410 (1995) (Stevens, J., dissenting) (emphasis added).

"character trait" in repeatedly disregarding others' rights.[230] "This approach views a prior record as a factor used to assess the defendant's character, presumably on the assumption that character has some relatively fixed quality that can be measured. The question, in short, is reduced to whether this defendant has an evil character, and how evil."[231] Others disagree on retributivist grounds. One author contends that a character-based approach would be a slippery slope: such an approach would likewise authorize evidence in addition to criminal history that could attest to character, a regime in which strict just desert philosophers would likely disapprove.[232]

Then there is the point, consistent with double-jeopardy-type complaints previously discussed: "[A] character-based approach cannot explain why treating a prior record as an aggravating factor is not equivalent to punishing the defendant twice for the same bad character."[233]

D. Informal Statute of Limitations

A concern that challenges the empirical legitimacy of evidence-based practices involves temporality. Risk assessment technologies generally qualify a past criminal act no matter how dated. The practice undercuts scientific principles as recidivism studies consistently show that the predictive ability of a prior offense decays over time and that many offenders actually desist from further criminal activities. The typical failure to place any statute-of-limitations-type of time restriction on prior crimes also ignores the age-crime curve in which people often naturally age out of criminal law violations. Further, risk assessment tools that do not consider dynamic factors ignore rehabilitation successes that should realistically drive down individual recidivism risk.

1. Decay

Statistical analyses show that individuals who have committed crimes in the past are more likely, on average, to reoffend later on in time.[234] Supporters of policies that do not appreciate any temporal limitation on criminal history measures also contend that "[i]t is unclear

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[230] Rappaport, *supra* note 31, at 599 (2003) (regarding Andrew von Hirsch).
[231] *Id.*
[232] *Id.* at 600.
[233] *Id.*
[234] Megan C. Kurlychek et al., *Enduring Risk? Old Criminal Records and Predictions of Future Criminal Involvement*, 53 CRIME & DELINQ. 64, 80 (2007).

why a conviction, merely because it is dated, ought to be excluded from the criminal history calculation, especially when the offender has had no pause in his criminal activity over time."[235] Still, while undoubtedly many instances of persistent recidivists exist, any presumption that the vast majority of offenders pose a constant and lifelong risk is not supported by empirical evidence.

Correspondingly, studies show significant decay in the predictive ability of a prior criminal event. A past crime's predictive salience fades over time.[236] Thus, the record of a criminal event appears to provide mainly a short-term correlation to recidivism.[237] Of even more import, the longer the person remains crime-free, the risk of criminal offending greatly decreases as time passes, though the degree obviously varies depending on the type of crime and history of the individual.[238] This pattern of declining risk profiles applies even to categories of offenders that risk assessment tools often consider high-risk, like sex offenders.[239] In general, the empirical picture regarding patterns of recidivism indicates that most offenders who have remained

[235] O'Neill et al., *supra* note 147, at 293.

[236] Joanna Amirault & Patrick Lussier, *Population Heterogeneity, State Dependence and Sexual Offender Recidivism: The Aging Process and the Lost Predictive Impact of Prior Criminal Charges over Time*, 39 J. CRIM. JUST. 344, 351 (2011).

[237] Kurlychek, *supra* note 234, at 80 ("The problem is that a recent criminal record seems to be far more predictive of short-term future behavior than older criminal records from many years ago."); Rappaport, *supra* note 31, at 592 ("[T]he utilitarian has a ready and plausible explanation – the predictive effect of a prior record likely diminishes with age. Common sense suggests that a recent prior record is more likely to indicate future risk than a crime committed twenty years ago, followed by a long period of apparently law-abiding conduct.").

[238] Megan C. Kurlychek et al., *Long-Term Crime Desistance and Recidivism Patterns—Evidence from the Essex County Convicted Felon Study*, 50 CRIMINOLOGY 71, 71 (2012) (finding evidence of a trajectory of desistence in a sample of felons in a northeastern county); Blumstein & Nakamura, *supra* note 173, at 327 (concluding from recidivism study of offenders first arrested in New York in 1980 for robbery, burglary, or aggravated assault that "[r]ecidivism probability declines with time "clean," so some point in time is reached when a person with a criminal record, who remained free of further contact with the criminal justice system, is of no greater risk than a counterpart of the same age—an indication of redemption from the mark of crime").

[239] R. Karl Hanson et al., *High-Risk Sex Offenders May Not Be High Risk Forever*, 29 J. INTERPERSONAL VIOLENCE 2792, 2792 (2014) (finding "sexual offenders' risk of serious and persistent sexual crime decreased the longer they had been sex offense–free in the community" and "[w]hereas the 5-year sexual recidivism rate for high-risk sex offenders was 22% from the time of release, this rate decreased to 4.2% for the offenders in the same static risk category who remained offense-free in the community for 10 years").

offense-free for any appreciable period will eventually become low risk.[240] Indeed, with sufficient time elapsed, the non-recidivist's risk of reoffending becomes roughly equivalent to the risk of those in the public who have never offended.[241]

Overall, recidivism studies contradict the popular belief that a significant majority of criminals remain at high risk of recidivism and that the risk remains constant.[242] All of this empirical knowledge strongly calls for recidivism premiums and risk assessment tools to curtail the use of criminal history from a temporal perspective. Regardless of the theoretical choice to justify reliance upon criminal history to prevent future dangerousness, there is no evidentiary basis to count all prior offenses or assume a fixed risk profile.[243] A few reasons to distrust the constancy assumption are that an individual's propensity to reoffend may vary. As examples, the potential reward of offending may vary by circumstances, the individual may experience fluctuating levels of self-control, and antisocial individuals may encounter variations in rational thought in weighing consequences and benefits.[244] In sum, a criminal past does not always portend a recidivist future.

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[240] Blumstein & Nakamura, *supra* note 173, at 349 ("The risk of recidivism declines with time clean, so we know that a person who has stayed clean for an extended period of time must be of low risk.").

[241] [R]isk of recidivism for a cohort of offenders returning to the community peaks fairly quickly and then diminishes considerably with the passage of time. Based on this consistently observed empirical pattern of criminal recidivism, we suggest that there may be a point at which the risk of a new criminal event among a population with a prior record becomes similar to the risk of a criminal event among individuals who have not offended in the past.

Kurlychek et al., *supra* note 234, at 70.

[242] Hanson et al., *supra* note 239; Murat C. Mungan, *The Law and Economics of Fluctuating Criminal Tendencies and Incapacitation*, 72 MD. L. REV. 156, 162–63 (2012) ("[A]n overwhelming majority of previous analyses assume that criminals have constant tendencies to commit crime and that the only benefit of imprisonment is deterrence.").

[243] Roberts & Yalincak, *supra* note 14, at 183 ("Keeping priors alive for the purposes of sentencing well beyond a decade is hard to justify on retributive or utilitarian grounds . . ."); Frase, *supra* note 189, at 152 ("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 . . ."); Dubber, *supra* note 20, at 707 ("[E]very repeat offender provision should exclude the consideration of stale convictions. Whatever notice a conviction and punishment may give an offender, its effect surely will dissipate at some point. Three serious felonies in the course of fifty years do not make a life of crime.").

[244] Mungan, *supra* note 242, at 186.

2. Desistance

A concept closely associated with the decaying risk level is the idea of desistance.[245] The slight difference is that desistance is viewed as a process in which the recidivism rate continues to decrease over time to a point where a crime-free existence becomes a stable trait.[246] Desistance is considered generally achieved when the recidivism rate declines to near zero.[247] A Bureau of Justice Statistics study of prisoners released in 30 states in 2005, perhaps the best embodiment of a nationally representative sample to date, found an overall pattern of desistence with risk of recidivism steadily declining over time after release.[248] Positively, the "general tendency for recidivism risk to decline over time is among the best replicated results in empirical criminology."[249]

Desistance studies can provide useful information to risk predictions. The available empirical research tends to negate the presumptions of chronic criminal behavioral patterns and uniform recidivism risk. Experts exploring the literature have formulated recommendations about the appropriate length of time that a prior criminal event can remain somewhat useful to risk predictions. For example, researchers reflected that:

> [W]e are skeptical that blanket decision rules based exclusively on whether someone has a criminal record will provide useful information for behavioral predictions. Instead, our analyses suggest that decision makers should place information about criminal records into a context that pays close attention to the recency of the criminal record as well as the existence of a criminal record. That is, if a person with a criminal record remains crime free for a period of about [seven] years, his or her risk of a new offense is similar to that of a person without any criminal record.[250]

Interestingly, other investigators have concurred with the seven-year tolling. Desistence research indicates that risk profiles at the seven-

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[245] For more information about the theories and empirical studies concerning criminal career trajectories and desistance, *see generally* JOHN F. MACLEOD ET AL., EXPLAINING CRIMINAL CAREERS: IMPLICATIONS FOR JUSTICE POLICY (2012); KEITH SOOTHILL ET AL., UNDERSTANDING CRIMINAL CAREERS (2009).

[246] Kurlychek et al., *supra* note 238, at 72.

[247] Kurlychek et al., *supra* note 238, at 73.

[248] Matthew R. Durose et al., *Recidivism of Prisoners Released in 30 States*, DEP'T OF JUST., BUR. OF JUST. STATISTICS 7 fig. 2 (2014), http://www.bjs.gov/content/pub/pdf/rprts05p0510.pdf.

[249] Kurlychek et al., *supra* note 238, at 75.

[250] Kurlychek et al., *supra* note 234, at 80.

year mark of a crime-free life for known offenders are similar to those of persons without prior convictions.[251] As further explained by a legal academic, the

> reasons why these outdated sentences [should] not [be] counted is rather simple: they do not capture the individual's current threat matrix, and an individual's desert for prior crimes has grown stale. Put in individual autonomy terms, the older sentences may not be indicative of the internal progress that the offender has made over time.[252]

i. Age-Crime Curve

Age is also highly relevant in decay and desistance models. For a variety of offenses, studies indicate consistent and distinct patterns in terms of aging. Young people are far more likely to commit most types of crimes and the risk usually declines thereafter.[253] Still, the pattern is not entirely linear across the lifespan. The "age-crime curve" accurately assesses research findings:

> The work on age-crime curves shows that very large percentages of young people commit offenses; rates peak in the midteenage years for property offenses and the late teenage years for violent offenses followed by rapid declines. For most offenders, a process of natural desistance results in cessation of criminal activities in the late teens and early 20s.[254]

Overall, "a common theme of life course criminology is the finding that a majority of one-time offenders do not go on to lead lives of crime but indeed age out of, or otherwise desist from, criminal activity."[255] For this reason, the United States Sentencing Commission has suggested that factoring criminal history along with age would improve the predictive validity for recidivism.[256]

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[251] Roberts & Yalincak, *supra* note 14, at 184 (citing Lila Kazemian, *Assessing the Impact of a Recidivist Sentencing Premium on Crime and Recidivism Rates, in* PREVIOUS CONVICTIONS AT SENTENCING 227 (Julian V. Roberts & Andrew von Hirsch eds., 2010)) (indicating research has "demonstrated that offenders with seven crime-free years are no more likely to reoffend than people with no prior convictions. In other words, [prior history] enhancements beyond the seven-year mark carry no crime preventive benefits, although they may well exacerbate disproportionate minority offender impacts.")).

[252] Sidhu, *supra* note 185.

[253] Gary Sweeten et al., *Age and the Explanation of Crime, Revisited* 42 J. YOUTH & ADOLESCENCE 921, 921 (2013).

[254] Tonry, *supra* note 59, at 182.

[255] Kurlychek et al., *supra* note 234, at 69.

[256] *Measuring Recidivism: The Criminal History Computation of the Federal*

Unfortunately, neither the federal Sentencing Commission nor many other criminal justice agencies have explicitly incorporated age-crime curve data into recidivist premiums or into risk assessment tools.[257] Several instruments increase risk rating to adjust for a youthful age.[258] Few, though, control for the back-end to materially reduce risk scores as offenders approach or exceed middle-age.[259] Institutional practices remain entrenched in reifying criminal history as a whole in recidivism predictions with a presumption that evidence of a criminal past retains value over a lifespan. Yet, the results are inconsistent with a true evidence-based culture and lead to the unnecessary incapacitation of many offenders who would otherwise have simply desisted as they aged.

Paul Robinson uses the term "prior-record cloak" to signify the reliance upon criminal history as a proxy for future dangerousness and a weak substitute for evidence of actual risk.[260] He criticizes the incongruous decisions that result: "The prior-record cloak leads us to ignore younger offenders' future crimes when they are running wild, and to begin long-term imprisonment, often life imprisonment under 'three strikes,' just when the natural forces of aging would often rein in the offenders."[261] Instead, Professor Robinson suggests that a more "rational and cost-effective preventive detention system would more readily detain young offenders during their crime-prone years and release them for their crime-free older years."[262]

Policies that cumulate criminal history points over the

Sentencing Guidelines, U.S. SENT'G COMM'N 16 (2004), http://www.lb5.uscourts.gov/ArchivedURLs/Files/08-10643%281%29.pdf.

[257] Marie VanNostrand & Kenneth J. Rose, *Pretrial Risk Assessment in Virginia*, LUMINOSITY, INC. 13 (2009), https://www.dcjs.virginia.gov/corrections/riskAssessment/assessingRisk.pdf.

[258] *Federal Pretrial*, *supra* note 95, at 10 (variable for age at interview); OFFICE OF PROB. & PRETRIAL SERVS., FEDERAL POST CONVICTION RISK ASSESSMENT: SCORING GUIDE §1.7 (2011) (containing a category for young age at onset of current supervision); Harris et al., *supra* note 168, at 23 (increased risk rating for young age at interview).

[259] *But see* QUINSEY ET AL., *supra* note 97, at 239 (containing factor to deduct points as the offender's age at index offense increases with increments of -1 age 28-33, -2 age 34-38, 03 over age 38); Susan Turner et al., *Development of the California Static Risk Assessment (CSRA): Recidivism Risk Prediction in the California Department of Corrections and Rehabilitation*, UC IRVINE CTR. FOR EVIDENCE-BASED CORRS 5 tbl. 3 (2013) (indicating decreasing number of risk points in a linear fashion).

[260] Robinson, *supra* note 123, at 1429, 1451.

[261] *Id*.

[262] *Id*.

defendant's lifetime without time restrictions present a further obstacle to the efficient use of resources. Obviously, older people have more time to compile offending behaviors.[263] As a consequence, as they age, prior offenders can achieve a criminal history score that overstates their risk (by ignoring the age-crime curve) or misrepresents their antisocial past (by obscuring the frequency and/or timeframes of prior criminal life). For example, risk tools might rate at high risk both: (a) a young person who committed three felonies in a short time span; and (b) an older person who committed three felonies over decades, the last of which dated far in the past at the time of assessment. Evidence from the age-time curve would suggest the actual risk profile would likely be disparate, but most risk tools would obscure that reality.

Certainly, policies dependent upon cumulative criminal history that ignore the age-crime curve in terms of decay and desistence patterns are hobbled by additional consequences. "By their very nature, recidivist statutes often do not catch up with an offender until after she no longer is in her crime prime."[264] Further, "[c]onfining people after they would have desisted from crime is in any case inefficient; it also may be criminogenic and operate to extend criminal careers of people who would otherwise have desisted."[265]

3. Dynamic Factors

Positive efforts at desistance should be affirmatively rewarded as studies show they reduce culpability and risk.[266]

> The unqualified use of adult criminal history, while reflective of individual choice and a physical identity that is constant over time, does not contemplate the possibility that the individual may change over time and that his or her threat to the public and moral desert may change as well. To subject the individual for the actions of the past, without the requisite meaningful connection to those incidents, would have the consequence of needlessly placing the offender in Zeno's paradox and rendering his or her internal progress a more distant prospect.[267]

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[263] Shawn D. Bushway & Anne Morrison Piehl, *The Inextricable Link Between Age and Criminal History in Sentencing*, 53 CRIME & DELINQ. 156, 157 (2007).

[264] Dubber, *supra* note 20, at 711.

[265] Tonry, *supra* note 59, at 182.

[266] Roberts & Yalincak, *supra* note 14, at 184.

[267] Sidhu, *supra* note 185. Zeno was an ancient Greek philosopher who articulated multiple paradoxes concerning logic, math, physical, and philosophical. Andrew Ushenko, *Zeno's Paradoxes*, 55 MIND 151, 151 (1946). The author indicates that what

The third- and fourth-generation risk assessments, by definition, fittingly incorporate at least some dynamic measures that implicate rehabilitative successes. Regrettably, the first- and second-generation risk tools do not score rehabilitation progress and thus fail to adequately capture data that would otherwise provide relevant information indicative of declining risk levels. Risk outcomes that result from those tools may therefore be inaccurate in the direction of overestimating recidivism potential. Similarly, risk-based policies heavily engaged with criminal history as a proxy and that ignore dynamic factors will suffer the same weaknesses.

E. Proxy to Demographic Factors

Recidivism risk assessment often operates to systemically prejudice disadvantaged groups.[268] It may be the case that members of the underclass, because of situational barriers to pro-social achievement, are statistically more likely to resort to crime. Recidivist premiums thereby may honestly, yet disproportionately, ensnare marginalized individuals as such policies are

> overwhelmingly concentrated on those people who exist at the intersection of economic deprivation and racial exclusion—the so-called "underclass." For these 'rejects of market society,' arrest and criminal conviction are not only much more likely than for more socially secure groups, these experiences are facts of life. For many denizens of the underclass, criminality is a rational, relatively normal response to the social conditions in which these people are mired.[269]

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he means by Zeno's paradox in this context is that an "individual's ability to reach a sufficient point of personal development is continuously frustrated." Sidhu, *supra* note 185, at 61.

[268] Zhang et al., *supra* note 68, at 169 ("Actuarial risk assessment has gained much notice and acceptance in the criminal justice system as a tool to facilitate decision making, despite concerns over applying group-based attributes to predict individual behavior and risk of continued marginalization of sizable groups of populations already at the fringes of the society.").

[269] White, *supra* note 221, at 741–42.

> The criminalization of criminality is an exercise in asserting more strongly the general, if not indelible, criminality of the poor and the socially oppressed. If being socially marginalized has always come with a preordination of criminality, habitual offender laws extend and formalize that condition, making past indicia of criminality like prior convictions iron clad bases of future punishment.

Id. *See also* Dubber, *supra* note 20, at 690 (1995) ("Insofar as [the recidivist premium' results in the mere shift to and containment of public and private violence in prisons and

On the other hand, the systemic disadvantage may not actually replicate actual criminal offending but may be a byproduct of inequitable policing patterns. Thus, risk assessments'

> reliance on arrest records may also exacerbate sentencing disparities arising from economic, social and/or racial factors. For example, officers in affluent neighborhoods may be very reluctant to arrest someone for behavior that would readily cause an officer in the proverbial "high crime" neighborhood to make an arrest. A record of a prior arrest may, therefore, be as suggestive of a defendant's demographics as his/her potential for recidivism or his/her past criminality.[270]

More discretely, dependence upon criminal history factors in risk predictions perpetuates systemic disservice to racial and ethnic minority groups who are otherwise entitled to protected status under equal protection law.[271] Recidivist premiums policies' use of prior evidence of offending exacerbate historical experiences in police investigation, arrest, prosecution, and criminal sentencing.[272]

> 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.[273]

When juvenile records are incorporated into criminal history measures, further racial disparities become unavoidable as minority boys are overrepresented at all stages of the juvenile adjudication processes.[274] Critics contend that "[r]acial discrimination in arrest,

certain urban minority communities, it is internally inconsistent and racially discriminatory.").

[270] United States v. Berry, 553 F.3d 273, 285 (3d Cir. 2009).

[271] Tonry, *supra* note 2, at 173; Roberts & Yalincak, *supra* note 14, at 179; Bernard E. Harcourt, *Risk as a Proxy for Race*, 27 FED. SENT'G REP. 237, 237 (2015)("we should resist the political temptation to embrace the progressive argument for risk-prediction instruments because their use will unquestionably aggravate the already intolerable racial imbalance in our prison populations.").

[272] Nancy J. King, *Sentencing and Prior Convictions: The Past, the Future, and the End of Prior-Conviction Exception to* Apprendi, 97 MARQ. L. REV. 523, 546 (2014).

[273] Tonry, *supra* note 2, at 173.

[274] Redding, *supra* note 175, at 251.

sentencing, or parole decisions, which is unambiguously prohibited on normative grounds, is also empirically wrong as a basis for decisions about active offenders."[275]

Bernard Harcourt is adamant about the existence of evidence substantiating that "risk has collapsed into prior criminal history, and prior criminal history has become a proxy for race."[276] Indeed, Harcourt outlines that the risk instruments used in the early twentieth century to guide parole decisions explicitly used race and nationality as rating factors.[277] After the civil rights movement in the 1960s when criminal justice authorities became cognizant of the political sensitivity to race-based decision-making, direct measures of race and ethnicity were removed.[278] However, he points to two changes implemented to act as newer proxies for race in risk assessment tools: (1) a reduction in the number and variety of risk factors overall; and (2) an increased emphasis on criminal history.[279]

V. CONCLUSIONS

Today, few would doubt that the U.S. criminal justice system is overpopulated, overburdened, and too costly. The adoption of evidence-based practices by legislators, criminal justice officials, and correctional practitioners is a commendable way to ameliorate the problems with the criminal justice system. Scientific data and knowledge are appropriate sources to educate and improve justice policies and programs. The issues highlighted herein explicitly addressed the convergence between criminal history measures and future recidivism risk that has emerged from evidence-based practices. Certainly, my proposal is not to reject empirically informed methods in their entirety. Instead, my hope is to reveal, highlight, and question the multiple consequences that the past-future orientation has created, and thereby initiate dialogues concerning

[275] Alfred Blumstein & Jacqueline Cohen, *Characterizing Criminal Careers*, 237 SCI. 985, 990 (1987).

[276] Harcourt, *supra* note 271, at 237; *but see* Jennifer Skeem, *Risk Technology in Sentencing: Testing the Promises and Perils (Commentary on Hannah-Moffat, 2011)*, 30 JUST. Q. 297, 301 (2013) (opining that it is not clear that criminal history is a proxy for race, pointing to studies that show risk tools perform well in terms of predictive ability across racial groups and economic classes and countering that studies relying upon alternative datasets, such as victimization and self-report confirm the association between race and crime).

[277] Harcourt, *supra* note 271, at 238.

[278] *Id* at 239.

[279] *Id*.

the issues raised. Actuarial risk assessment has unfortunately amplified the impact of criminal records, and, using questionable sources, can qualify as evidence of past offending. As illuminated by the *Back to the Future* theme, the potential reconstruction of an individual's prior record often may have the unfortunate effect of altering an individual's future.

A main purpose of the neorehabilitation movement was to revive and update the professional knowledge of best practices to reduce recidivism while still protecting the public from high-risk criminals. Yet, the reification of criminal history as outlined herein may undermine both the proportionality of penalties resulting therefrom and the promises of scientific studies. For example, desistance patterns are insufficiently incorporated within risk assessment tools. This article also explored the theoretical potential to re-label—and thereby normatively challenge—the perspective of the past dictating the future embodied in risk technologies in terms of sanctioning the hypothetical future crime or one's criminal status or character. In the end, it is the case that one's past is related to one's present and future. Nonetheless, the notion of free will and insights from evidence-based studies signify that any presumption of the "once-a-criminal, always-a-criminal" mantra is unwarranted.