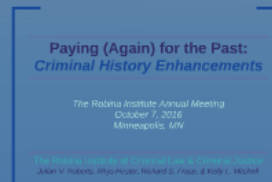




## Paying (Again) for the Past: *Criminal History Enhancements*



UNIVERSITY OF MINNESOTA



# ***PAYING FOR THE PAST:*** The Consequences of Criminal Convictions



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CLE: This event is approved for 5.25  
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# **Paying (Again) for the Past:** ***Criminal History Enhancements***

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*The Robina Institute Annual Meeting  
October 7, 2016  
Minneapolis, MN*

---

**The Robina Institute of Criminal Law & Criminal Justice**  
*Julian V. Roberts, Rhys Hester, Richard S. Frase, & Kelly L. Mitchell*

# Paying (Again) for the Past: *Criminal History Enhancements*

Introduction



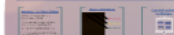
Impacts



Justifications

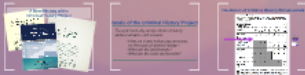
2017

Conclusion & Recommendations





# *Introduction*



# A Brief History of the Criminal History Project

Julian V. Roberts

## The Role of Criminal Record in the Sentencing Process

Men's evil man  
water. (Shakesp

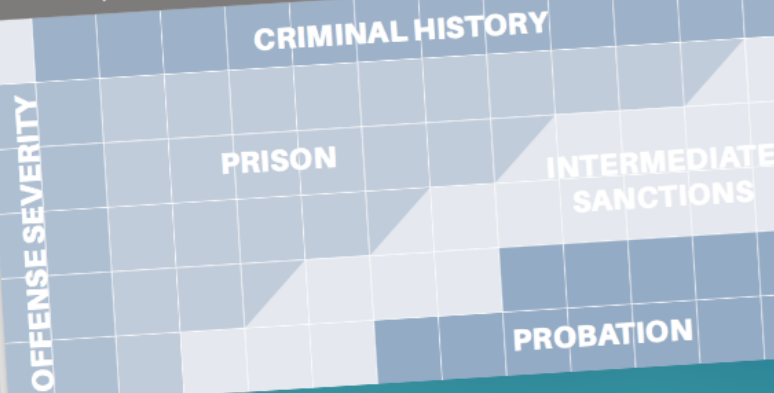
### ABSTRACT

An offender's criminal record is a key factor in sentencing. Statute in many jurisdictions, and there are many recidivists. Advocate a premium on the ground that need stronger disincentive is required for offenders. State and federal courts have used desert-based theories of sentencing.

UNIVERSITY OF MINNESOTA

## CRIMINAL HISTORY ENHANCEMENTS SOURCEBOOK

A publication by the Robina Institute of Criminal Law and Criminal Justice



ROBINA INSTITUTE  
OF CRIMINAL LAW AND CRIMINAL JUSTICE

Richard S. Frase

## What Explains Persistent Racial Disproportionality in Minnesota's Prison and Jail Populations?

### ABSTRACT

Racial disparity in prison and jail populations, measured by the ratio of black to white per capita incarceration rates, varies substantially from state to state. To understand these variations, researchers must examine disparities at earlier stages of the criminal process and also racial differences in socioeconomic status that help explain disparity in cases entering the system. Researchers must adjust disparity ratios to correct for limitations in available data and in studies of prior incarceration rates. Minnesota has one of the highest black/white incarceration rates. Disparities at the earlier, measurable stages of Minnesota's criminal process—arrest and felony convictions—are as great as the disparity in total custody (prison plus jail) and prison populations than at arrest and conviction. The primary reason for the heavy weight sentencing guidelines give to offenders' prior records. Highly disparate arrest rates appear to reflect unusually large disparities of socioeconomic disparity between black and white residents.

Comparing incarceration rates by race have found wide variations across American states. For example, in 2005 the ratio of black to white per capita incarceration rates ranged from a high of 13.6:1 in Mississippi to a low of 1.1:1 in Vermont.

This paper is by Benjamin N. Berger, Professor of Criminal Law, University of Minnesota, and Anthony Doob, Barry Feld, Marc Mauer, Myron Orfield, Joan Fitzpatrick, Michael Tonry, Robert Weidner, and Franklin Zimring and for assistance by Kathleen Starr (University of Minnesota JD 2008, University of Criminology). Chicago. All rights reserved.

# Goals of the Criminal History Project

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To systematically study criminal history enhancements and answer:

- *How are states enhancing sentences on the basis of criminal history?*
  - *What are the justifications?*
  - *What are the costs and benefits?*
-

# Illustration of Criminal History Enhancement

## 4.A. Sentencing Guidelines Grid

Presumptive sentence lengths are in months. Italicized numbers within the grid denote the discretionary range within which a court may sentence without the sentence being deemed a departure. Offenders with stayed felony sentences may be subject to local confinement.

| SEVERITY LEVEL OF CONVICTION OFFENSE<br>(Example offenses listed in <i>italics</i> ) |           | CRIMINAL HISTORY SCORE |                       |                       |                       |                       |                                    |                                    |
|--|-----------|------------------------|-----------------------|-----------------------|-----------------------|-----------------------|------------------------------------|------------------------------------|
|  |           | 0                      | 1                     | 2                     | 3                     | 4                     | 5                                  | 6 or more                          |
| <i>Murder, 2nd Degree</i><br>(intentional murder; drive-by-shootings)                | <b>11</b> | 306<br><i>261-367</i>  | 326<br><i>278-391</i> | 346<br><i>295-415</i> | 366<br><i>312-439</i> | 386<br><i>329-463</i> | 406<br><i>346-480</i> <sup>2</sup> | 426<br><i>363-480</i> <sup>2</sup> |
| <i>Murder, 3rd Degree</i><br><i>Murder, 2nd Degree</i><br>(unintentional murder)     | <b>10</b> | 150<br><i>128-180</i>  | 165<br><i>141-198</i> | 180<br><i>153-216</i> | 195<br><i>166-234</i> | 210<br><i>179-252</i> | 225<br><i>192-270</i>              | 240<br><i>204-288</i>              |
| <i>Assault, 1st Degree</i>   | <b>9</b>  | 86<br><i>74-103</i>    | 98<br><i>84-117</i>   | 110<br><i>94-132</i>  | 122<br><i>104-146</i> | 134<br><i>114-160</i> | 146<br><i>125-175</i>              | 158<br><i>135-189</i>              |
| <i>Agg. Robbery, 1st Degree;</i><br><i>Burglary, 1st Degree (w/</i>                  | <b>8</b>  | 48<br><i>41-57</i>     | 58<br><i>50-69</i>    | 68<br><i>58-81</i>    | 78<br><i>67-93</i>    | 88<br><i>75-105</i>   | 98<br><i>84-117</i>                | 108<br><i>92-129</i>               |
| <i>Felony DWI;</i><br><i>Financial Exploitation of a</i><br><i>Vulnerable Adult</i>  | <b>7</b>  | 36                     | 42                    | 48                    | 54<br><i>46-64</i>    | 60<br><i>51-72</i>    | 66<br><i>57-79</i>                 | 72<br><i>62-84</i> <sup>2, 3</sup> |
| <i>Assault, 2nd Degree</i><br><i>Burglary, 1st Degree (Occupied Dwelling)</i>        | <b>6</b>  | 21                     | 27                    | 33                    | 39<br><i>34-46</i>    | 45<br><i>39-54</i>    | 51<br><i>44-61</i>                 | 57<br><i>49-68</i>                 |
| <i>Residential Burglary;</i><br><i>Simple Robbery</i>                                | <b>5</b>  | 18                     | 23                    | 28                    | 33<br><i>29-39</i>    | 38<br><i>33-45</i>    | 43<br><i>37-51</i>                 | 48<br><i>41-57</i>                 |
| <i>Nonresidential Burglary</i>   | <b>4</b>  | 12 <sup>1</sup>        | 15                    | 18                    | 21                    | 24<br><i>21-28</i>    | 27<br><i>23-32</i>                 | 30<br><i>26-36</i>                 |
| <i>Theft Crimes (Over \$5,000)</i>   | <b>3</b>  | 12 <sup>1</sup>        | 13                    | 15                    | 17                    | 19<br><i>17-22</i>    | 21<br><i>18-25</i>                 | 23<br><i>20-27</i>                 |
| <i>Theft Crimes (\$5,000 or less)</i><br><i>Check Forgery (\$251-\$2,500)</i>        | <b>2</b>  | 12 <sup>1</sup>        | 12 <sup>1</sup>       | 13                    | 15                    | 17                    | 19                                 | 21<br><i>18-25</i>                 |
| <i>Assault, 4th Degree</i><br><i>Fleeing a Peace Officer</i>                         | <b>1</b>  | 12 <sup>1</sup>        | 12 <sup>1</sup>       | 12 <sup>1</sup>       | 13                    | 15                    | 17                                 | 19<br><i>17-22</i>                 |

<sup>1</sup> 12<sup>1</sup>=One year and one day

☐ Presumptive commitment to state imprisonment. First-degree murder has a mandatory life sentence and is excluded from





## CRIMINAL HISTORY SCORE

| 0                     | 1                     | 2                     | 3                     | 4                     | 5                                 | 6 or more                         |
|-----------------------|-----------------------|-----------------------|-----------------------|-----------------------|-----------------------------------|-----------------------------------|
| 306<br><i>261-367</i> | 326<br><i>278-391</i> | 346<br><i>295-415</i> | 366<br><i>312-439</i> | 386<br><i>329-463</i> | 406<br><i>346-480<sup>2</sup></i> | 426<br><i>363-480<sup>2</sup></i> |
| 150<br><i>128-180</i> | 165<br><i>141-198</i> | 180<br><i>153-216</i> | 195<br><i>166-234</i> | 210<br><i>179-252</i> | 225<br><i>192-270</i>             | 240<br><i>204-288</i>             |
| 86<br><i>74-103</i>   | 98<br><i>84-117</i>   | 110<br><i>94-132</i>  | 122<br><i>104-146</i> | 134<br><i>114-160</i> | 146<br><i>125-175</i>             | 158<br><i>135-189</i>             |
| 48<br><i>41-57</i>    | 58<br><i>50-69</i>    | 68<br><i>58-81</i>    | 78<br><i>67-93</i>    | 88<br><i>75-105</i>   | 98<br><i>84-117</i>               | 108<br><i>92-129</i>              |
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|                       |                       |                       | 30                    | 45                    | 51                                | 57                                |

# Illustration of Criminal History Enhancement

## 4.A. Sentencing Guidelines Grid

Presumptive sentence lengths are in months. Italicized numbers within the grid denote the discretionary range within which a court may sentence without the sentence being deemed a departure. Offenders with stayed felony sentences may be subject to local confinement.

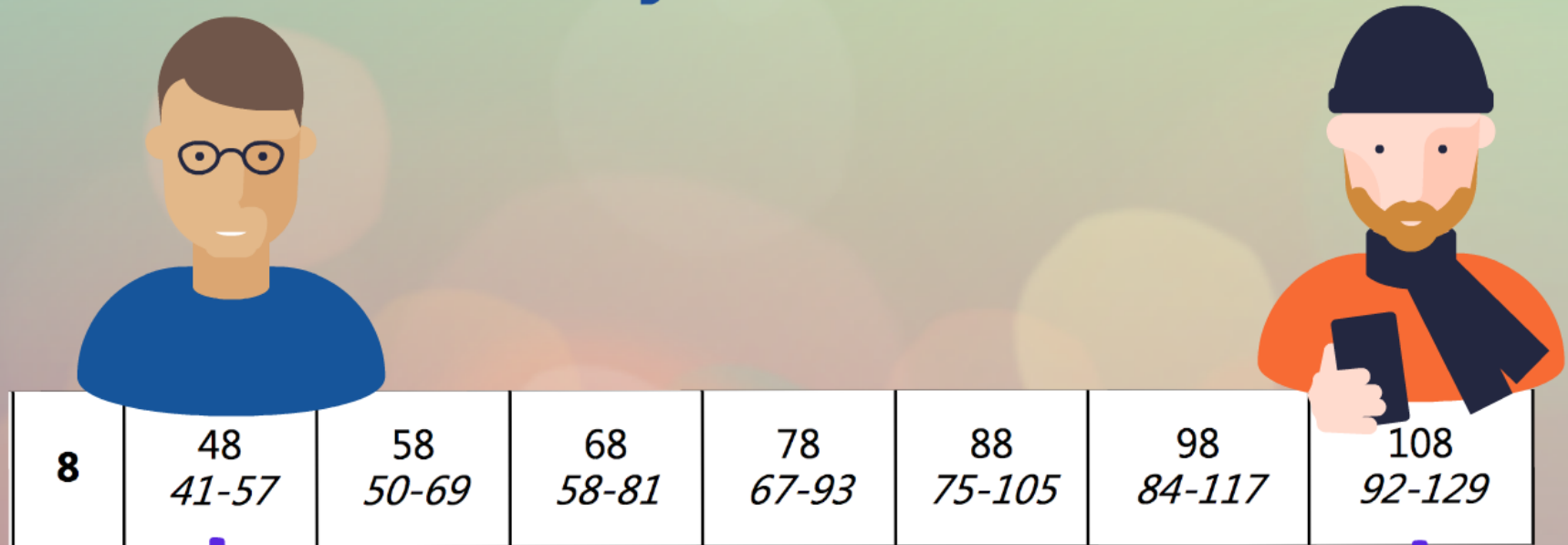
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| <i>Assault, 1st Degree</i>   | <b>9</b>  | 86<br><i>74-103</i>    | 98<br><i>84-117</i>   | 110<br><i>94-132</i>  | 122<br><i>104-146</i> | 134<br><i>114-160</i> | 146<br><i>125-175</i>              | 158<br><i>135-189</i>              |
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<sup>1</sup> 12<sup>1</sup>=One year and one day

☐ Presumptive commitment to state imprisonment. First-degree murder has a mandatory life sentence and is excluded from



# Illustration of Criminal History Enhancement



## Common Score Components:

- Number of Prior Felonies
- Felony Weight
- Misdemeanors
- Juvenile Adjudications
- Custody Status Violation



$$\frac{108}{48} = 2.25x$$

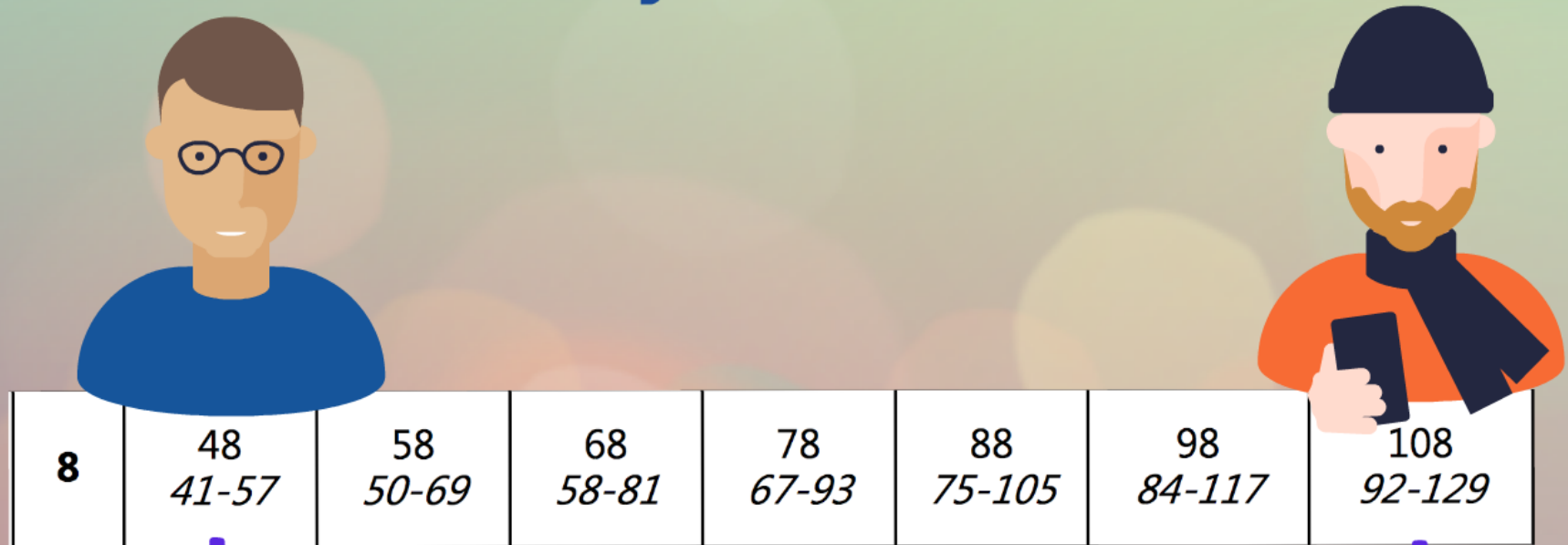
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# Illustration of Criminal History Enhancement



## Common Score Components:

- Number of Prior Felonies
- Felony Weight
- Misdemeanors
- Juvenile Adjudications
- Custody Status Violation



$$\frac{108}{48} = 2.25x$$

# An Example from Washington State

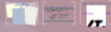
|  | Offender Score  |           |           |           |           |           |           |           |           |           |
|--|---|-----------|-----------|-----------|-----------|-----------|-----------|-----------|-----------|-----------|
|  | 0   | 1         | 2         | 3         | 4         | 5         | 6         | 7         | 8         | 9+        |
| S<br>e<br>r<br>i<br>o<br>u<br>s<br>n<br>e<br>s<br>s<br><br>L<br>e<br>v<br>e<br>l | LEVEL XVI<br>LIFE SENTENCE WITHOUT PAROLE/DEATH PENALTY |           |           |           |           |           |           |           |           |           |
|  | 280m  | 291.5m    | 304m      | 316m      | 327.5m    | 339.5m    | 364m      | 394m      | 431.5m    | 479.5m    |
|  | LEVEL XV  | 240 - 320 | 250 - 333 | 261 - 347 | 271 - 361 | 281 - 374 | 291 - 388 | 312 - 416 | 338 - 450 | 370 - 493 |
|  |   | 171.5m    | 184m      | 194m      | 204m      | 215m      | 225m      | 245m      | 266m      | 307m      |
|  | LEVEL XIV   | 123 - 220 | 134 - 234 | 144 - 244 | 154 - 254 | 165 - 265 | 175 - 275 | 195 - 295 | 216 - 316 | 257 - 357 |
|  |   | 143.5m    | 156m      | 168m      | 179.5m    | 192m      | 204m      | 227.5m    | 252m      | 299.5m    |
|  | LEVEL XIII  | 123 - 164 | 134 - 178 | 144 - 192 | 154 - 205 | 165 - 219 | 175 - 233 | 195 - 260 | 216 - 288 | 257 - 342 |
|  |   | 108m      | 119m      | 129m      | 140m      | 150m      | 161m      | 189m      | 207m      | 243m      |
|  | LEVEL XII   | 93 - 123  | 102 - 136 | 111 - 147 | 120 - 160 | 129 - 171 | 138 - 184 | 162 - 216 | 178 - 236 | 209 - 277 |
|  |   | 90m       | 100m      | 110m      | 119m      | 129m      | 139m      | 170m      | 185m      | 215m      |
|  | LEVEL XI  | 78 - 102  | 86 - 114  | 95 - 125  | 102 - 136 | 111 - 147 | 120 - 158 | 146 - 194 | 159 - 211 | 185 - 245 |
|  |   | 59.5m     | 66m       | 72m       | 78m       | 84m       | 89.5m     | 114m      | 126m      | 150m      |
|  | LEVEL X   | 51 - 68   | 57 - 75   | 62 - 82   | 67 - 89   | 72 - 96   | 77 - 102  | 98 - 130  | 108 - 144 | 129 - 171 |
|  |   | 36m       | 42m       | 47.5m     | 53.5m     | 59.5m     | 66m       | 89.5m     | 101.5m    | 126m      |
|  | LEVEL IX  | 31 - 41   | 36 - 48   | 41 - 54   | 46 - 61   | 51 - 68   | 57 - 75   | 77 - 102  | 87 - 116  | 108 - 144 |
|  |   | 24m       | 30m       | 36m       | 42m       | 47.5m     | 53.5m     | 78m       | 89.5m     | 101.5m    |
|  | LEVEL VIII  | 21 - 27   | 26 - 34   | 31 - 41   | 36 - 48   | 41 - 54   | 46 - 61   | 67 - 89   | 77 - 102  | 87 - 116  |
|  |   | 17.5m     | 24m       | 30m       | 36m       | 42m       | 47.5m     | 66m       | 78m       | 89.5m     |
|  | LEVEL VII   | 15 - 20   | 21 - 27   | 26 - 34   | 31 - 41   | 36 - 48   | 41 - 54   | 57 - 75   | 67 - 89   | 77 - 102  |
|  |   | 13m       | 17.5m     | 24m       | 30m       | 36m       | 42m       | 53.5m     | 66m       | 78m       |
|  | LEVEL VI  | 12+ - 14  | 15 - 20   | 21 - 27   | 26 - 34   | 31 - 41   | 36 - 48   | 46 - 61   | 57 - 75   | 67 - 89   |
|  |   | 9m        | 13m       | 15m       | 17.5m     | 25.5m     | 38m       | 47.5m     | 59.5m     | 72m       |
|  | LEVEL V   | 6 - 12    | 12+ - 14  | 13 - 17   | 15 - 20   | 22 - 29   | 33 - 43   | 41 - 54   | 51 - 68   | 62 - 82   |
|  |   | 6m        | 9m        | 13m       | 15m       | 17.5m     | 25.5m     | 38m       | 50m       | 61.5m     |
|  | LEVEL IV  | 3 - 9     | 6 - 12    | 12+ - 14  | 13 - 17   | 15 - 20   | 22 - 29   | 33 - 43   | 43 - 57   | 53 - 70   |
|  |   | 2m        | 5m        | 8m        | 11m       | 14m       | 19.5m     | 25.5m     | 38m       | 50m       |
|  | LEVEL III   | 1 - 3     | 3 - 8     | 4 - 12    | 9 - 12    | 12+ - 16  | 17 - 22   | 22 - 29   | 33 - 43   | 43 - 57   |
|  |   |           | 4m        | 6m        | 8m        | 13m       | 16m       | 19.5m     | 25.5m     | 38m       |
|  | LEVEL II  | 0-90 days | 2 - 6     | 3 - 9     | 4 - 12    | 12+ - 14  | 14 - 18   | 17 - 22   | 22 - 29   | 33 - 43   |
|  |   |           | 3m        | 4m        | 5.5m      | 8m        | 13m       | 16m       | 19.5m     | 25.5m     |
|  | LEVEL I   | 0-60 days | 0-90 days | 2 - 5     | 2 - 6     | 3 - 8     | 4 - 12    | 12+ - 14  | 14 - 18   | 17 - 22   |
|  |   |           |           |           |           |           |           |           |           | 22 - 29   |

30x



# Paying (Again) for the Past: *Criminal History Enhancements*

Introduction



Impacts



Justifications



Conclusion & Recommendations



# *Justifications*

---

Justifications for Continuing  
in the Face of War  
The following are the  
justifications for continuing  
in the face of war.



# Justifications for Enhancing on the Basis of Prior Record

---

**Risk Argument:** *criminal history reveals the offender poses a greater risk to reoffend.*

**Retribution Argument:** *criminal history makes the offender more blameworthy for the current offense.*

# Paying (Again) for the Past: *Criminal History Enhancements*

Introduction



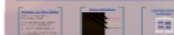
Impacts



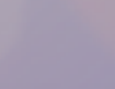
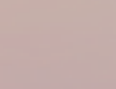
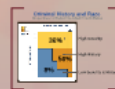
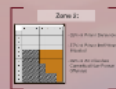
Justifications



Conclusion & Recommendations



# *Impacts*



# Adverse Impacts:

offense proportionality

aging prison population

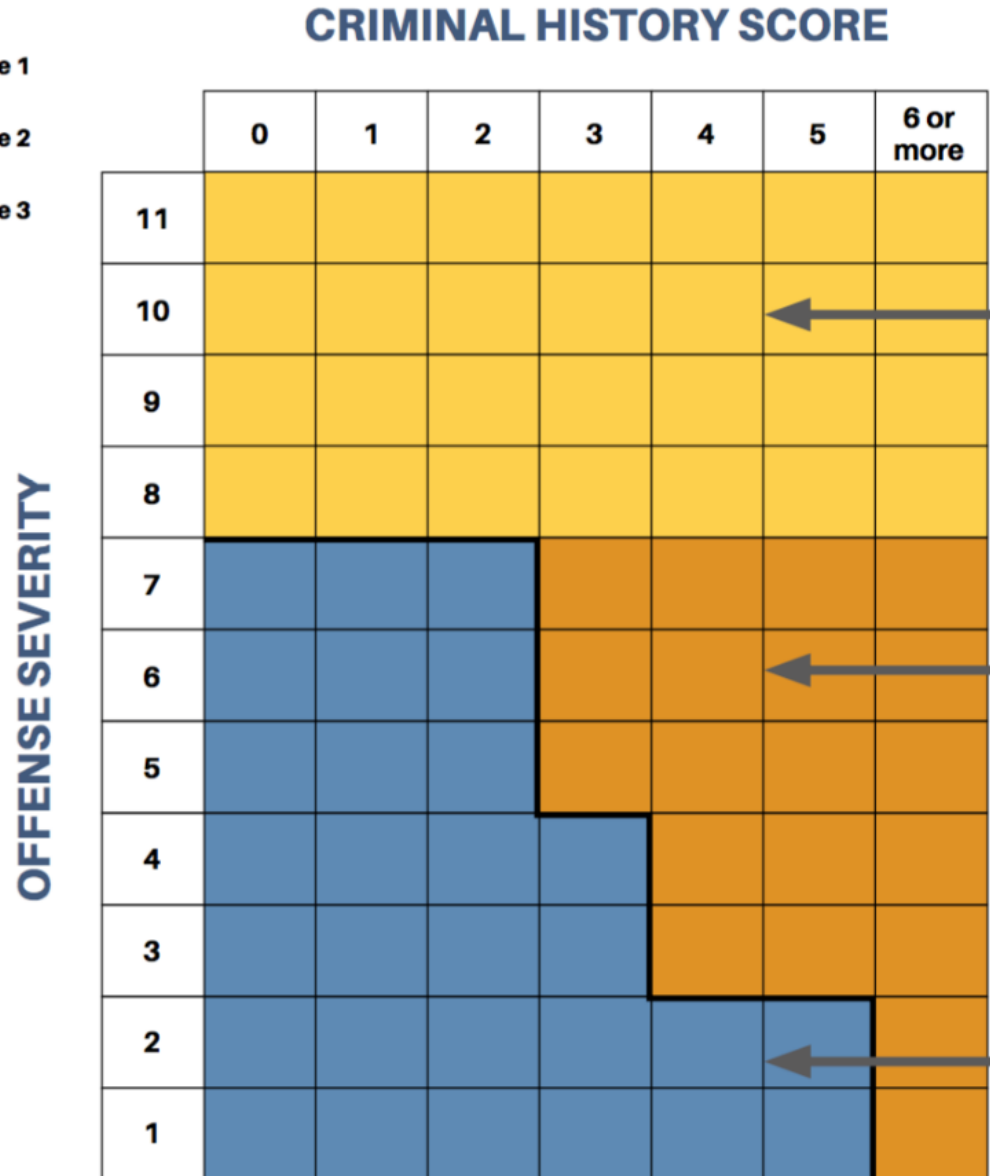
prison bed priorities

size and expense of prisons

racial disparities







# Zone 1

High Severity

# Zone 2

High Criminal History

# Zone 3

Low Severity & History

# Focus on Criminal History: "Zone 2"

## Minnesota, Standard Grid (2014)



**Total  
Sentences**

**Prison  
Sentences**

**Zone 1**  
High Severity

1,346

843

**Zone 2**  
High Criminal History

2,865

2,104

**Zone 3**  
Low Severity & History

10,930

868

**Total**

15,141

3,815

19%

55%

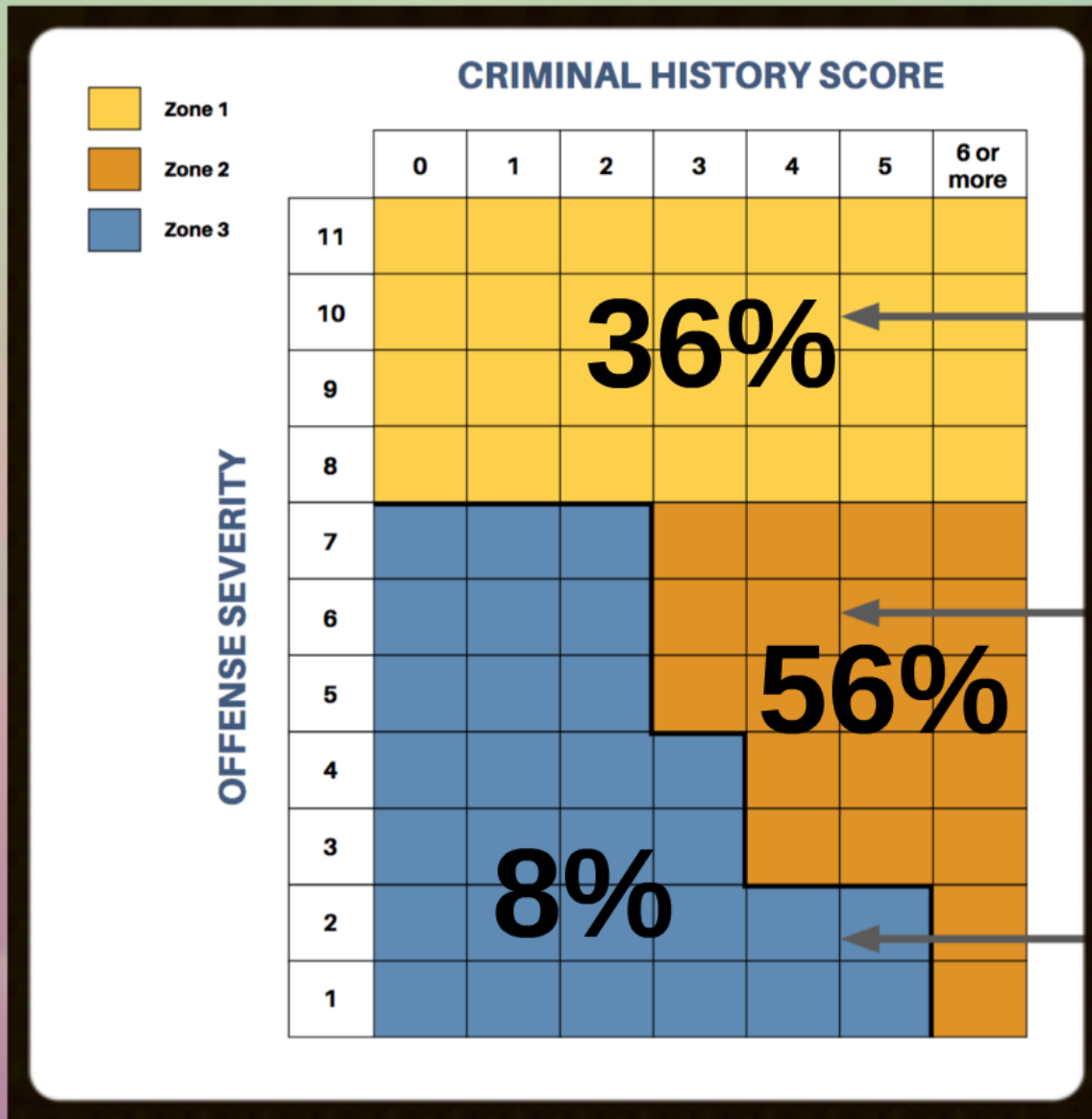
## Zone 2:

|    | 0 | 1 | 2 | 3 | 4 | 5 | 6+ |
|----|---|---|---|---|---|---|----|
| 11 |   |   |   |   |   |   |    |
| 10 |   |   |   |   |   |   |    |
| 9  |   |   |   |   |   |   |    |
| 8  |   |   |   |   |   |   |    |
| 7  |   |   |   |   |   |   |    |
| 6  |   |   |   |   |   |   |    |
| 5  |   |   |   |   |   |   |    |
| 4  |   |   |   |   |   |   |    |
| 3  |   |   |   |   |   |   |    |
| 2  |   |   |   |   |   |   |    |
| 1  |   |   |   |   |   |   |    |

- 55% of Prison Sentences
- 37% of Prison Bed Years Imposed
- 69% of Z2 Offenders Committed Non-Person Offenses

# Criminal History and Race

## Disparities in Recommended Prison Rates



High Severity

High History

Low Severity & History



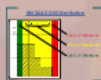
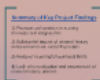
# Criminal History & Racial Disparities:

## *A Jurisdictional Comparison*

| Primary Grids            |                                  |  |  |
|--------------------------|----------------------------------|--|--|
| <i>Jurisdiction/Grid</i> | <i>Zone 1:<br/>High Severity</i> | <i>Zone 2: High<br/>Criminal History</i> | <i>Zone 3: Mandatories &amp;<br/>Other Special Rules</i> |
| Kansas                   | 48%                              | 57%                                      | -4%  |
| Minnesota                | 36%                              | 56%                                      | 8%   |
| North Carolina           | 61%                              | 41%                                      | -2%  |
| Washington               | 51%                              | 49%                                      | 0%   |



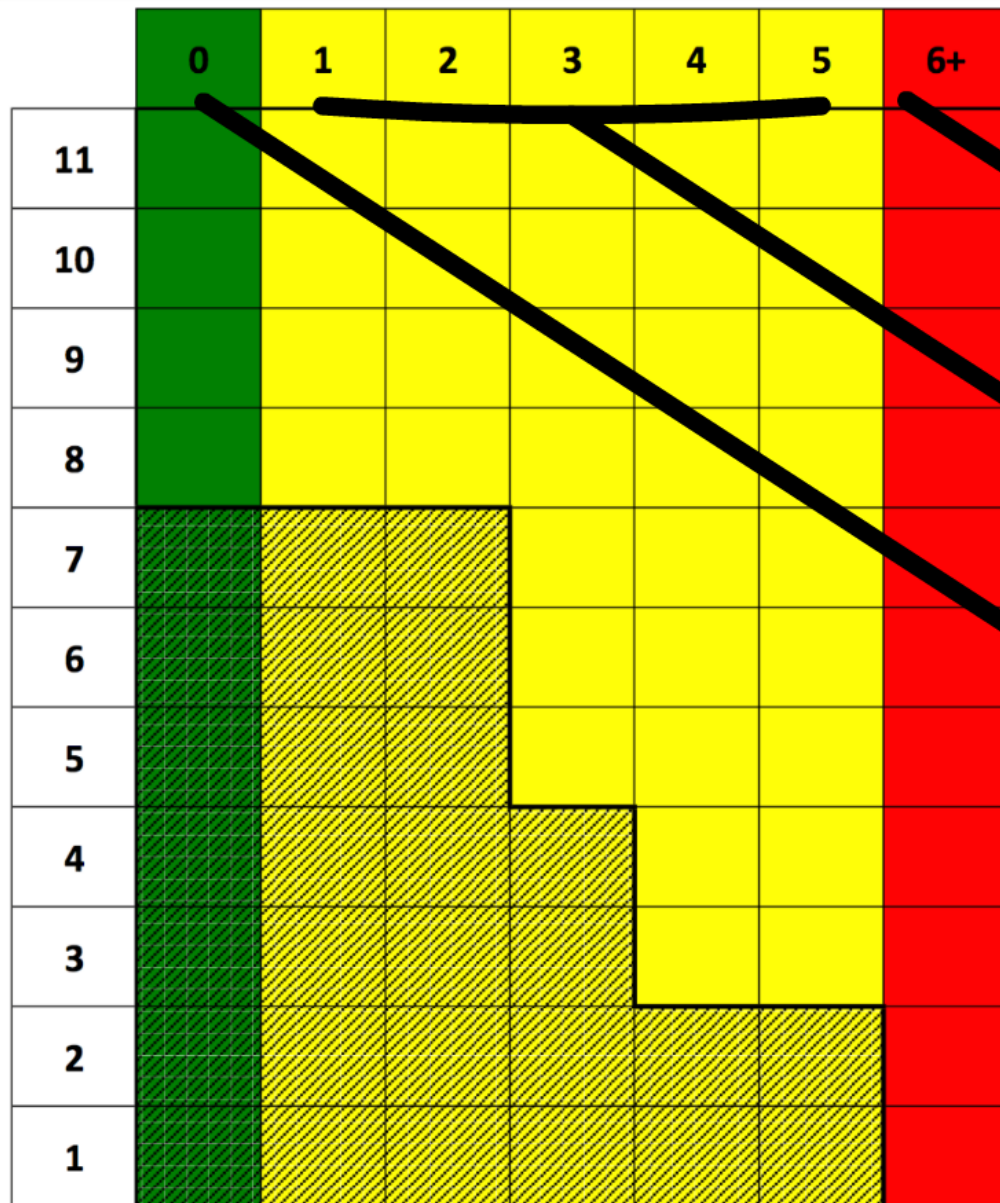
# Conclusion & Recommendations



# Summary of Key Project Findings

- 1) Pronounced variation in scoring formulas and magnitudes
- 2) Substantial impact of criminal history enhancements on racial disparities
- 3) Rarity of meaningful look-back limits
- 4) Lack of re-evaluation and assessment of criminal history policies

# MN (2014) CHS Distribution



10% of Offenders

57% of Offenders

33% of Offenders



# Considerations for Reform



# Limit the Magnitude

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*Prior record should never account for more than half of a sentence.*

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# Limit the Impact of Older Offenses

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*Exclude all adult priors after 10 years.*

*Impact should decay with time.*

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# Limit Juvenile Priors

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## *Options:*

- *Disregard once the individual is 18*
  - *Disregard juvenile offenses after 5 years*
  - *Give juvenile offenses less weight*
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# Robina Public Opinion Research

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- 69% in favor of restricting use of old priors
- Increasing disregard of aging priors in sentencing vignettes
- 74% in favor of restricting use of juvenile priors

# Allow for Some Judicial Adjustment to the Criminal Record

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*For example:*

- Court can increase or decrease the criminal history score if it understates or overstates the seriousness of the prior record.*
  - Court can remove or decrease the weight of older priors if close to the decay period.*
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*Thank You*

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# Paying (Again) for the Past: *Criminal History Enhancements*

Introduction



Impacts



Justifications



Conclusion & Recommendations





# Paying (Again) for the Past: Criminal History Enhancements



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| SEVERITY LEVEL OF<br>CONVICTION OFFENSE<br>(Example offenses listed in italics)            |    | CRIMINAL HISTORY SCORE |                 |                 |                |                |                             |                             |
|--|----|------------------------|-----------------|-----------------|----------------|----------------|-----------------------------|-----------------------------|
|  |    | 0                      | 1               | 2               | 3              | 4              | 5                           | 6 or<br>more                |
| <i>Murder, 2nd Degree</i><br>(intentional murder; drive-by-<br>shootings)                  | 11 | 306<br>261-367         | 326<br>278-391  | 346<br>295-415  | 366<br>312-439 | 386<br>329-463 | 406<br>346-480 <sup>2</sup> | 426<br>363-480 <sup>2</sup> |
| <i>Murder, 3rd Degree</i><br><i>Murder, 2nd Degree</i><br>(unintentional murder)           | 10 | 150<br>128-180         | 165<br>141-198  | 180<br>153-216  | 195<br>166-234 | 210<br>179-252 | 225<br>192-270              | 240<br>204-288              |
| <i>Assault, 1st Degree</i>   | 9  | 86<br>74-103           | 98<br>84-117    | 110<br>94-132   | 122<br>104-146 | 134<br>114-160 | 146<br>125-175              | 158<br>135-189              |
| <i>Agg. Robbery, 1st Degree;</i><br><i>Burglary, 1st Degree (w/<br/>Weapon or Assault)</i> | 8  | 48<br>41-57            | 58<br>50-69     | 68<br>58-81     | 78<br>67-93    | 88<br>75-105   | 98<br>84-117                | 108<br>92-129               |
| <i>Felony DWI;</i><br><i>Financial Exploitation of a<br/>Vulnerable Adult</i>              | 7  | 36                     | 42              | 48              | 54<br>46-64    | 60<br>51-72    | 66<br>57-79                 | 72<br>62-84 <sup>2,3</sup>  |
| <i>Assault, 2nd Degree</i><br><i>Burglary, 1st Degree (Occupied<br/>Dwelling)</i>          | 6  | 21                     | 27              | 33              | 39<br>34-46    | 45<br>39-54    | 51<br>44-61                 | 57<br>49-68                 |
| <i>Residential Burglary;</i><br><i>Simple Robbery</i>                                      | 5  | 18                     | 23              | 28              | 33<br>29-39    | 38<br>33-45    | 43<br>37-51                 | 48<br>41-57                 |
| <i>Nonresidential Burglary</i>   | 4  | 12 <sup>1</sup>        | 15              | 18              | 21             | 24<br>21-28    | 27<br>23-32                 | 30<br>26-36                 |
| <i>Theft Crimes (Over \$5,000)</i>   | 3  | 12 <sup>1</sup>        | 13              | 15              | 17             | 19<br>17-22    | 21<br>18-25                 | 23<br>20-27                 |
| <i>Theft Crimes (\$5,000 or less)</i><br><i>Check Forgery (\$251-\$2,500)</i>              | 2  | 12 <sup>1</sup>        | 12 <sup>1</sup> | 13              | 15             | 17             | 19                          | 21<br>18-25                 |
| <i>Assault, 4th Degree</i><br><i>Fleeing a Peace Officer</i>                               | 1  | 12 <sup>1</sup>        | 12 <sup>1</sup> | 12 <sup>1</sup> | 13             | 15             | 17                          | 19<br>17-22                 |