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The compelling case for low-violence-risk preclusion in American prison policy

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This article recommends the development of broad policies of preclusion regarding the use of incarceration for offenders who are highly unlikely to commit a violent crime in the future. The proposal builds on the new Model Penal Code: Sentencing's provision on the limited utilitarian purposes of incarceration. Such low-violence-risk-preclusion strategies (LVRPs) would stand on the most powerful predictive capabilities of today's risk assessment technology. If implemented properly, there is reason to believe that substantial drops in prison rates could be realized in most states. The preclusion groups would include defendants who should not be sent to prison or jail by sentencing judges even though the law allows for such penalties; those serving prison sentences who should be released by parole boards or other releasing authorities at the earliest opportunity; and probation and parole violators who should not be revoked to prison or jail. The strongest objection to the LVRP proposal is the fear of racial or other unacceptable biases in its apportionment of reduced-incarceration benefits. Given current high levels of disproportionality in prison and jail populations, however, there is reason to think that the benefits of LVRP would be especially pronounced in disadvantaged communities.

1 | INTRODUCTION

This article focuses on a targeted decarceration strategy that would rely heavily on the use of actuarial risk assessment. It recommends the development of broad policies of preclusion of the use of incarceration for offenders who are highly unlikely to commit a violent crime in the future. Such low-violence-risk-preclusion strategies (LVRPs)

would stand on the most powerful predictive capabilities of today's risk assessment technology. The objective of LVRPs would be to target large numbers of defendants who are sent to prison under current practices, and large groups of prisoners who should be – but are not being – released.

As discussed in the following, existing risk assessment instruments (RAIs) are surprisingly good at identifying offenders who are at low risk of violent recidivism. At least for some RAIs, estimated rates of correct predictions of "true negatives" (those least likely to commit an act of violence) exceed 90%. While the definition of low violence risk is ultimately a policy determination, I offer a suggested rule of thumb. Someone who presents a 90% probability of not committing a violent crime in the foreseeable future, should presumptively be included in any well-designed LVRP program.[1]

This article proposes that prison and jail sentences should almost always be ruled out for such low-risk offenders when we have reasonable confidence in our actuarial tools.[2] The way to operationalize the idea would be to create presumptive decision rules that prohibit the imposition or continuation of prison terms for the carve-out groups, except in cases that present "extraordinary" or "substantial" circumstances justifying departure from the presumption. (The selected wording of the departure standard strengthens or weakens the binding force of the presumption.) Essential to the plan would be a meaningful enforcement scheme, such as appellate sentence review, to oversee the grounds for departure decisions.[3]

The preclusion groups envisioned in the article include: (1) defendants who should not be sent to prison or jail by sentencing judges even though the law allows for such penalties; (2) those serving prison sentences who should be released by parole boards or other releasing authorities at the earliest opportunity; and (3) probation and parole violators who should not be revoked to prison or jail despite the fact that revocation is a legally authorized sanction in their cases.

2 | THE STATISTICAL POWER OF PREDICTIONS OF LOW VIOLENCE RISK

The LVRP proposal rests on an application of prediction science that is unusually well supported in empirical research. For decades, research has shown that actuarial risk assessment instruments have far greater success in identifying people at low risk of serious reoffending than when trying to pick out the most likely violent recidivists.[4]

For example, "true negative" rates among people designated as low risk of violence averaged 91% in a respected 2012 meta-analysis of violence prediction instruments. Combining the results of 30 studies of violence risk prediction instruments, the authors found that, among those people classified as "low" risk, 91% did not violently reoffend,

[1]The policy question of acceptable risk borderlines will depend in part on the nature of the crimes that an instrument is designed predict. Most of today's violence-prediction instruments address the risk of *any* violent act in the future, with no minimum threshold of seriousness [*see* Melissa Hamilton, *Adventures in Risk: Predicting Violent and Sexual Recidivism in Sentencing Law*, 47 Ariz. St. L.J. 1, 19–20 (2015)]. This is not true, however, of all existing instruments or those that may be created in the future. For example, some instrument developers claim that useful predictions of future homicidal acts are within reach [*see* Richard Berk, Lawrence Sherman, Geoffrey Barnes, Ellen Kurtz, & Lindsay Ahlman, *Forecasting Murder Within a Population of Probationers and Parolees: A High Stakes Application of Statistical Learning*, 172 J. Royal Statistical Soc'y 191 (2009)]. A number of widely used instruments look specifically to the risk of sexual assault as distinct from other criminal activities [*see* Grant Duwe & Michael Rocque, *The Home-Field Advantage and the Perils of Professional Judgment: Evaluating the Performance of the Static-99R and the MnSOST-3 in Predicting Sexual Recidivism*, 46 Law & Human Beh. 269 (2018)].

[2]The main exception would be cases in which incarceration is required on purely retributive grounds (*see infra* note 9 and accompanying text).

[3]This is essentially the same structure as that used by the better sentencing guidelines systems [*see* American Law Institute, Model Penal Code: Sentencing (forthcoming, 2020) (hereinafter *MPCS*), Appendix A]. As outlined in this Article, presumptive LVRP rules could be adopted in states with or without judicial sentencing guidelines.

[4]*See* Kathleen Auerhahn, *Selective Incapacitation and the Problem of Predi*ction, 37 Criminology 703, 725 (1999) (although RAND Corporation risk-prediction instrument fared poorly when trying to identify dangerous offenders, it performed "very well in accurately identifying low-rate offenders" in an original study, and showed "considerable improvement in precision … in identifying low-rate offenders" in a replication study); Hennessey D. Hayes and Michael R. Geerken, *The Idea of Selective Release*, 14 Just. Quarterly 353, 368–369 (1997) ("prediction scales used in the past to predict high-rate offenders' offense behavior actually perform better at predicting the offense behavior of low-rate offenders;" proposing policy of "selective release" as opposed to selective incapacitation); Stephen D. Gottfredson and Michael Gottfredson, *Selective Incapacitation?*, 478 Annals of the American Academy of Political and Social Science 135 (1985) ["Predictive accuracy, while much in need of improvement, is sufficient for (the policy of selective deinstitutionalization), but insufficient for (the policy of selective incapacitation)"].

with an interquartile "negative prediction value" range of 81–95%.[5] In 2018, the Pennsylvania Sentencing Commission developed a violence-prediction tool with a reported 98% true-negative rate.[6]

In the domain of low-risk identification, broad definitions of "violence" can work in favor of an instrument's policy usefulness. In the sentencing commission study described earlier, for instance, the reported 98% (true negatives) were people who would not commit any "offense against the person" as defined in the state criminal code. There is much behavioral heterogeneity in that standard. Among the 2% of "false negatives," most of the crimes they can be expected to commit will not cause or risk serious victim injury.

In predictive strength, the weakness of low-violence-risk predictions is that they do not include enough people. Many people sorted into higher risk categories are "false positives" who in fact will (or would) not commit future acts of violence. This defect should not be overlooked. The failure of a particular defendant or prisoner to come within the preclusion group is not equivalent to an affirmative case that the person should be confined. Rather, as in college and law school admissions, LVRP is intended to resolve many easy cases on the numbers alone. For decisions that are less clear-cut, a more searching inquiry is required.

3 | LOW-VIOLENCE-RISK PRECLUSION AND THE PURPOSES OF IMPRISONMENT

The new Model Penal Code: Sentencing (MPCS) takes a restrictive view of the societal purposes that can justify sentences of incarceration in individual cases. This article builds on that philosophy. Most relevant to the LVRP proposal, the new Code narrows the utilitarian purposes that sentencing judges may take into account. Section 6.11 provides:

> (2) The court may impose incarceration:
>
> a when necessary to incapacitate dangerous offenders, provided a sentence imposed on this ground is not disproportionately severe; or
> b when other sanctions would depreciate the seriousness of the offense, thereby fostering disrespect for the law. When appropriate, the court may consider the risks of harm created by an offender's criminal conduct, or the total harms done to a large class of crime victims.
>
> (3) The length of term of incarceration shall be no longer than needed to serve the purposes for which it is imposed.[7]

Under this formula, the primary utilitarian justification for imprisonment is the belief that a defendant is dangerous.[8] If this principle is accepted, then a high degree of certainty that a person is not dangerous should in most cases

[5]See Seena Fazel, Jay P. Singh, & Helen Doll, *Use of Risk Assessment Instruments to Predict Violence and Antisocial Behaviour in 73 Samples Involving 24,827 People: Systematic Review and Meta-Analysis*, 345 Br. Med. J. e4692 (2012) (findings show that "these tools can effectively screen out individuals at low risk of future offending" even though authors conclude that the instruments have only "low to moderate positive predictive values" for violence commission).

[6]*See* Pennsylvania Commission on Sentencing, *Revisions to the Proposed Risk Assessment Instrument* (2018), at 3 tbl. 1 (reporting that proposed risk scale predicts violent recidivism with an estimated accuracy of only 11% but negative prediction – of no violent recidivism – is 98% accurate). The commission concluded that the RAI was too weak to be used to identify high-risk defendants as candidates for incapacitative sentences, but powerful enough to identify those who could be safely diverted from incarceration on public safety grounds.

[7]*MPCS*, *supra* note 3, § 6.11(2),(3). All substantive provisions of the new Code were approved in 2017 [*see* American Law Institute, *Model Penal Code: Sentencing, Proposed Final Draft* (approved 24 May 2017)].

[8]Rehabilitation is never a justification for the use of incarceration under the MPCS, although the Code does require that prisoners must be afforded "reasonable … opportunities to rehabilitate themselves and prepare for reintegration into the law-abiding community following their release." *MPCS*, *supra* note 3, § 6.11(4). The Code also precludes sentencing judges from imposing a prison term, or lengthening the term that would otherwise be imposed, on the ground of general deterrence. *See id.*, § 6.11, Comment *e* ("Judgments about general deterrence are best made at the systemwide policymaking level, in light of credible empirical evidence, and are least likely to be administered effectively or uniformly by sentencing judges, one case at a time"). Arguably, Subsection 6.11(2)(b) incorporates an additional utilitarian goal of not "fostering disrespect for the law." Also arguably, this language sounds in one or another branch of retributive theory (of which there are many). This ambiguous aspect of § 6.11, however, is not central to the Article's discussion.

rule out a carceral sentence (or should cut off the term of someone who is already confined). The major exception is stated in Subsection (2)(b). In some cases, according to the Code, the seriousness of the offense standing alone is enough to justify a prison term.[9]

There is a degree of indeterminacy in this formulation, which is probably unavoidable. The MPCS does not define "dangerousness," in the belief that no single definition is universally appropriate to all circumstances or acceptable to all jurisdictions. However, the Code does state that the dangerousness threshold will rarely be met by predictions of nonviolent recidivism. Only the most serious of nonviolent crimes would qualify:

> The term "dangerous" is frequently used in American law, but has no universal legal definition. State laws differ in the types of potential harm that fall within its ambit. In the Code, the term is meant to include offenses that cause or risk serious injuries to crime victims, and to rule out less serious crimes, but its precise boundaries are left to the legislatures, sentencing commissions, and courts of each state.[10]

In this article, the proposed reference points for LVRP are the low risk of "violence" or "serious violence" – themselves terms with uncertain boundaries.[11] Nonetheless, I offer LVRP as a fair attempt to mobilize the MPCS's narrowing of the utilitarian goals in prison cases.

For readers who are not prepared to defer to the MPCS, the following proposition should still be uncontroversial: if we are highly confident that a given offender is not dangerous, then the prison sanction should not be used unless we have some other satisfactory reason for doing so. For present purposes, this is enough to go forward. After all, the LVRP proposal is offered as a presumptive rule, which can be overridden for sufficiently good reasons.

4 | COULD LVRPS SUBSTANTIALLY REDUCE AMERICAN PRISON POPULATIONS?

It is always hard to know if a proposed criminal justice reform would in fact perform as intended.[12] The underlying hypothesis of LVRP is that there are many people in American prisons and jails who do not need to be there if our criterion is the need to protect the public from violent criminals (short-handed below as the "over-incapacitation hypothesis"). The facts on the ground will vary markedly from state to state, but there is reason to believe that the low-risk group makes up a meaningful slice of prison populations almost everywhere in the US.

Multiple sources of information, from different angles of observation, suggest that America over-incarcerates people who pose no significant danger to society.

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[9]For example, people convicted of homicide often have a low risk of recidivism compared with those who have been convicted of less serious offenses. It would be a rare homicide, however, that would not call for a prison sentence on purely retributive grounds. Another example: Bernie Madoff was justly imprisoned, most people would agree, even though he presented little continuing threat to the public after his massive Ponzi scheme was exposed.

[10]*MPCS*, *supra* note 3, § 1.02(2), Comment *b*. For examples of definitions of dangerousness that have been offered in the literature, *see* Christopher Slobogin, *A Jurisprudence of Dangerousness*, 98 Nw. L. Rev. 1, 19 (2003); Norval Morris & Marc Miller, *Predictions of Dangerousness*, in Michael Tonry ed., 6 Crime and Justice: An Annual Review of Research 1 (1985). In most state civil commitment laws, definitions of dangerousness tend to focus on the likelihood that the patient will inflict "serious" physical injury on other people – and often require evidence of past acts of this kind. In a significant number of states, however, dangerousness is defined to include the likelihood of causing any physical harm to another person. See *MPCS*, *supra* note 3, § 1.02(2), Reporters' Note *b(1)* (collecting the relevant language from dozens of state statutes).

[11]*See* Min Yang, Stephen C. P. Wong & Jeremy Coid, *The Efficacy of Violence Prediction: A Meta-Analytic Comparison of Nine Risk Assessment Tools*, 136 Psych. Bull. 740, 742 (2010) ("There is no universally accepted definition of violence. … For researchers, a definition of violence such as 'behaviors that can or are expected to lead to significant physical or psychological harm' would probably suffice as a working definition to guide research and theoretical discussions") (citations omitted). Yang et al. use cyber-bullying as an example of how the definition of violence can change with time and the advent of new technology.

[12]*See*, *e.g.*, Malcolm M. Feeley, Court Reform on Trial: Why Simple Solutions Fail (1983); David J. Rothman, Conscience and Convenience: The Asylum and its Alternative in Progressive America (1980).

One memorable indicator was a 1999 study of the inmate composition of three state prison systems coauthored by John J. DiIulio, Jr. (with Anne Morrison Piehl and Bert Useem).[13] The study was eye-catching because, in the earlier 1990s, DiIulio had been one of the most prominent incarceration hawks in the country.[14] The 1999 report signaled, at least for him, a striking change in direction.[15] The report's principal conclusion was that large numbers of prisoners in all three states posed too little recidivism risk to justify their incarceration on cost–benefit grounds:

> [W]hile it clearly pays to incarcerate those at the 80th percentile [of recidivism risk] in all three states, on incapacitation grounds alone, it does not appear to "pay" to incarcerate those below the median.[16]

In a 2008 examination of three economic studies across five state prison systems, Piehl and Useem reported the same conclusion.[17]

To similar effect, a 2016 report by the Brennan Center for Justice estimated that a large fraction of those currently held in American prisons present too little public-safety risk to justify their continued confinement:

> Of the 1.46 million state and federal prisoners, an estimated 39 percent (approximately 576,000 people) are incarcerated with little public safety rationale. They could be more appropriately sentenced to an alternative to prison or a shorter prison stay, with limited impact on public safety. If these prisoners were released, it would result in cost savings of nearly $20 billion per year, and almost $200 billion over 10 years.[18]

These estimates are reinforced by the practical experiences of some states. Virginia was the pioneer in the use of low-risk assessment as a prison-diversion strategy at judicial sentencing. The state legislature instructed the Virginia Criminal Sentencing Commission to design a risk tool to be applied to drug and property offenders who were assigned prison terms under the state's sentencing guidelines. Initially, the legislature ordered that the RAI should be designed to select the 25% among this drug/property-prison group who presented the lowest recidivism risk. For defendants so identified, the guidelines would recommend that the sentencing judge consider a community alternative to the indicated prison sentence.

Based on Virginia recidivism data, the commission designed a relatively simple one-page instrument to estimate the risk of felony reconviction for individual defendants, which was externally validated (and has been continuously updated from new in-state data).[19] Over time, the commission discovered that the lowest-risk quartile of the drug/property-prison group was statistically indistinguishable from the next-lowest quartile, so that a full 50% of drug/property defendants selected for prison by the guidelines could be recommended for diversion.

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[13]Anne Morrison Piehl, Bert Useem & Jr. John J. DiIulio, *Right-Sizing Justice: A Cost–Benefit Analysis of Imprisonment in Three States* (Manhattan Institute, 1999) (based on surveys of prisoners in New York, New Mexico, and Nevada).

[14]*See* John J. DiIulio, Jr., *Let 'em Rot*, The Wall Street Journal, January 26, 1994; John J. DiIulio, Jr., The Value of Prisons, *The Wall Street Journal*, May 13, 1992; William J. Bennett, John J. DiIulio, Jr., & John P. Walters, Body Count: Moral Poverty … And How to Win America's War Against Crime and Drugs (1996). (In fairness to DiIulio, the title of his editorial published as "Let 'em Rot" was affixed by the *Wall Street Journal* editors and was quickly disavowed by DiIulio. *See* John J. DiIulio, Jr., *Your Ugly Sentiment, Not Mine*, The Wall Street Journal, February 3, 1994.) DiIulio's had been one of the loudest voices arguing that just about everyone in prison needed to be there – and he stoked public fear of crime with rhetorical flourishes such as the invention of the term "juvenile superpredators" (also known as "feral presocial beings"). *See* John J. DiIulio, Jr., *The Coming of the Super-Predators*, The Weekly Standard, November 27, 1995; John J. DiIulio, Jr., *The Question of Black Crime*, The Public Interest, Fall 1994, pp. 3–32.

[15]On DiIulio's evolution of views, see Elizabeth Becker, *As Ex-Theorist on Young "Superpredators," Bush Aide Has Regrets*, New York Times, Feb. 9, 2001; Jacob Sullum, *Prison Conversion: After Studying Nonviolent Drug Offenders, A Criminologist Who Once Said "Let 'Em Rot" Now Says "Let 'Em Go,"* Reason, August/September 1999.

[16]*Right-Sizing Justice*, *supra* note 13, at 9.

[17]Bert Useem and Anne Morrison Piehl, Prison State: The Challenge of Mass Incarceration 67 (2008).

[18]James Austin, Lauren-Brooke Eisen, James Cullen, Jonathan Frank, *How Many Americans Are Unnecessarily Incarcerated?* 7–8 (Brennan Center for Justice, 2016) (quoting from report's preface by Inimai Chettiar).

[19]*See* Matthew Kleiman, Brian J. Ostrom & Fred L. Cheesman, II, *Using Risk Assessment to Inform Sentencing Decisions for Nonviolent Offenders in Virginia*, 53 Crime & Delinq. 106 (2007); Virginia Criminal Sentencing Commission, *Annual Report 2018* 31–34 (2018).

For present purposes, we can view the commission's research as a self-study of how many prison-bound offenders under the state's guidelines fall into a low enough risk category to make their incarceration a dubious proposition on public safety grounds. The findings support the over-incapacitation hypothesis. Moreover, because Virginia's prison-diversion RAI looks to the risk of any new felony conviction, it puts fewer people into the diversion group than an instrument keyed to risk of violence of the type proposed here.

The Virginia experience also provides an insight into how an effective LVRP program should be designed. One of the primary weaknesses of Virginia's prison-diversion program is that it is not legally enforceable in any way. There is no departure standard and no appellate review. In this framework, trial judges have freely ignored the risk-based encouragement to impose community sentences, following the suggestion less than half the time.[20] This experience points to the need to create presumptive LVRP rules – "presumptive" in the sense that they are binding on the decision-maker in the absence of contravening circumstances. If enforced in run-of-the-mill cases, the data from Virginia suggest that a policy of low-risk exclusion could have a substantial impact on the state's prison rate.

Word from other states also reinforces the over-incapacitation hypothesis. In the realm of prison sentencing via parole-release decisions, we have reason to believe that significant numbers of prisoners are denied release and sent back into their state prison populations, even though their continued incarceration has little or no justification on public safety grounds. This pattern seems to have gained momentum in the late 20th century. During the nation's build-up to mass incarceration from 1972 to 2007, parole boards – decision by decision – converted a large share of their parole-release discretion into "parole-denial discretion".[21]

There is much evidence that American parole boards regularly decline to release low-risk prisoners. In a 2015 national survey, a majority of parole board chairs named political vulnerability and pressure toward minimization of all risk as one of the most important problems confronting their field.[22] For example, the Colorado Parole Board uses parole-release guidelines that incorporate credible risk assessments of prisoners, yet the board follows the guidelines' recommendations to release low-risk prisoners only 43% of the time. (In contrast, they follow recommendations to deny release 92% of the time.)[23] From this we can estimate that release rates in Colorado for low-risk prisoners could more than double, if public safety were the lodestar for decision.

We also know that parole boards regularly clamp down on release decisions in the wake of a single horrific crime by a parolee that captures media attention. Sometimes, entire parole boards have been removed – a form of accountability that is well understood by their replacements.[24]

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[20] *See* John Monahan, *Risk Assessment in Sentencing*, in Erik Luna ed., Reforming Criminal Justice, Volume 4: Punishment, Incarceration, and Release 93 (Academy for Justice, 2017).

[21] *See* Kevin R. Reitz, *Prison-Release Reform & American Decarceration*, 104 Minn. L. Rev. (forthcoming 2020).

[22] Ebony L. Ruhland, Edward E. Rhine, Jason P. Robey, & Kelly Lyn Mitchell, *The Continuing Leverage of Releasing Authorities: Findings from a National Survey* (Robina Institute of Criminal Law and Criminal Justice, 2017).

[23] *See* Kevin R. Reitz, Edward E. Rhine, Alexis Lee Watts, Mariel E. Alper & Cecelia Klingele, *Profiles in Parole Release and Revocation: Examining the Legal Framework in the United States: Colorado* 10 (Robina Institute of Criminal Law and Criminal Justice, 2016):

> In 2013–14, the Board's combined release and deferral decisions were in agreement with the [parole guidelines] in 68% of all cases. In cases where the [guidelines] recommended deferral, the Board's "agreement percentage" was 92.3%; where the guidelines recommended release, the agreement percentage was 42.9%.

For the underlying data, *see* Kevin L. Ford, *Analysis of Colorado State Board of Parole Decisions: FY 2014 Report* 34–35 (Colorado Division of Criminal Justice and Colorado State Board of Parole, 2015).

[24] *See* Beth Schwartzapfel, *How Parole Boards Keep Prisoners in the Dark and Behind Bars*, Washington Post, July 11, 2015 ("A man the [Massachusetts parole board] had voted unanimously to release went on to commit another terrible crime. … [W]hen board members arrived at work days later, armed troopers escorted them to a conference room where they found … the governor's chief of staff, distributing resignation letters"; John Dannenberg, *Systemic Changes Follow Murder of Colorado Prison Director*, Prison Legal News, July 10, 2014; Dave Altimari & Colin Poitras, *Parole An Issue After Cheshire Slayings*, Hartford Courant, July 27, 2007; Christine Stuart, *[Connecticut] Governor Rell Bans Parole for Crimes of Violence*, New York Times, Sept. 23, 2007; Martin Fish, *Killing Led to Tougher Parole System: Ten Years After "Mudman," Pennsylvania Convicts Still Serve Some of the Longest Terms*, Philadelphia Inquirer, June 6, 2005.

If a way were found to enforce a true presumption of release for low-risk prisoners, the mathematics of parole discretion suggest that significant drops in Colorado's prison population could result.[25] As in Virginia, an enforceable prison-preclusion policy (at the parole-release stage rather than the sentencing hearing) would be a promising decarceration strategy in Colorado. One possible way to implement this approach would be to provide for the automatic release of most or all prisoners who meet LVRP thresholds, without requiring a vote of the board. Instead, the board would be required to affirmatively intervene to stop a presumptively automatic release.

The over-incapacitation hypothesis is hardly original with me. Many criminal justice experts believe that incarceration practices can be reined in through the careful introduction of risk-based reforms, and that an appropriately restrained prison policy may depend on such measures. Professor Jennifer Skeem has said, "If we're interested in undoing mass incarceration without a surge in crime, we'll have to use risk-assessment technology."[26] Legal philosopher Douglas Husak has argued:

> [W]e should be receptive to any means at our disposal with the potential to make a dent in our unacceptable rate of incarceration. If [risk-based sentencing] can help to do so – as I believe it can – legal philosophers should be enthusiastic about it.[27]

John Monahan has urged that, "[O]ne way to reduce mass incarceration and the fiscal and human sufferings intrinsic to it is to engage in a morally constrained form of risk assessment in sentencing offenders."[28] Even decades ago, Norval Morris and Marc Miller argued that, "A merciful and just system of punishment presupposes leniency toward those who least threaten social injury; and this, in turn, inexorably involves predictions of dangerousness."[29]

5 | THE QUESTION OF RACIAL DISPARITIES

Risk assessment in the criminal sentencing process is a topic of heated controversy, with a maelstrom of arguments and counter-arguments in circulation.[30] Because this article is meant to be short, I will focus only on the most disturbing objection: that the expanded use of risk-influenced sentencing in prison cases will harden or worsen the currently high levels of racial disparities in American incarceration rates. Some critics consider these effects to be inevitable, while others regard them as a likelihood or significant possibility.[31]

On the other side of this question, many experts have posited that risk-influenced sentencing – if undertaken with sufficient care – will not lock in or exacerbate existing racial disparities in punishment. There are several important arguments on this score represented in the literature. I note them in the following. Afterward, I add a new thought to the mix concerning the measurement of success or failure when we seek to reduce the racialized impacts of American incarceration policy.

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[25]For an examination of the mathematics of parole-release discretion in several states, and the degrees to which state laws cede control over prison population size to releasing authorities, *see* Reitz, *Prison-Release Reform*, *supra* note 21.

[26]Statement of Jennifer Skeem, Joint Meeting of Parole Advisory Council and Probation Advisory Board, Robina Institute of Criminal Law and Criminal Justice, Minneapolis, Minnesota, May 11, 2017.

[27]Douglas Husak, *Why Legal Philosophers (Including Retributivists) Should Be Less Resistant to Risk-Based Sentencing*, in Jan W. de Keijser, Jesper Ryberg, and Julian V. Roberts, eds., Predictive Sentencing: Normative and Empirical Perspectives (2019).

[28]John Monahan, *Risk Assessment in Sentencing*, in Erik Luna ed., Reforming Criminal Justice, Volume 4: Punishment, Incarceration, and Release 78 (Academy for Justice 2017).

[29]Norval Morris & Marc Miller, *Predictions of Dangerousness*, in Michael Tonry, ed. 6 Crime and Justice: An Annual Review of Research 4 (1985).

[30]For a discussion of the main categories of objections to the use of risk assessment tools at sentencing, *see MPCS*, *supra* note 3, § 9.08, Comment *a*.

[31]*Compare* Bernard E. Harcourt, Against Prediction: Profiling, Policing and Punishing in an Actuarial Age (2008); Michael Tonry, *Predictions of Dangerousness in Sentencing: Déjà Vu All Over Again*, in Michael Tonry ed., 48 Crime and Justice: A Review of Research 439 (2019); Eric Holder, *Speech Presented at the National Association of Criminal Defense Lawyers 57th Annual Meeting and 13th State Criminal Justice Network Conference, Philadelphia, PA*, 27 Fed. Sent. Rptr. 252, 254 (2015) ("By basing sentencing decisions on static factors and immutable characteristics—like the defendant's education level, socioeconomic background, or neighborhood—[risk assessment measures] may exacerbate unwarranted and unjust disparities that are already far too common in our criminal justice system and in our society"); Sonja B. Starr, *Evidence-Based Sentencing and the Scientific Rationalization of Discrimination*, 66 Stan. L. Rev. 803 (2014).

First, it is not clear that the best available RAIs have racially discriminatory effects when applied responsibly. A fair reading of the empirical literature is that we should not simply assume that all RAIs have built-in racial biases. The relevant research is still accumulating.[32] A number of studies of specific instruments have found an absence of predictive bias.[33] Other studies have reported measurable skewing by race.[34] Two have noted applications in which Black defendants were favored.[35]

Second, the policy question we should be asking is whether a risk-influenced sentencing reform such as LVRP would be a step forward or backward from the horribly flawed status quo. Traditional American sentencing systems (without systematic use of validated risk assessment tools) have produced extremely high incarceration rates in Black communities, especially among the poor.[36] It would be a shame to ban alternative risk-influenced approaches before their real-world effects have been tested. It is plausible to think that RAIs in some settings can be a check on the tendency of criminal justice decision-makers to overestimate recidivism risk. There is evidence, for instance, that the weight given to defendants' criminal histories at sentencing is a powerful contributor to racial disparities in prison sentences. It is relevant to ask whether an evidence-based, risk-informed approach would be an improvement, even if it fails to eradicate all disparities.[37]

One step forward is clearly achievable, if we insist (as we must) that risk-influenced sentencing be a transparent process.[38] The legal discretionary processes that produce racial disparities in punishment today are not readily visible

[32]So far, as the debate of algorithmic fairness unfolds, there is no consensus on how racial bias (or its absence) should be measured. *See* Melissa Hamilton, *The Biased Algorithm: Evidence off Based Impact on Hispanics*, 56 Amer. Crim. L. Rev. 1,553 (2019). Cf. Sarah L. Desmarais & Evan M. Lowder, *Pretrial Risk Assessment Tools: A Primer for Judges, Prosecutors, and Defense Attorneys* 7–8 (Safety and Justice Challenge, 2019) ["What research exists generally shows parity in risk assessment scores and comparable levels of accuracy in estimating the likelihood of pretrial outcomes across groups defined by race and ethnicity (although the outcome measures themselves, include rearrest, may reflect systemic inequities)."]

[33]*See* Jennifer L. Skeem & Christopher T. Lowenkamp, *Risk, Race, and Recidivism*, 54 Criminology 680, 700 (2016) (study examining relationships among race, risk assessment [the Post Conviction Risk Assessment instrument], and future arrest; reporting that "results indicate that risk assessment is not 'race assessment.' … [T]here is little evidence of test bias for the PCRA. The instrument strongly predicts rearrest for both Black and White offenders"); Sarah L. Desmarais, Kiersten L. Johnson & Jay P. Singh, *Performance of Recidivism Risk Assessment Instruments in U.S. Correctional Settings*, 13 Psych. Services 206, 216 (2016) (finding "some evidence suggesting comparable predictive validity of COMPAS and LSI-R for White and non-White offenders"); Christopher T. Lowenkamp, Alexander M. Holsinger, & Thomas H. Cohen, *PCRA Revisited: Testing the Validity of the Federal Post Conviction Risk Assessment (PCRA)*, 12 Psychological Services 149, 155 (2015) ("the results were consistently valid across males and females, as well as Black and White offenders, and Hispanic and non-Hispanic offenders"); Tim Brennan, William Dieterich, and Beate Ehret, *Evaluating the Predictive Validity of the COMPAS Risk and Needs Assessment System*, 36 Crim. Just. & Beh. 21, 33 (2009) ("The present study found that the COMPAS recidivism models preformed equally well for African American and White men at predicting the arrest outcomes").

[34]*See* Hamilton, *The Biased Algorithm*, *supra* note 32; Julia Angwin, Jeff Larson, Surya Mattu & Lauren Kirchner, *Machine Bias: There's software used across the country to predict future criminals. And it's biased against blacks.*, Pro Publica, May 23, 2016.

[35]*See* Evan M. Lowder, Megan M. Morrison, Daryl G. Kroner, & Sarah L. Desmarais, *Racial Bias and LSI-R Assessments in Probation Sentencing and Outcomes*, 46 Crim. Just. & Beh. 210, 226–27 (2019) ("[O]ur findings raise the possibility of dissimilar application of risk assessment findings by race, particularly when defendants are classified at Low risk. However, this disparate application appears to be both in the favor of Black probationers, who received shorter sentences at Low risk levels relative to White probationers and comparable sentences at High risk levels, and fairly small in effect size"). Pennsylvania's sentencing commission recently completed a racial-impact analysis on proposed risk-assessment scales [see Pennsylvania Commission on Sentencing, *Revisions to the Proposed Risk Assessment Instrument* (2018), at 3–6 (reporting results of racial impact analysis)]. The report concluded, id. at 6:

> The risk assessment instrument scales appear to be free from predictive bias between Black and White offenders. The racial impact examination of the scales revealed similar AUC [area under the curve] statistics for White and Black offenders, and … no significant interaction effects. [W]hen we examine the potential bias, the differences appear to be due to lower false positives among the high risk predictions and higher false negatives among the low risk predictions for Black individuals, both of which "benefit" Black individuals.

[36]*See, e.g.*, Pew Center on the States, *One in 100: Behind Bars in America 2008* (Pew Charitable Trusts, 2008); Jeremy Travis, Bruce Western & Steve Redburn, The Growth of Incarceration in the United States: Exploring the Causes and Consequences (2014) (National Academy of Sciences report); Marc Mauer, Race to Incarcerate (2013); Michael Tonry, Punishing Race: A Continuing American Dilemma (2011); Michelle Alexander, The New Jim Crow: Mass incarceration in the Age of Colorblindness (2010); Khalil Gibran Muhammad, The Condemnation of Blackness: Race, Crime, and the Making of Modern Urban America (2010); Bruce Western, Punishment and Inequality in America (2006). On state-by-state variations in racial disparities in incarceration, *see* Ashley Nellis, *The Color of Justice, Racial and Ethnic Disparities in State Prison* (The Sentencing Project 2016).

[37]*See* Julian V. Roberts & Richard S. Frase, Paying for the Past: The Case Against Prior Record Sentence Enhancements (2019).

[38]My view of adequate transparency stretches from the creation, validation, and updating of a specific instrument through its uses in individual cases. *See* Jessica M. Eaglin, *Constructing Recidivism Risk*, 67 Emory L.J. 59 (2017). The new Model Penal Code's endorsement of experimentation with risk-influenced sentencing is conditioned on such transparency, *see MPCS*, *supra* note 3, § 9.08 & Comment *a*.

in their operation, so their causes and effects must be sought through painstaking research.[39] There is lots of room for deniability in the current system, as well as unconscious bias. A transparent risk assessment process would allow for public scrutiny, evaluation by independent researchers, procedural protections, and substantive challenges that are barely available in American criminal justice systems today.[40] For instance, it is far easier to imagine a successful constitutional challenge to a racially biased RAI than it has been (for many decades) to effectively challenge the racial inequities that spring from the "human" decisions of judges, juries, and parole officials.[41]

The last point I want to make in this section is a plea to rethink the statistics and numerate (or innumerate) perceptions we rely upon when thinking about the equitable merits of a proposed sentencing reform. As Daniel Kahneman has observed, the manner in which we frame statistical knowledge has a huge psychological effect on peoples' judgments and decisions.[42]

To explore this point, I will raise two hypothetical LVRP reform proposals that we believe will have the effect of reducing incarceration populations overall. We might imagine here a retooled version of the Virginia prison diversion program that is legally binding on judges in the absence of extraordinary circumstances. Alternatively, we might hypothesize a prison-release reform that calls for the automatic release of the vast majority of low-violence-risk prisoners who become eligible for parole, with exceptions only for extraordinary cases. Once we are confident that we have a risk-influenced sentencing reform that will lower prison populations, however, we must still confront the fear that the reform will operate in a racially biased way.

Here we must be careful not to shoot ourselves in the foot. When speaking of racial disparities in punishment, the debate has been overly driven by the statistical construct known as the "disparity ratio." This is the ratio between the Black incarceration rate (measured against the denominator of a state's Black population) and the White rate (similarly derived). While I do not contest the usefulness of the ratio approach – it can be illuminating and powerful – ratios have an unfortunate tendency to obscure the absolute numbers of people we are talking about. Crucially, they can divert attention from the raw realities of incarceration policy as felt within real-world communities.[43] If we are to evaluate the racial impacts of proposed reforms, our highest concern should be the projected changes in absolute incarceration rates in Black and White communities. This is a measurement approach rooted in units of human lives, not abstract percentages.

When we suspect that ratios are warping our perceptions, we can often refer to absolute measurements as reality checks. For example, let us assume that we have designed an LVRP reform program that is projected to reduce a state's prison population by 25%. According to the projections, however, the LVRP reform will have no effect on the steep "disparity ratio" between Black and White incarceration rates. Knowing this, some might say that the LVRP program appears to be "baking in" the pre-existing racial disparities, leaving them untouched, and is therefore not to be favored.

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[39] *See, e.g.*, Allen J. Beck & Alfred Blumstein, *Racial Disproportionality in U.S. State Prisons: Accounting for the Effects of Racial and Ethnic Differences in Criminal Involvement, Arrests, Sentencing, and Time Served*, 34 J. Quant. Criminology 853 (2018); Richard S. Frase, *What Explains Persistent Racial Disproportionality in Minnesota's Prison and Jail Populations?*, in Michael Tonry ed., 38 Crime and Justice: A Review of Research 201 (2009).

[40] *See MPCS*, *supra* note 3, § 9.08, Comment *f*:

> Under the Code's approach, whenever a sentence of incarceration is influenced by risk assessment scales, the defendant must enjoy the full procedural protections of a sentencing hearing. These include representation by counsel, the ability to challenge the risk score that has been calculated in his case, the ability to challenge the reliability and constitutionality of the instruments or processes that have been used – on their face and as applied, and the right to appellate review of adverse risk-informed decisions at the trial-court level. For example, the structure of Section 9.08 ensures that defendants have a judicial forum in which to raise constitutional objections that a particular risk assessment instrument is racially discriminatory in application.

[41] *See McCleskey v. Kemp, 481 U.S. 279 (1987).* As Randall Kennedy has observed, the number of American sentences or sentencing schemes that have been invalidated on grounds of racial bias is virtually zero. *Randall Kennedy, Race, Crime, and the Law (1997).*

[42] Daniel Kahneman, Thinking, Fast and Slow (2011).

[43] For a discussion of the weaknesses of a "ratio" approach in the policy analysis of prison rates, and an argument in favor of much greater focus on absolute prison rates, *see* Kevin R. Reitz, *Measuring Changes in Incarceration Scale: Shifts in Carceral Intensity as Felt by Communities*, 23 Berkeley J. Crim. L. 1 (2019).

This should not be the end of the analysis, however. If the pre-reform ratio of Black–White disparities in incarceration is 5:1 (roughly the actual disparity ratio for the US as a whole today), then a 25% reduction in aggregate prison and jail populations will benefit a much larger percentage of African Americans than Whites, even if the 5:1 disparity ratio is unimproved. Using simplified numbers, suppose the pre-reform Black incarceration rate is 1,000 per 100,000 Blacks in the general population, and the White incarceration rate is 200 per 100,000 Whites. A 25% reduction in incarceration rates while holding the 5:1 disparity ratio constant would benefit 250 Blacks per 100,000 but only 50 Whites per 100,000. (The post-reform incarceration rates would fall to 750 per 100,000 for Blacks and 150 per 100,000 for Whites.) On these assumptions, the "same" 25% overall incarceration drop would have five times more deincarcerative impact in Black communities than among the White population.[44]

Now let us consider a more difficult scenario, in which an LVRP reform initiative has been projected to reduce the White incarceration rate by 30% and the Black rate by only 15%. This looks like a starkly disparate allocation of benefits, to the disadvantage of the Black community. At first glance, many people might conclude that the reform is too racially skewed to go forward. Indeed, if we start with a 5:1 disparity ratio in statewide incarceration rates, this single reform would worsen that ratio to more than 6:1.[45] With such numbers in hand, many legal experts might argue that the suggested LVRP reform is unconstitutional.

But changes in ratios may be the wrong statistic to focus on. If we look instead to absolute effects, the White drop in the incarceration rate would benefit 60 Whites per 100,000 while the Black drop would benefit 150 Blacks per 100,000. In absolute terms, the beneficial change felt in Black communities would be more than twice that among Whites.

As often happens in life, exclusive attention to ratios and percentages can be misleading indicators of change over time, especially if we are comparing two things that have dramatically different starting positions.[46] Absolute values are often the most reliable policy guides. In the "difficult" scenario described earlier, I would prefer to say that the pre-reform differential between in Black and White incarceration rates was +800 per 100,000 (1,000 per 100,000 compared with 200 per 100,000), while the projected post-reform differential would be +700 (850 per 100,000 vs. 150 per 100,000). That is not a cure for the entire problem of racial disparities in the high-incarceration era, but it would represent significant progress.

6 | CONCLUSION

The literature and policy debate concerning the use of actuarial risk assessment tools in criminal sentencing has exploded in recent years – so much so that no one can keep up with it all. The collective examination sprawls across many fields of expertise and argumentation, from hard empiricism to practical policy implementation to constitutional law to moral philosophy to racial justice. The moralistic heat of the discussion has by itself been distinctive, reaching levels rarely seen in other areas of criminal justice policy outside the death penalty. Reading only the titles of publications or their headlines, many speak as though their minds are irrevocably made up.[47]

[44]The felt reduction of "carceral intensity" in the most disadvantaged Black neighborhoods would be dramatically greater than in White communities.

[45]The post-reform Black incarceration rate would be 850,000 compared with the new White rate of 150 per 100,000.

[46]Observations based on percentage change can approach the ridiculous. On the day my son turned 2 years old, the ratio between our numerical ages was nearly cut in half. More precisely, his age increased by 100% from his first to second birthdays. Over roughly the same year, my age increased by 2.2%. As an older colleague has often told me, younger people are always aging at a faster rate than older people. The younger they are, the higher the rate. Yet everyone ages 1 year at a time, stated as an absolute increment. In that fateful year, from 2004 to 2005, did my son really age 4,500% "more" or "faster" than me? Or did we both age 1 year? Both answers are mathematically correct, but both do not *feel* right as a matter of human significance. (Curiously, the subjective experience of aging is one of ever-increasing speed.) In statistical terminology, the question is not which measure is more "accurate," but which is more "relevant" to the people who make use of the observation.

[47]See, e.g *Machine Bias*, *supra* note 34; Sonja B. Starr, *Evidence-Based Sentencing and the Scientific Rationalization of Discrimination*, 66 Stan. L. Rev. 803 (2014); Bernard E. Harcourt, Against Prediction: Profiling, Policing and Punishing in an Actuarial Age (2008).

Despite appearances, it is difficult to find absolutist proponents who would endorse the use of RAIs in any and all contexts – just as it is hard to find risk objectors who would ban RAIs from all conceivable uses.[48] This article focuses on a single proposal within the large universe of potential applications of RAIs in the criminal justice system. Low-violence-risk preclusion is meant to hit a sweet spot in which many of the proffered benefits of risk-influenced prison sentencing are heightened, while a number of important objections are attenuated. This article has argued that LVRPs stand a good chance of bringing about meaningful reductions in the standing prison populations of many states – a goal of historical priority that has proven elusive. LVRPs also have the advantage of drawing from RAI'sarea of greatest statistical power, reducing concerns about false positives and undue risks to public safety. The most glaring weakness in the narrow LVRP proposal offered here is that it will apply to too few prisoners or prison-bound defendants. That is not a clear winning argument, however, against extending the benefits of LVRP to easy cases.

Many serious hurdles remain, including the necessity of ensuring transparency in the creation, validation, and use of RAIs and the development of minimum procedural safeguards that do not exist for most American risk-influenced sentencing today. Finally, questions about unfair biases in the use of RAIs are unsettled and unsettling. They must remain at the forefront of any experiments that bring algorithms into the sentencing process. Perhaps this prospect should inspire more hope than fear, however. There is reason to think that greater visibility and contestability may lighten the deplorable status quo in distributive justice by race and ethnicity that now stains American prison policy.

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[48]Layered viewpoints of this kind seem to be common. Highly influential critics of risk-informed sentencing, such as Eric Holder and Sonja Starr, would allow it when selecting defendants for various community-corrections programs. Michael Tonry, another strong voice on the objector side, is comfortable with the use of RIS when making parole-release decisions (joined by Sonja Starr).