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The Perils of "Old" and "New" in Sentencing Reform

Jessica M. Eaglin

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*JESSICA M. EAGLIN**

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INTRODUCTION

The introduction of actuarial risk assessment tools is a popular, but controversial, bipartisan sentencing reform.[1] These tools standardize predictions of a defendant's likelihood of engaging in criminal behavior in the future. As a reform, these tools produce new and/or improved information meant to shape and guide judicial sentencing discretion. Advocates suggest their use could lead to a reduction in incarceration all while maintaining public safety.[2]

Scholarship debates this reform from many angles, often emphasizing why this reform is "new" and focusing on whether it is

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1. *See, e.g.*, First Step Act, Pub. L. No. 115–391, 115th Cong. (2018) (bipartisan bill expanding use of risk assessments in federal system); *Evidence-Based Sentencing*, CTR. FOR SENTENCING INITIATIVES, (Feb. 4, 2020), https://www.ncsc.org/microsites/csi/home/Evidence-Based-Sentencing.aspx [https://perma.cc/4DH2-RPL6] (encouraging expansion of actuarial risk assessments at sentencing in the states).

2. *See, e.g.*, *Joint Meeting of Parole Advisory Council: Hearing in Minneapolis, Minnesota*, May 11, 2017 (statement of Jennifer Skeem) ("If we're interested in undoing mass incarceration without a surge in crime, we'll have to use risk-assessment technology.").

good or bad for sentencing law and policy.[3] Important critiques are generated from these debates, but, as I will suggest in this Essay, they miss a bigger picture. The popularity of this tool as a sentencing reform reflects a broader preference for more technology as the *primary* response to demands for criminal justice reform.[4] Framing debate about this practice around what is "new" facilitates the shift by orienting focus around technical advancements as solutions, while obscuring changes in punishment and society during the buildup of the carceral state in the late twentieth century.[5]

This Essay turns attention from actuarial risk assessment tools as a reform to the inclination for a technical sentencing reform more broadly. When situated in the context of technical guidelines created to structure and regulate judicial discretion in the 1980s and beyond, the institutionalization of an actuarial risk assessment at sentencing is both an old and new idea. Both sentencing guidelines and actuarial risk assessments raise conceptual and empirical questions about sentencing law and policy. This Essay drills down on two conceptual issues—equality and selective incapacitation—to highlight that actuarial risk assessments as a reform raise recurring questions about sentencing, even as social perspectives on resolving those questions are shifting. Rather than using the "old" nature of the questions as evidence that tools should proliferate; however, this Essay urges critical reflection on the turn toward the technical in the present day, in the face of mass incarceration. It calls for expanding the methodological scope of critiques about actuarial risk tools as sentencing reform going forward. I thank the Annual Survey of American Law and NYU School of Law for the opportunity to reflect on these issues in the context of a symposium celebrating the work of Professor Stephen Schulhofer.

This contribution unfolds in four parts. Part I introduces actuarial risk tools as a sentencing reform. Part II complicates the per-

3. *See, e.g.*, Richard Berk & Jordan Hyatt, *Machine Learning Forecasts of Risk to Inform Sentencing Decisions,* 27 FED. SENT'G R. 222 (2015); Sonja B. Starr, *Evidence-Based Sentencing and the Scientific Rationalization of Discrimination*, 66 STAN. L. REV. 803 (2014); Michael Tonry, *Legal Ethical Issues in the Prediction of Recidivism*, 26 FED. SENT'G R. 167 (2014).

4. For critiques of technical reforms in other criminal justice contexts, *see, e.g.*, Amna A. Akbar, *Toward a Radical Imagination of Law*, 93 N.Y.U. L. REV. 405, 465–70 (2018) (body cameras and police reform); Chaz Arnett, *From Decarceration to E-Carceration*, 41 CARDOZO L. REV. (forthcoming 2020) (electronic monitoring and corrections reform).

5. For a more detailed discussion of this argument, see generally Jessica M. Eaglin, *Technologically Distorted Conceptions of Punishment*, 97 WASH. U. L. REV. 483 (2019).

ception that the tools are "new" by framing this reform in the context of the turn toward judicial sentencing guidelines as a reform in the 1980s. Part III considers how recurring issues of equality and incapacitation obscure social transformations related to expansion of the carceral state between implementation of sentencing guidelines and proliferation of actuarial tools in the present day. Part IV asserts that the framing of "old" and "new" in current scholarship about actuarial risk tools as a sentencing reform is detrimental. It encourages expanding methodological approaches that inform scholarship on this type of reform going forward.

I.
ACTUARIAL RISK TOOLS AS A NEW SENTENCING REFORM

Since 1970, the United States has experienced an exponential increase in its prison population.[6] This increase is disproportionately concentrated on poor communities of color.[7] By 2009, one in 100 people in the United States were incarcerated;[8] one in three black men faced incarceration in their lifetime;[9] and the correctional apparatus expanded much further than ever before.[10] Today, this phenomenon is referred to as "mass incarceration."[11] While

6. Between 1970 and 2010, the number of people incarcerated in state and federal prisons jumped from 196,000 to more than 1.6 million. *Compare* BUREAU OF JUST. STAT., PRISONERS IN 1925–81 2 tbl.1 (1982) *with* E. ANN CARSON, BUREAU OF JUST. STAT., PRISONERS IN 2016 3 tbl.1 (2018).

7. In 1950, the U.S. incarcerated just over 200,000 people; today it incarcerates 2.2 million. In 1950, the prison population was 70% white; today it is 60% black and brown.

8. PEW CENTER ON THE STATES, ONE IN 100: BEHIND BARS IN AMERICA 2008 6 (2008).

9. ACLU, Mass Incarceration (Feb. 10, 2020), https://www.aclu.org/issues/smart-justice/mass-incarceration/mass-incarceration-animated-series [https://perma.cc/FXQ9-E3GJ].

10. PEW CENTER ON THE STATES, ONE IN 31: THE LONG REACH OF AMERICAN CORRECTIONS 4–5 (2009) (detailing expansion of U.S. population under correctional supervision through probation and parole).

11. There have been modest reductions in the prison population since 2007, but none significant enough to suggest an end to mass incarceration. *See* JENNIFER BRONSON & E. ANN CARSON, BUREAU OF JUST. STAT., PRISONERS IN 2017 1 (describing a 17% decline in prison admission rate between 2007 and 2017, but noting that the actual decline in prisoners decreased by closer to 3%). Rather, these reductions suggest that the U.S. prison population may be stabilizing at a different, and much higher, rate of incarceration after a period of significant growth. *See* FRANKLIN ZIMRING, MASS INCARCERATION MOMENTUM (examining trends in state correctional populations to assess whether states are significantly changing incarceration practices) (transcript on file with author).

scholars debate the causes of this increase in prisoners over the last forty years,[12] a growing consensus exists among law and policymakers that the growth of prison populations should be addressed through criminal justice reforms.[13]

At sentencing, the institutionalization of statistically robust actuarial risk tools is an increasingly popular reform in the states.[14] Actuarial risk assessment tools purport to predict a defendant's likelihood of engaging in criminal behavior in the future, defined as "recidivism."[15] The tools' outcome is based on statistical analyses of data which document the presence or absence of objective factors about offenders in the past that correlate with recidivism.[16] These "risk factors" are weighted and compiled into a risk tool that ranks defendants by their similarity to the profile of those who recidivate.[17] Most tools divide defendants into standardized categories based on the assessment of a defendant's level of recidivism risk, such as low, medium, or high.[18] Court administrators may use the

12. For examples of debate on the causes of incarceration, *compare* MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS (2010) (politics and racism) *with* JOHN F. PFAFF, LOCKED IN: THE TRUE CAUSES OF MASS INCARCERATION—AND HOW TO ACHIEVE REAL REFORM 198–201 (2017) (prosecutors and discretion).

13. *See, e.g.*, Benjamin Levin, *The Consensus Myth in Criminal Justice Reform*, 117 MICH. L. REV. 259 (2018); Rachel E. Barkow, *The Criminal Regulatory State*, *in* THE NEW CRIMINAL JUSTICE THINKING 33–35 (Sharon Dolovich & Alexandra Natapoff eds., 2018) (noting the fiscal and social costs that create pressure to address incarceration).

14. Note that actuarial risk assessments and other predictive analytic techniques are growing in popularity *outside* the post-conviction sentencing context as well. *See, e.g.*, Andrew Guthrie Ferguson, *Policing Predictive Policing*, 94 WASH. U. L. REV. 1115 (2017) (policing); Lauryn P. Gouldin, *Defining Flight Risk*, 85 U. CHI. L. REV. 677 (2018) (pretrial bail determinations); Cecelia Klingele, *The Promise and Perils of Evidence-Based Corrections*, 91 NOTRE DAME L. REV. 537 (2015) (corrections). This Essay is contained to a discussion of the use of actuarial risk tools at post-conviction sentencing. While its observations and takeaways may have some application in those other contexts, it is beyond the scope of this Essay to explore those connections fully.

15. Jessica M. Eaglin, *Constructing Recidivism Risk*, 67 EMORY L.J. 59, 75–78 (2017).

16. *Id.* at 78–84.

17. *Id.* at 83–84.

18. *Id.* at 86. Advanced tools may predict other features of a defendant, like their susceptibility to drug addiction or responsiveness to specific types of behavioral interventions. *See, e.g.*, Kelly Hannah-Moffatt, *Punishment and Risk*, *in* THE SAGE HANDBOOK OF PUNISHMENT AND SOCIETY 129, 132–37 (Jonathan Simon & Richard Sparks eds., 2013) (describing evolution of actuarial risk assessment technologies).

tools' assessment to inform a judge's discretion when sentencing a defendant.[19]

These actuarial risk tools are increasingly being incorporated into sentencing processes across the country. Advocates suggest the tools will improve judicial discretion and criminal system efficiency without increasing crime by identifying low-risk defendants most suitable for diversion from incarceration.[20] Critics suggest that the tools will replicate and entrench problematic features of the carceral state. Put simply, the tools may exacerbate already existing racial disparities in the criminal justice system because the tools rely on data skewed by current practices that disproportionately burden marginalized populations.[21] Furthermore, the aspect of the tools which encourages increasing punishment for some defendants on the basis of unrealized future behavior undermines normative limits on punishment.[22] Thus, this reform may expand the carceral state and rate of incarceration rather than contract it.[23] Despite opposition from scholars and policymakers, advocates have supported the proliferation of actuarial risk tools in states as a pragmatic reform with the potential to reduce the economic and social pressures of mass incarceration.[24] Today, nearly thirty states permit, encourage, or require consideration of actuarial risk tools at sentencing.[25]

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19. *See* Erin Collins, *Punishing Risk*, 107 GEO. L. J. 57, 66 (2018) (shaping sentencing decision regarding length and location of punishment); Eaglin, *supra* note 5, at 494 (shaping length, location, and conditions of supervision if diverted to community supervision).

20. *See, e.g.*, Richard P. Kern & Meredith Farrar-Owens, *Sentencing Guidelines with Integrated Offender Risk Assessment*, 25 FED. SENT'G REP. 176 (2013); MODEL PENAL CODE: SENTENCING § 6B.09 (AM. L. INST., Proposed Final Draft, 2017).

21. *See, e.g.*, Bernard E. Harcourt, *Risk as a Proxy for Race: The Dangers of Risk Assessment*, 27 FED. SENT'G REP. 237 (2015); Attorney General Eric Holder, Remarks at the National Association of Criminal Defense Lawyers 57th Annual Meeting (Aug. 1, 2014); Starr, *supra* note 3, at 806.

22. *See, e.g.*, Tonry, *supra* note 3; Dawinder S. Sidhu, *Moneyball Sentencing*, 56 B.C. L. REV. 671 (2015).

23. *See, e.g.*, Jessica M. Eaglin, *Against Neorehabilitation*, 66 SMU L. REV. 189 (2013); Collins, *supra* note 19, at 91.

24. *See, e.g.*, MODEL PENAL CODE, *supra* note 20, at § 6B.09 cmt. d–e; NAT'L CTR. FOR STATE CTS, USE OF RISK AND NEEDS ASSESSMENT INFORMATION IN STATE SENTENCING PROCEEDINGS (Sept. 2017).

25. *See* Megan T. Stevenson & Jennifer L. Doleac, *Algorithmic Risk Assessment in the Hands of Humans* 54–55 app. A.1 (IZA Inst. of Labor Econ. Discussion Paper No. 12853, 2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3513695 [https://perma.cc/ZR2J-CXF7] (collecting list of states). There is some discrepancy in what counts here. This number includes states with evidence of using risk

II.
ACTUARIAL RISK TOOLS AS "NEW" AND "OLD": SITUATING A TECHNICAL REFORM IN HISTORICAL CONTEXT

Much of the enthusiasm for actuarial risk tools as reform generates from the perception that the tools offer a "new" solution to improve sentencing determinations. The proliferation of actuarial risk tools appears "new" for two reasons. First, tools are more technically robust than ever before, and the capacity for further technical improvements into the future is clear.[26] Whereas sentencing structures often encourage judges to take recidivism risk into account through consideration of criminal history, studies suggest that, as a predictor of risk, this metric operates as an imprecise proxy for future behavior.[27] Actuarial risk tools rely on more data and have empirical backings that suggest that their predictions of recidivism risk are more consistently accurate than human judgment.[28] In this sense, the tools are new because they are more accurate as measured by evolving statistical standards.[29]

Second, actuarial risk tools appear "new" because they are offered as a means to *reduce* sentences to incarceration for some defendants rather than simply a mechanism to *increase* it. To date, most efforts to incorporate consideration of recidivism risk into sentencing have served as a one-way ratchet to increase a defendant's likely punishment for a crime. For example, sentencing guidelines and mandatory minimum penalties of the 1980s and 1990s introduced sentencing enhancements that were either explicitly or implicitly based upon the idea that the most dangerous offenders should be incapacitated for longer periods of time.[30] These en-

assessment tools at sentencing. *See id.* For insight into the significance of tool selection, see Eaglin, *supra* note 15, at 114–116.

26. *See, e.g.*, Aziz Z. Huq, *Racial Equity in Algorithmic Criminal Justice*, 68 Duke L.J. 1043, 1062–76 (2019) (framing entry of predictive risk tools in criminal justice as new, and explaining machine based learning techniques on the horizon).

27. *See, e.g.*, 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, 532–37 (2014).

28. For a summary of scholarship making the human to tool comparison, see MODEL PENAL CODE, *supra* note 20, at § 6B.09 cmt. a. For a study debating the superior accuracy of tools to humans, *see* Julia Dressel & Hany Farid, *The Accuracy, Fairness, and Limits of Predicting Recidivism*, 4 SCI. ADVANCES 1–2 (2018).

29. *See* Eaglin, *supra* note 15, at 89–94 (questioning application of technical standards to assess the accuracy of an actuarial risk tool at sentencing).

30. *See* JONATHAN SIMON, MASS INCARCERATION ON TRIAL: A REMARKABLE COURT DECISION AND THE FUTURE OF PRISONS IN AMERICA 17–46 (2014) (describing the logic of total incapacitation and its basis in various sentencing reforms in Cali-

hancements serve as a key factor in increasing the length of sentence for many defendants across the country. In turn, increased sentence lengths contribute to the increased number of people behind bars.[31] However, in the face of economic and social pressures to reduce incarceration that emerged around 2010,[32] states are now more willing to divert defendants from incarceration because they present a low risk of recidivism.[33] Embracing risk and seeking to manage it, advocates suggest, may smartly reduce crime and incarceration with bipartisan support.[34] Thus, risk tools offer a new way to approach the old fear of recidivism that contributed to the increase in prison populations throughout the country from the 1970s onward.

In short, the introduction of actuarial risk tools appear "new" because they reflect a turn toward utilizing technical advancements to improve judicial decision-making, ensure consistency and rationality, and resolve social, political, and economic pressures to address the phenomenon of mass incarceration smartly.

But this should all sound somewhat familiar to those scholars and practitioners knowledgeable of the larger trends in sentencing reform over the past forty years. Not only are risk assessments nothing new in criminal justice, but the idea that a technical project can operate to resolve sociopolitical problems reflected most poignantly at sentencing has a similarly deep history. In other words, from the perspective of sentencing law and policy, this reform is, in important respects, old.

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fornia); Eaglin, *supra* note 23, at 196–99 (framing various sentencing reforms from the 1980s–90s in the states as part of the turn toward total incapacitation).

31. *See, e.g.*, NAT'L RESEARCH COUNCIL, THE GROWTH OF INCARCERATION IN THE UNITED STATES: EXPLORING CAUSES AND CONSEQUENCES 70 (2014) (attributing the great number of people behind bars in the U.S. to increases in the use and severity of prison sentences).

32. It is difficult to pinpoint the exact year that momentum for criminal justice reforms to reduce prison populations took off. For a description of confluent factors leading to sentencing reforms in the 2010s, see Eaglin, *supra* note 23, at 190–91 n.3–6.

33. There are limits to eligibility for diversion aside from a defendant's actuarial risk level. *See, e.g.*, Jessica M. Eaglin, *The Drug Court Paradigm*, 53 AM. CRIM. L. REV. 595 (2016) (highlighting how the focus on low-level, nonviolent drug offenders can limit actual reduction in prison populations).

34. The bipartisan nature of the reform generates from its disaggregation with sociopolitical realities leading to the racialized nature of mass incarceration and the orientation around fiscal impact. *See* Eaglin, *supra* note 5, at 535.

Actuarial risk tools are "old" in the sense that risk assessments have been used in criminal justice administration since the 1930s.[35] For example, Illinois incorporated actuarial risk assessments into its parole release determinations as early as 1932.[36] Risk assessments also played a prevalent role in the construction of sentencing guidelines in the 1980s.[37] It undergirded some of the most draconian sentencing enhancements of the 1990s as well, including the controversial three-strikes laws in California and other states.[38] Consideration of risk, and in particular an emphasis on risk as a means to rationalize sentencing practices through systemic reform, is surely nothing new.[39]

Nor are technical projects meant to standardize judicial decision-making at sentencing new as criminal justice reform. Numerous states, and the federal government, built administrative apparatuses around initiatives to create technical projects designed to improve judicial decision-making in the last quarter of the twentieth century.[40] These sentencing commissions often managed development of guidelines largely based on numerical grids to predict and standardize sentence outcomes. Though these technical structures were ultimately used to *reduce* judicial discretion and eventually raised constitutional issues that led to their current nonmandatory status,[41] as a sentencing reform these structures were offered as a bipartisan solution to rising sociopolitical pressures to address disparities in sentencing.[42]

To be sure, the proliferation of actuarial risk tools is not the same as the creation of sentencing guidelines. The guidelines purported to narrow the range of sentences appropriate for a defen-

35. BERNARD E. HARCOURT, AGAINST PREDICTION: PROFILING, POLICING, AND PUNISHING IN AN ACTUARIAL AGE (2007) (detailing the origin of predictive tools in Illinois in the 1930s).

36. *Id.*

37. *Id.* at 77 (describing the proliferation of actuarial assessments from the 1960s forward); *see also* Eaglin, *supra* note 5.

38. HARCOURT, *supra* note 35.

39. *See* Eaglin, *supra* note 5, at 505, 508 (tracing role of actuarial risk assessments from rehabilitative treatment decisions to systemic parole guidelines to judicial sentencing guidelines).

40. *See id.* at 543.

41. Blakely v. Washington, 542 U.S. 296 (2004); United States v. Booker, 543 U.S. 220, 242 (2005).

42. *See, e.g.*, NAOMI MURAKAWA, THE FIRST CIVIL RIGHT: HOW LIBERALS BUILT PRISON AMERICA 106–111 (2014) (explaining the ambiguity of the "disparity" problem); KATE STITH & JOSE A. CABRANES, FEAR OF JUDGING: SENTENCING GUIDELINES IN THE FEDERAL COURTS (1998) (guidelines as bipartisan solution to critiques of sentencing discretion).

dant based on the severity of crime and a limited set of characteristics about the offender. Actuarial risk tools only seek to standardize a particular factor considered at sentencing. Thus, whereas sentencing guidelines sought to standardize a defendant's substantive sentence outcome, actuarial risk tools do not. Nor have risk tools yet been used as a means to *limit* judicial discretion, while the guidelines were implemented in that exact way.[43]

Yet, in many ways the introduction of actuarial risk assessments as a solution to the economic and social pressures of mass incarceration recycles an old idea. Technical projects were key to several reforms implemented before and during the buildup of the carceral state.[44] The sentencing guidelines created in the 1980s were generated from technical projects meant to respond to bipartisan critiques of criminal sentencing.[45] The parole guidelines, which served as the basis upon which sentencing guidelines developed, were generated from a technical project to structure parole release decisions in response to political pressures about criminal justice administration in the 1970s.[46] The esteemed era of clinical rehabilitation, which immediately preceded the rise of U.S. prison populations, also relied on technical projects to shape decision-making in response to social and political transformations in the 1950s.[47] Initial technical reforms were not meant to affect *judges'* discretion, but instead that of parole boards and parole officers. Nevertheless, the idea that a tool generated from a technical project could reduce the sociopolitical pressures visible at sentencing has deep roots in the history of sentencing reform.[48]

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43. *But see, e.g.*, Brandon L. Garrett & John Monahan, *Judging Risk*, 108 CAL. L. REV. __, 34–35 (forthcoming 2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3190403 [https://perma.cc/3MRC-7P5V] (suggesting that legislatures or sentencing commissions could make sentencing guidelines "more binding" to anchor judicial decision-making to actuarial risk assessment outcomes).

44. On the development of technologies and intersection with carceral state build up, *see generally* ELIZABETH HINTON, FROM THE WAR ON POVERTY TO THE WAR ON CRIME: THE MAKING OF MASS INCARCERATION IN THE UNITED STATES (2016).

45. *See* Eaglin, *supra* note 5, at 504.

46. *See id.* at 509.

47. *See id.* at 506–07.

48. In this sense it is unsurprising that among scholars of sentencing law and policy, those who embraced the sentencing guidelines of the 1980s often encourage the use of actuarial risk tools at sentencing today. *Compare* John F. Pfaff, *The Continued Vitality of Structured Sentencing following Blakely: The Effectiveness of Voluntary Guidelines*, 54 UCLA L. REV. 235, 237 (2006) *with* JOHN F. PFAFF, LOCKED IN: THE TRUE CAUSES OF MASS INCARCERATION – AND HOW TO ACHIEVE REAL REFORM 198–201 (2017) (encouraging adoption of actuarial risk tools as sentencing reform); Kevin R. Reitz, *"Risk Discretion" at Sentencing*, 30 FED. SENT'G REP. 68 (2017)

III.
BEYOND THE QUANTITATIVE DEBATES: REVISITING "OLD" SENTENCING PROBLEMS IN NEW FORM

Whereas many scholars advance empirical critiques of actuarial risk tools today, this Part highlights two "old" conceptual problems which are revived within current debates about actuarial risk assessment. The introduction of these tools as a reform raises questions about the meaning of equality at sentencing. It also begs revisiting the theoretical idea of incapacitation in practice. Framing debates about actuarial risk assessments around these recurring conceptual issues cautions that the enthusiasm for what makes these tools new threatens to obscure social transformations by undermining efforts to reduce the pressures of mass incarceration. By locating the turn toward actuarial risk tools in the context of shortcomings from recent history, this Part offers a different perspective on actuarial risk assessments as a sentencing reform.

A. Equality

"Equality" at sentencing could refer to many things, and different sociopolitical perspectives give resonance to different types of equality. Actuarial risk tools, like the sentencing guidelines before them, give rise to debate about how to pursue equality at sentencing. However, they may obscure the sociopolitical component of the debate in the process.

Guidelines introduced (or perhaps just brought to the fore) a deeper debate about what makes sentence outcomes "equal." Stephen Schulhofer, among others, produced important work to illuminate how fraught a simple demand for equality at sentencing can be.[49] As he suggested, there are at least three different types of equality in sentencing outcomes: all defendants get the same sentence (leading to unwarranted similarities in outcomes); all offenses get the same sentence (leading to unwarranted disparities in outcome); or different defendants get different sentences on the basis of the same "relevant" factors.[50] In pursuit of the latter aim—to ensure different sentences on the basis of the same factors—the

(encouraging domestication of statistically robust risk tools in sentencing structures); *but see* Tonry, *supra* note 3, at 167.

49. Stephen J. Schulhofer, *Assessing the Federal Sentencing Process: The Problem is Uniformity, Not Disparity*, 29 AM. CRIM. L. REV. 833, 835–37 (1992).

50. *Id.*

guidelines often introduced the first and second kind of errors into sentence outcomes.[51]

In addition to the three types of equality described above, technical guidelines introduced a fourth type of overarching inequality to sentencing. This inequality occurs when a defendant receives a formally sound sentence (as defined by the standards described above), which is irrational by any contextual standard. For example, in *Chapman v. United States*,[52] the Supreme Court upheld a defendant's sentence based on the weight of LSD, where the weight included the "mixture or substance" containing LSD. This metric created the "bizarre" outcome that a defendant's sentence could vary under the federal sentencing guidelines between a fifteen- to twenty-year range and less than a year based upon the drug's form.[53] That is, the key sentencing factor became whether the drug dealer transferred the drug in a weighty sugar cube or in pure liquid form.[54] Though the Court held this method to distinguish between drug offenders to be rational, the case highlighted a threat of equality when excessively focused on the "*in*puts" of a sentence rather than the substantive justice of a sentence. As Albert Alschuler described it, such focus could produce "equal nonsense for all."[55]

For purposes of this discussion, the key point to highlight is that one can choose a type of formal equality to pursue at sentencing and at the same time sacrifice substantive justice.[56] In the context of the sentencing guidelines, law and policymakers often chose to construe *uniformity* in sentencing guidelines as substantive equality in sentencing outcomes.[57] This decision invited the institutionalization within sentencing structures of sentencing practices that would disproportionately impact racialized minorities and sustain

51. *See id.*

52. Chapman v. United States, 500 U.S. 453 (1991).

53. *Id.* at 468 (Stevens, J., dissenting).

54. *See id.* at 458 n.2.

55. Albert W. Alschuler, *A Plea for Less Aggregation*, 58 U. CHI. L. REV. 901, 918 (1991).

56. Aya Gruber, *Equal Protection under the Carceral State*, 112 NW. L. REV. 1337, 1367–68 (2018) (critiquing the guidelines as an example of reform that pursues equality by "leveling up criminal punishment").

57. *See* Schulhofer, *supra* note 49.

extended sentence lengths for various crimes.[58] These factors directly contribute to the phenomenon of mass incarceration.[59]

Debates about equality in the construction of actuarial risk tools for sentencing parallel this guideline debate. Scholars divide on what makes a risk assessment equal and whether it matters for sentencing. Advocates for the tools assert that more statistically robust actuarial tools that consider more "risk factors" that would otherwise be excluded from consideration at sentencing make the tools more technically accurate. That technical accuracy—as measured by its statistical value—can produce a form of parity because all defendants are measured by the same standards.[60] This parity, advocates suggest, is equality.[61] Some critics of the tools focus on the fact that the tools include factors that are deeply controversial and potentially illegal, such as the use of gender and potentially race.[62] Other common risk factors, such as education level, employment history, neighborhood of origin, and age of first arrest, correlate with poverty and social disadvantage. Some scholars suggest that inclusion of these factors, regardless of the outcome, fosters inequality.[63] Thus, scholars—and the courts—divide on whether similar outcomes based on rational distinctions (such as criminal history or actual recidivism) make an outcome equal or whether avoidance of dissimilar outcomes based on irrational distinctions (by, for example, eliminating racial disparities in outcomes even if that means taking race into account) makes an outcome equal.[64]

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58. *See* Eaglin, *supra* note 5, at 524; Gruber, *supra* note 56, at 1367–68 (highlighting how federal sentencing guidelines introduced harsh sentences and greater racial disparities).

59. The increase in the prison population is, in a technical sense, the product of an increase in the number of offenders entering the system and the length of time served when entering the system. Sentencing practices that disproportionately keep minorities in the system longer increase the racialized character of prison. Sentencing practices that increase the length of time for defendants increase the amount of time served.

60. Any number of statistical values can stand in for a measure of technical accuracy. These include predictive parity, false negative rates, false positive rates, and many more. For an overview of the different measures and their implications for the pursuit of equality in prediction, see Sandra G. Mayson, *Bias In, Bias Out*, 128 YALE L.J. 2241, 2241–47 (2019). *See also* Huq, *supra* note 26.

61. *See, e.g.*, Huq, *supra* note 26.

62. *See, e.g.*, Starr, *supra* note 3, at 824; Sidhu, *supra* note 22; Tonry, *supra* note 3, at 171–72; Eaglin, *supra* note 15.

63. *See, e.g.*, Starr, *supra* note 3, at 838.

64. *See, e.g.*, Mayson, *supra* note 60, at 2241–47 (providing overview of this debate and erring on the side that a predictive tool should seek predictive parity based on as many risk factors as possible).

This narrow construction debate illuminates a change in perspective rather than just a change in the tools. What actuarial risk assessment tools predict and how the tools are designed to arrive at their predictions calls to mind the larger debate set off by the introduction of sentencing guidelines. Technical interventions like sentencing guidelines or actuarial risk tools privilege a particular type of equality at sentencing—that of standardized inputs producing substantively just outcomes. That shift in focus can have a concrete effect on criminal justice policy. It pushes aside the question of whether sentencing practices driving at uniformity produce substantively irrational sentences.[65] For example, in the context of drug offenses, the pursuit of equality through standardized inputs obscures the policy question of what an appropriate drug sentence should be.[66] It also buries problematic sociological features of the carceral state, like its disproportionate burden on marginalized populations, in technocratic morass.[67] All the while, individual sentence outcomes may appear more sound yet remain excessively punitive.[68]

B. Selective Incapacitation

Consideration of actuarial risk tools as a reform demands revisiting the role of incapacitation theory in sentencing practices. Actuarial risk tools are useful as a reform now because they encourage the selective distribution of punishment on the basis of a defendant's likelihood of engaging in future criminal behavior in order

65. *See* Mark W. Bennett, *Confronting Cognitive "Anchoring Effect" and "Blind Spot" Biases in Federal Sentencing: A Modest Solution for Reforming a Fundamental Flaw*, 104 J. CRIM. L. & CRIMINOLOGY 489, 494–503 (2014) (describing anchoring effect studies); Jelani Jefferson Exum, *Forget Sentencing Equality: Moving from the "Cracked" Cocaine Debate Toward Particular Purpose Sentencing*, 18 LEWIS & CLARK L. REV. 95 (2014) (describing the anchoring effect of sentencing guidelines in sentencing reformers' agendas).

66. *See* Exum, *supra* note 65, at 117 (noting that an equality-based critique of crack cocaine sentencing "raises important concerns" but "by not arguing that drug sentencing is altogether purposeless, reformers are limiting reform possibilities").

67. *See* Starr, *supra* note 3, at 806.

68. *Compare* Exum, *supra* note 65, at 119–20 (noting the problematic anchoring effect of drug sentencing guidelines) *and* Bennett, *supra* note 65, at 519–29 (noting the same gravitational pull of sentencing guidelines more broadly, beyond just drug sentencing) *with* Starr, *supra* note 3, at 867–69 (providing empirical analysis of a sentencing hypothetical wherein actuarial risk assessments gravitationally pulled defendants' sentences up) *and* Collins, *supra* note 19, at 68–69 (providing anecdotal evidence of actuarial tools anchoring sentences by increasing punitiveness as well).

to reduce reliance on incarceration as punishment. Yet this shift in perspective invites a different language to discuss punishment practices that obscures the political nature of an expanding carceral state.

Selective incapacitation refers to the notion that states could identify those individuals most likely to reoffend to save resources and make crime control more efficient.[69] If sentencing laws ensured that these high-risk individuals were incarcerated for longer terms, then they would reduce crime and the costs of incarceration.[70] This notion inspired several sentencing reforms which were implemented during the buildup of the carceral state. For example, three strikes laws and criminal history enhancements in Washington, D.C. in the 1970s, and the federal sentencing guidelines in the 1980s, increased sentence length for repeat offenders based on this idea.[71] Even state sentencing guidelines, which were often far less draconian than the federal guidelines, often institutionalized this idea within their sentencing structures.[72] Such incapacitation-driven reforms directly led to increases in the prison population associated with mass incarceration.[73]

The proliferation of more statistically robust actuarial risk tools now reuses the idea of selective incapacitation, but they are meant to operate in the opposite direction. That is, by using more statistically robust predictions of risk, the institutionalization of tools reflects the notion that states can identify those who are most likely *not* to reoffend. By *diverting* these people from longer terms of incarceration while leaving other defendants to current sentencing practices (and potentially longer terms of incarceration), advocates suggest that states may reduce crime and the costs of incarceration.[74] Only now, instead of identifying this predictive logic as some version of incapacitation, it is conceptualized as what I have else-

69. *See* PETER W. GREENWOOD SELECTIVE INCAPACITATION (Rand Corp. vii 1982).

70. *See id.*

71. "Selective incapacitation" as a formal theory emerged in the 1980s, but the idea was prevalent in the 1970s as well. *See* HINTON, *supra* note 44, at 173–74 (sentencing reforms in the 1970s); *see also* HARCOURT, *supra* note 35, at 32 (sentencing reforms in the 1980s).

72. *See* Eaglin, *supra* note 5, at 516.

73. *See* NAT'L RESEARCH COUNCIL, *supra* note 31, at 70 *(*attributing the increase in length of prison sentences to, among other reforms, "the enactment in more than half the states and in the federal system of three strikes and truth-in-sentencing laws").

74. *See, e.g.*, MODEL PENAL CODE, *supra* note 20, at § 6B.09 cmt. d–e.

where referred to as "neorehabilitation."[75] Actuarial risk tools as a sentencing reform are considered part of a rehabilitative turn because the assessments may encourage courts to divert some defendants from prison terms and toward needed treatment alternatives or other diversion programs (although this outcome is not necessarily guaranteed).[76]

But actuarial risk tools as a sentencing reform implemented to further neorehabilitation may not resolve the problems of mass incarceration, including the economic pressures it places on states. This "new" way to shape sentencing practices through actuarial risk assessments may encourage expansion of the carceral state among the populations already most affected by mass incarceration. Because actuarial tools rely on data collected based on current practices, they will disproportionately target the poor and communities of color because the carceral state's expansion has disproportionately impacted these subpopulations.[77] Even if the tools are used for their most benevolent purpose—to reduce incarceration and encourage rehabilitation—they will likely encourage a different kind of rehabilitation focused on behavioral modifications and surveillance rather than simply job training and skills building.[78] By *increasing* surveillance on the communities already over-surveilled in the carceral state, this outcome undermines the likelihood that even the best tools will *reduce* incarceration in the long term.[79]

75. Eaglin, *supra* note 23.

76. The rehabilitative component of a diversion-from-prison sentence is not guaranteed. Alternatives to prison-incarceration do not equate rehabilitation. In Virginia, for example, the legislature structured decision-making so that an actuarial risk assessment score encourages the court to divert a defendant from a long prison sentence and instead sanction the defendant through "jail, release, probation, community service, outpatient substance abuse treatment or electronic monitoring." BRANDON GARRETT ET AL., NONVIOLENT RISK ASSESSMENT IN VIRGINIA SENTENCING: THE SENTENCING COMMISSION DATA 5 (2018). Some of these alternatives may further rehabilitative aims, like treatment services, but others may not, like electronic monitoring. *See, e.g.*, Eaglin, *supra* note 5, at 39–40 (noting the problematic intersection between rehabilitative rhetoric and incapacitative reforms); Eaglin, *supra* note 33, at 631–34 (critiquing the ways that treatment-oriented diversions can obscure the expanding reach of the carceral state). For an interesting critique of the limited use of diversion-from-prison sentences and actuarial risk assessments in Virginia, see Brandon Garrett et al., *Judicial Reliance on Risk Assessment in Sentencing Drug and Property Offenders: A Test of the Treatment Resource Hypothesis*, 46 CRIM. JUSTICE & BEHAV. 799 (2019).

77. For a more detailed explanation of this assertion, see Harcourt, *supra* note 21. *See also* Eaglin, *supra* note 23.

78. Eaglin, *supra* note 23; Eaglin, *supra* note 5, at 507.

79. For a description of the cycle of correctional supervision to incarceration, see, e.g., Arnett, *supra* note 4.

Rather, this reform may encourage different kinds of incapacitation within the carceral state that can sustain the higher levels of incarceration in the United States over time.

In a way, actuarial risk tools and technical sentencing guidelines share in this obfuscation of incapacitation's political shortcomings. Whereas actuarial risk assessments are associated with a turn toward rehabilitation, the sentencing guidelines were associated with a shift toward retribution.[80] Both tools distract from the political nature of incapacitation logics in practice. For example, incapacitation raises questions about how to allocate resources inside the carceral state while eliding questions about whether and how to allocate resources outside it. This may include strategically responding to different social problems like drug addiction and mental health in nonpunitive ways.[81] In the context of sentencing guidelines, even simple questions like how much it costs to build and maintain technical reforms in comparison to investing in nonpunitive responses to social problems were erased from discussion.[82] Similar questions have yet to be explored in the context of actuarial risk assessments proliferating in the states today.

These strategic questions are political in nature, but are implicated in sentencing reforms. A focus on technical sentencing guidelines as reform then, just like a focus on technical actuarial assessments now, threatens to obscure these kinds of political questions of punishment by insulating sentencing from politics. Ironically, both technical tools obscure those questions even as they seek to manage a different kind of political pressure to be "tough," rather than "smart," on crime.[83] But until policymakers start responding to social problems with methods other than criminal enforcement, meaningful reductions in incarceration are not guaranteed. This remains true even if a technical reform encour-

80. *See* Eaglin, *supra* note 15.

81. *See* Eaglin, *supra* note 33; Aya Gruber et al., *Penal Welfare and the New Human Trafficking Intervention Courts*, 68 FLA. L. REV. 1333 (2016).

82. *See* Alschuler, *supra* note 55 (critiquing the cost saving argument regarding technical sentencing guidelines); Bernard E. Harcourt, *The Systems Fallacy: A Genealogy and Critique of Public Policy and Cost-Benefit Analysis*, 47 J. LEGAL STUD. 419 (2018) (critiquing framing of cost analysis in criminal justice).

83. *See, e.g.,* PFAFF, *supra* note 12, at 196–200 (encouraging the use of data-driven, technical reforms like sentencing guidelines and actuarial risk assessments to manage the tough-on-crime politics of sentencing for violent offenses); *see generally* Rachel E. Barkow, PRISONERS OF POLITICS: BREAKING THE CYCLE OF MASS INCARCERATION 177 (2019) (calling for "smartly designed expert agencies" to shape criminal justice policies but recognizing that such policies cannot grapple with "cultural shifts beyond the scope of an institutional fix").

ages a language of punishment that shifts toward a softer version of incapacitation. In this sense, a "new" technical reform threatens to obscure the same "old" sociopolitical questions about incapacitation and society implicated by the expansion of the carceral state.

IV.
RETHINKING "OLD" AND "NEW": LOOKING TO THE FUTURE, LEARNING FROM THE PAST

Juxtaposing issues with actuarial risk tools and sentencing guidelines urges caution as states and policymakers encourage a new technical intervention at sentencing. Technical sentencing reforms can raise important questions about punishment while obscuring realities about punishment in society. Critically engaging with technical reforms through a framework of "old" and "new" may obscure the clear choices that law and policymakers are making—choices that beg deeper questions about punishment and society. While actuarial risk tools offered today appear to be a new technical reform meant to change punishment practices and possibly reduce sentences to incarceration for some defendants, this discussion highlights that these tools exist within a larger status quo. That is, as some things change (namely, our notions of equality at sentencing and the idea of selective incapacitation) to accommodate technical reforms, the bigger picture (like using the criminal apparatus as the primary form of government intervention) may fall further from view and, in turn, stay the same.

This concern has implications for the kind of scholarship that is needed to fully grasp and confront how we are choosing to respond to the pressures of mass incarceration. While there is a wealth of scholarship emerging on actuarial risk assessments at sentencing and beyond, it is lacking in part due to the orientation around what is "new." Thus, scholars are drawing upon empirical methodologies assessing the tools' accuracy, theoretical data science literature debating the tools' construction, and the social sciences more broadly.[84] To a lesser extent, scholars are drawing upon punishment theory to critique the tools as well.[85] These methodolo-

84. *See, e.g.*, Starr, *supra* note 3; Huq, *supra* note 26 (discussing theoretical data science literature); Reitz, *supra* note 48 (discussing administrative law).

85. For an interesting critique of excessive reliance on punishment theory, see Alice Ristroph, *Just Violence*, 56 ARIZ. L. REV. 4 (2014). For examples of recent scholarship relying on punishment theory to critique the proliferation of actuarial risk tools, see, e.g., Tonry, *supra* note 3; Collins, *supra* note 19. I have, myself, drawn on these theories as well in past scholarship. *See* Eaglin, *supra* note 15.

gies result in a "formalist" approach to criminal justice scholarship that "has little to say about the consequences of punishment, the nature of incarceration, or the forms of enforcement or social control that criminal law might trigger."[86] In other words, what is "new" in technical terms struggles to incorporate what is known about mass incarceration in sociological terms.

Looking back at the scholarship developed around the introduction of sentencing guidelines and other systemic sentencing reforms reveals the need for a different kind of scholarship. Stephen Schulhofer's empirical work examining mandatory minimum sentences, for example, was so profound because it showed how a systemic reform operated in the context of realities about the administration of criminal justice.[87] His inquiries about the sentencing guidelines interrogated assumptions about the guidelines and equality *in practice* by looking to actual outcomes from implementing the reform.[88] There is a relative dearth of this kind of empirical scholarship around the introduction of actuarial risk assessments as sentencing reform.[89] To be sure, it exists but often is dismissed as outside the mainstream of critiques.[90] This is to our detriment. If the question is whether risk tools improve upon current sentencing practices, the answer should be informed by what, exactly, we are currently doing. Only with this kind of empirical reflection—one focused on the tools' impact in practice and not those metrics created to measure tools' accuracy in the abstract—can we fully grasp the impact of more technical, system-wide sentencing reforms.

But there is also a need to look beyond quantitative methodologies to grasp the implications of this sentencing reform, too. Legal scholarship driven by the humanities should complement empirical inquiries of the tools' impact by metrics other than the tools' inter-

86. *See* Benjamin Levin, *Mens Rea Reform and its Discontents*, 109 J. CRIM. L. & CRIMINOLOGY 491, 520 (2019).

87. Stephen J. Schulhofer, *Rethinking Mandatory Minimums*, 28 WAKE FOREST L. REV. 199 (1993).

88. *See, e.g.*, Ilene Nagel & Stephen J. Schulhofer, *A Tale of Three Cities: An Empirical Study of Charging and Bargaining Practices under the Federal Sentencing Guidelines*, 66 S. CAL. L. REV. 501 (1992); Schulhofer, *supra* note 49.

89. *But see, e.g.*, HARCOURT, *supra* note 35. To the extent this scholarship does exist, it often suggests or presumes that the problem lies with human decisionmakers rather than with the interplay between the tools, punishment, and society. Megan Stevenson & Jennifer Doleac, *Algorithmic Risk Assessment in the Hands of Humans* 36–37 (IZA Inst. of Labor Econ. Discussion Paper No. 12853, 2020) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3513695 [HTTPS://PERMA.CC/GXZ7-GJ5Y].

90. *See* Mayson, *supra* note 60 (dismissing Harcourt's call to be skeptical about prediction as "unrealistic").

nal measures of success. Humanist methodologies, including history, social theory, and political theory, were often implemented to ground critiques of sentencing guidelines.[91] Sociohistorical critiques continue to emerge that reframe technical reforms' impact on criminal justice policies and practice in relation to mass incarceration and beyond its scope.[92] As the concepts around criminal justice shift to accommodate technical reforms, legal scholarship would do well to draw upon these humanist works and methodologies to critique actuarial risk tools and other reforms oriented around the assumption that automation improves decision-making without cost.[93] These humanist critiques inform our understanding of how we got to the present crisis point where 2.2 million people are incarcerated in the United States, a disproportionate number of whom are people of color. Infusing such critiques into legal scholarship can also inform our understanding of where we are headed when we adopt certain responses to this crisis. If nothing else, such scholarship illuminates that sentencing reform exists in context. Let that context be as rich with the shortcomings of the past as the promises of the future. For only by fully reflecting on how we arrived at this point of crisis can we begin to comprehend what we are doing when we respond to it.

CONCLUSION

This Essay reflects upon a controversial sentencing reform—actuarial risk tools—in the context of another controversial sentencing reform of the 1980s—the sentencing guidelines. By situating the two reforms in one conversation about conceptual transformations, this piece illuminates how the inclination to reach for a technical tool in response to the pressures of mass incarceration is a road well-traveled. While our perspective—here, our understanding of what actuarial risk tools do and whether they accord with our notions of equality and justice—has changed, our inclination has not. It is this inclination for technical solutions that needs

91. *See, e.g.*, Rachel E. Barkow, *Recharging the Jury: The Criminal Jury's Constitutional Role in an Era of Mandatory Sentencing*, 152 U. PA. L. REV. 33 (2003) (history).

92. *See, e.g.*, HINTON, *supra* note 44 (approaching the problem from history and criminal justice); MURAKAWA, *supra* note 42 (approaching the problem from politics and criminal justice); HUNTER HEYCK, THE AGE OF SYSTEM: UNDERSTANDING THE DEVELOPMENT OF MODERN SOCIAL SCIENCE (2015) (approaching the problem from history and society).

93. For an interesting example of the intersection of law and history scholarship regarding criminal justice reform more broadly, see Sara Mayeux, *The Idea of "The Criminal Justice System,"* 45 AM. J. CRIM. L. 55 (2018).

critique. This Essay calls upon scholars to make those critiques on bases both quantitative and qualitative in nature. This is, I suspect, exactly what an esteemed scholar like Stephen Schulhofer would expect given the wealth of critiques of sentencing guidelines upon which his work built. We should expect no less in the face of actuarial risk tools and the acceleration of the trend toward technical criminal justice reforms.