Evidence-based practices are in vogue as the post-modern savior within criminal justice. Not long ago, a legal commentator observed that risk analysis dominated the law in the areas of environmental, health, and safety issues but had not yet become established in criminal law and procedure.1 Whatever the validity of the statement at the time, across jurisdictions the criminal justice system has

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embraced the evidence-based practices movement. The United States’ economic ills and its record-breaking rate of incarceration have convinced policymakers to adopt new strategies to constrain a dependence on imprisonment, encourage alternative rehabilitative programming, reduce recidivism risk, and improve public safety. The evidence-oriented model utilizes the best data available from the empirical sciences to identify and classify individuals based on their potential future risk of reoffending, and then to manage offender populations accordingly.

Well-informed decisions are critical to achieving a proper balance among such interests as protecting the public and efficiently expending government resources, while at the same time respecting individuals’ liberty interests. The ideology of risk is now considered at the heart of such a balancing act in that information about a defendant’s risk of recidivism informs an expanding number and variety of criminal justice decisions. Interested observers have referred to risk-based philosophies as promoting a “preventive, future-oriented logic of risk,” representing “risk factorology,” and embracing a stance toward risk aversion.

The assessment of risk cannot constitute a simplistic enterprise as human behavior is often capricious. Advocates of the new risk penology properly continue to search for improvements in risk assessment practices by incorporating scientific advances from interdisciplinary research fields. Empirical studies influenced a more recent revolution of the risk penology toward the risk-needs model, which adds to the prediction of future risk a framework for engaging principles of effective correctional interventions addressing criminogenic needs. To be sure, academics across disciplines have long been studying criminal offending. The idea that criminal justice should not be simply focused on warehousing offenders was

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2. Christopher T. Lowenkamp et al., When a Person Isn’t a Data Point: Making Evidence-Based Practice Work, 76 FED. PROBATION, no. 3, 2012, at 11, 12.
5. Lowenkamp et al., supra note 2, at 12–13; Christopher Slobogin, A Jurisprudence of Dangerousness, 98 NW. U. L. REV. 1, 1 (2003) (“Dangerousness determinations permeate the government’s implementation of its police power.”).
represented with a zeitgeist-like emphasis on rehabilitation until the 1970s.\textsuperscript{11} However, since that time the American criminal justice system dramatically deviated away from rehabilitative goals toward retribution, which helps account for the high rate of incarceration ever since. Nonetheless, a current of disappointment with the high financial and social costs of over-incarceration have convinced officials across the country to explore new ideologies by considering alternatives to incarceration and the adoption of practices that work to reduce recidivism rates by addressing criminogenic needs. In sum, this so-called “neorehabilitation” model—meaning the rehabilitation of rehabilitation—seeks to improve upon past practices by incorporating evidence-based practices.\textsuperscript{12} Despite good intentions, controversies emerged.

This Article proceeds as follows. Section II surveys the variety of criminal justice decisions currently informed by risk-needs assessment and introduces several of the most popular tools. Section III reviews constitutional and moral objections to risk-needs tools, such as those recently raised by Attorney General Eric Holder, targeting a host of sensitive factors contained therein, such as demographic and other immutable characteristics. The constitutional analysis engages equal protection, prisoners’ rights, due process, and sentencing law. The text also examines the philosophical polemic aimed uniquely at sentencing as to whether risk should play any role in determining punishment. Neorehabilitation is not necessarily always the golden standard. Across criminal justice decisions, punishment theories variously involve sometimes conflicting perspectives depending on whether officials are reliant upon retribution, deterrence, incapacitation, and/or rehabilitation as the orienting value system(s). The utility of risk-needs considerations likewise will vary by the prevailing punishment philosophy. Section IV appraises potential alternatives for risk-needs methodologies if the concerns so raised prove legitimate. Any option comes with significant consequences. Retaining offensive variables incites political and ethical reproach, while simply removing them weakens statistical validity of the underlying models and diminishes the promise of evidence-based practices. With respect to sentencing, promoting an emphasis on risk diminishes the focus of punishment on blameworthiness, while neglecting risk and needs serves to sabotage a core objective of the contemporary neorehabilitation model of harnessing the ability to identify and divert low risk offenders to community-based alternatives offering culturally-sensitive rehabilitative services. Section V concludes.

\section*{II. Risk-Needs Instruments}

The employment of automated tools that capitalize on the ideology of risk is enjoying its heyday in criminal justice. Numerous scholars and scientists have

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\item \textsuperscript{11} Berman, supra note 3, at 158.
\item \textsuperscript{12} Jessica M. Eaglin, Against Neorehabilitation, 66 SMU L. REV. 189, 193 (2013).
\end{itemize}
\end{footnotesize}
hastened to develop and cross-validate a variety of tools. Risk-needs assessment has become a competitive industry with governmental and for-profit businesses issuing a host of instruments that are either generic in nature or targeted to specific groups (e.g., youth, mentally disordered) or offense types (e.g., sex offenders, violent aggressors). Recidivism prediction is ubiquitous. Everybody’s doing it. There is an enormous academic and professional literature. Unprecedented private sector involvement has occurred in designing and marketing instruments and providing services to government. Some of the tools are proprietary and require payment for their use, while others are in the public domain. Officials in the criminal justice system have become convinced that predicting risk and addressing criminogenic needs are crucial to the core goals in criminal justice of protecting the public, securing correctional institutions, reducing recidivism, providing rehabilitative programming, and at the same time saving resources.

A. Utility of Risk-Needs Data

A justification for the prevalence of risk-based datasets and models is the growth in the number and type of decisions for which they are perceived to be useful. Initially, evidence-based practices were adopted to inform post-conviction decisions and management strategies, such as parole determinations, supervised release conditions, provision of reentry services, decisions to revoke supervision, and judgments concerning probation and parole sanctions. Risk analysis is helpful in crafting release conditions as studies indicate overly burdensome restrictions can harm many otherwise low risk offenders. The adoption of the evidence-based model in general, and the implementation of risk-needs tools more specifically, has recently been promoted in pretrial contexts, such as pretrial

20. Id. at 74–75.
diversion,31 deferred adjudication, bail, and plea negotiations,22 and juvenile transfers to adult court.23 The concern now is not just an immediate interest in reserving pretrial detention for those likely to fail if released into the community, but also a longer term recognition that pretrial incarceration positively correlates with post-conviction failures.24 Risk-needs assessments are immensely popular for a variety of similar decisions made in specialty courts, such as drug courts25 and reentry courts.26

Empirically-based evaluations of future recidivism risk and criminogenic needs are also helpful in other management circumstances, such as designation as a sexually violent predator for purposes of civil commitment,27 sex offender registration classification,28 inmate security classification levels, institutional placement,29 and therapy options in treatment.30 Perhaps the most recent legal arena to turn to risk-needs is sentencing. The idea being to guide sentencers in distinguishing high-risk defendants, for whom preventive incapacitation—perhaps even the death penalty—may be suitable, from low-risk offenders who may fittingly be diverted from prison.31 Risk-needs data also are informing sentencing decisions in the consideration of suitable alternatives to prison and tailoring conditions of community confinement to individual and cultural circumstances.32

Experts maintain there exists a “central eight” risk-needs categories that research consistently show are most associated with recidivism.33 Comprising the central eight, the “big four” are antisocial attitudes, antisocial associates, antisocial personalities, and criminal history, while the “moderate four” include substance abuse, family characteristics, education and employment, and lack of prosocial

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leisure or recreation (though it is recognized that the moderate four largely influence recidivism via the big four). Thus, risk-needs instruments in the field of criminal offending often embed at least a few factors from the central eight categories.

The utility of using risk-needs instruments has attracted energetic support from many reputable policy centers, namely the Justice Center of the Council of State Governments, the Justice Management Institute, the Center for Effective Public Policy, the Vera Institute, and the Center for Court Innovation. Loyalty to evidence-based corrections is equally evident at the state and local levels. For instance, the Judicial Branch of California officially labels the implementation of evidence-based practices in sentencing and corrections policy and practice as “perhaps the most important reform” in criminal justice. The New York City Department of Probation likewise proclaims that it “is in the midst of incorporating evidence-based policies and practices into virtually everything [they] do.”

**B. Evolution of Risk-Needs Tools**

The instruments at the heart of evidence-based corrections practices have evolved over time such that a historical perspective unveils four generations of assessment tools. The first generation of assessments consisted of clinicians conducting unstructured or semi-structured interviews to extract relevant information that, based on the professional’s experience and knowledge, constituted recidivism risk factors. First generation assessment methodologies formed the basis for modern risk assessment practices; although they have largely been

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35. See infra app. A.
37. BEEMAN & WICKMAN, supra note 22, at 3.
supplanted by later generation tools because of perceived improvements in predictive validity.  

Second generation assessments were empirically-based scoring instruments of those variables that were statistically shown to correlate with recidivism. The focus of second generation instruments was on risk rather than rehabilitation needs, and they were intended to be brief and efficiently scored. Examples of second generation instruments are the Violence Risk Appraisal Guide (VRAG), Static-99, and the federal Pre-Trial Risk Assessment tool (PTRA). VRAG remains the most popular tool to assess violent recidivism and contains twelve factors, such as age, marital status, criminal history, and psychopathy. Static-99 is most widely used for sexual recidivism and contains ten static factors, five of which relate to criminal history, with several variables respecting victim type, plus age and cohabitation history. A more recently created instrument, though it still falls within the second generation genre, is the federal probation office’s PTRA tool. PTRA rates eleven items, including the seriousness of the current charge, education, home ownership, and citizenship.

The third generation’s scientific advancements combined actuarial assessment with directed professional judgment and integrated static with dynamic factors. Static risk factors normally are historical, unchangeable, and generally not amenable to interventions. Dynamic factors incorporate criminogenic needs, which are often mutable in nature and, therefore, may be proper targets for rehabilitative programming. The HCR-20 is a structured professional judgment guide for violence risk assessment and management. Its developer recently

44. See Tim Brennan et al., Evaluating the Predictive Validity of the COMPAS Risk and Needs Assessment System, 36 CRIM. JUST. & BEHAV. 21, 21–22 (2009) (noting the first generation “approach relied on clinical and professional judgment in the absence of any explicit or objective scoring rules”).
46. Brennan et al., supra note 44, at 22.
47. Debra A. Pinals et al., Violence Risk Assessment, in SEX OFFENDERS: IDENTIFICATION, RISK ASSESSMENT, TREATMENT, AND LEGAL ISSUES 49, 55 (Fabian M. Saleh et al. eds., 2009).
49. Skeem & Monahan, supra note 9, at 39.
53. Id. at 1096.
claimed that the HCR-20 is among the world’s most widely used and best validated risk-needs instruments for violent reoffending.\(^{56}\) In summary, the HCR-20 is so-named for its inclusion of 20 risk factors in Historical, Clinical, and Risk management domains. The instrument contains 10 historical, largely static, risk factors that fall into three general categories (problems in adjustment or living, problems with mental health, and past antisocial behavior) and 10 potentially changeable, dynamic risk factors. Five of these concern current clinical status such as negative attitudes and active symptoms of major mental illness (the Clinical scale), and five concern future situational risk factors such as lack of plan feasibility and treatment noncompliance (the Risk Management scale).\(^{57}\)

The Level of Service Inventory-Revised (LSI-R), also a third generation tool,\(^{58}\) is likewise a structured professional judgment instrument and is, according to a national survey by the Vera Institute, the most commonly used generic risk-needs tool across American criminal justice agencies.\(^{59}\)

[The LSI-R] contains 54 items rationally grouped according to the following 10 subcomponents representing different risk/need areas: Criminal History, Education/Employment, Finances, Family/Marital, Accommodations, Leisure/Recreation, Companions, Alcohol/Drug, Emotional/Personal, and Attitude/Orientation. Items are scored as either present or absent, based on a semistructured interview and review of available file information, and subsequently summed to yield a total score. Higher scores reflect a greater risk of recidivism and need for intervention.\(^{60}\)

In the latest iteration, fourth generation assessments supplemented the risk-needs combination with responsivity principles and a longer perspective on case management spanning from intake through case closure.\(^{61}\) “Responsivity is defined as tailoring case plans to the individual characteristics, circumstances, and learning style of each offender.”\(^{62}\) Fourth generation tools are often automated with technological applications using algorithmic scoring. The federal probation system developed its Post Conviction Risk Assessment (PCRA) as a fourth

\(^{56}\) Id. at 3.
\(^{58}\) Pinals et al., supra note 47, at 56.
\(^{59}\) Vera Memorandum, supra note 39, at 4.
\(^{60}\) David J. Simourd & P. Bruce Malcolm, Reliability and Validity of the Level of Service Inventory-Revised Among Federally Incarcerated Sex Offenders, 13 J. Interpersonal Violence 261, 264 (1998).
\(^{61}\) Fass et al., supra note 43, at 1096.
The PCRA scores a variety of static and dynamic factors, including education, employment, substance abuse, family problems, and procriminal attitudes. The Correctional Offender Management Profiling for Alternative Sanctions (COMPAS) is one of the best known fourth generation tools, and is described as a “web-based tool designed to assess offenders’ criminogenic needs and risk of recidivism. Criminal justice agencies across the nation use COMPAS to inform decisions regarding the placement, supervision, and case management of offenders.” Reflecting the progresses made in the fourth generation, COMPAS distinguishes itself:

Unlike other risk assessment instruments, which provide a single risk score, the COMPAS provides separate risk estimates for violence, recidivism, failure to appear, and community failure. In addition to the Overall Risk Potential, as represented by those four scales, the COMPAS provides a Criminogenic and Needs Profile for the offender. This profile provides information about the offender with respect to criminal history, needs assessment, criminal attitudes, social environment, and additional factors such as socialization failure, criminal opportunity, criminal personality, and social support.

Overall, a confident synthesis of the proposed value of the current state of risk-needs tools is as follows:

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

The foregoing constitutes a rather brief introduction to the evolution of risk-needs tools and an identification of a few of the most popular in use today. The next section will provide a more extensive investigation of the application of risk-needs tools in criminal justice decisions, with a focus on constitutional law issues and moral considerations.

III. CRITICAL OBSERVATIONS OF RISK-NEEDS ASSESSMENTS

The philosophy underlying evidence-based practices, along with its goal of informing a host of correctional decisions, certainly are laudable. Policymakers and justice officials should be praised for seeking out progressive ideas and engaging alternative options, as opposed to the frequent presumption of incarceration that has burdened their corrections systems over the last thirty years.69 However, scholars and practitioners are debating the appropriateness of using risk-needs tools for criminal justice-oriented decisions due to the presence of potentially objectionable variables within them. Risk-needs tools incorporate a host of factors that are demographic in nature, score on measures involving personal and social functioning, increase risk predictions based on the presence of mental conditions and drug addictions, and rate attitudes indicative of an antisocial outlook. Consequently, a variety of the items scored in risk-needs assessments raise constitutional, ethical, and normative issues.70 For reference, Appendix A contains a summary list of the factors and measures used in some of the most popular risk-needs instruments, sorted by generation.

Risk-needs tools normally score at least several demographic characteristics of the individuals evaluated. Among various instruments, these entail age,71 gender,72 citizenship,73 and marital status.74 Risk-needs tools orient toward rating demographic variables regarding various aspects of family of origin, including having lived with both biological parents until age sixteen,75 a criminal family,76 parental alcohol problem,77 and current family situation.78 Ratings are commonly provided relative to the individual’s personal history, namely criminal background,79 educational attainment,80 and employment stability.81 The instruments often contain

70. Tonry, supra note 14, at 167, 169.
71. PCRA; PTRA; VRAG; Static-99; COMPAS. See infra app. A (summarizing risk assessment tools); Northwestern, supra note 66, at 20, 27 (2013); see also Minn. Dept. of Corrections, The Minnesota Sex Offender Screening Tool-3.1 (MnSOST-3.1): An Update to the MnSOST-3, at 33 (2012) (describing MnSOST-3.1, a Minnesota sex offender screening tool).
72. COMPAS. See infra app. A (summarizing risk assessment tools); see also Sonja B. Starr, Evidence-Based Sentencing and the Scientific Rationalization of Discrimination, 66 Stan. L. Rev. 803, 823 n.76 (2014) (listing instruments that incorporate gender). PCRA includes the Psychological Inventory of Criminal Thinking Styles (PICTS) with a gender-based scoring system.
73. PTRA. See infra app. A (summarizing risk assessment tools).
74. PCRA; VRAG. See infra app. A (summarizing risk assessment tools).
75. VRAG. See infra app. A (summarizing risk assessment tools).
76. LSI-R; COMPAS. See infra app. A (summarizing risk assessment tools).
77. VRAG. See infra app. A (summarizing risk assessment tools).
78. PCRA; LSI-R. See infra app. A (summarizing risk assessment tools).
79. PCRA; PTRA; VRAG; Static-99; HCR-20; LSI-R. See infra app. A (summarizing risk assessment tools).
80. PCRA; PTRA; LSI-R; COMPAS. See infra app. A (summarizing risk assessment tools).
81. PCRA; PTRA; HCR-20; LSI-R; COMPAS. See infra app. A (summarizing risk assessment tools).
measures implicating socioeconomic status, such as financial condition, ownership of home, residential stability, and living in a neighborhood with high crime or illegal drug activity.

Some risk-needs tools compile and rate various aspects of personal and social functioning. Examples consist of elementary school maladjustment and problems with personal support, in addition to factors focused on reliance on social services or public assistance, which may suggest deficits in personal responsibility. Various measures rate relationship issues involving family, consisting of relationship with parents and marital/family problems, and social functioning, such as a history of problems with relationships, social adjustment problems, lack of pro social support, and maintaining criminal acquaintances.

Addictions and mental conditions are commonly integrated therein. These include problems with alcohol or drugs, a history of a mental disorder, personality disorder, psychopathy, or of mental health treatment. Several of the instruments judge attitudes, such as temperament towards supervision and change, lack of insight, personal instability, and problems with stress and coping.

Upon reviewing the foregoing summary, and the list of variables contained in Appendix A, one might well be both comforted that many of the factors appear

82. LSI-R; COMPAS. See infra app. A (summarizing risk assessment tools).
83. PTRA. See infra app. A (summarizing risk assessment tools).
86. LATESSA, ET. AL, supra note 84, at 49.
87. VRAG. See infra app. A (summarizing risk assessment tools); see also LSI-R (rating school suspensions and level of participation in school activities). Id.
89. LSI-R. See infra app. A (summarizing risk assessment tools).
90. PCRA; LSI-R. See infra app. A (summarizing risk assessment tools).
91. Id.
93. LSI-R; HCR-20; COMPAS. See infra app. A (summarizing risk assessment tools).
94. PCRA; LSI-R; COMPAS. See infra app. A (summarizing risk assessment tools).
95. LSI-R; COMPAS. See infra app. A (summarizing risk assessment tools).
96. PCRA: VRAG; LSI-R. See infra app. A (summarizing risk assessment tools).
97. PTRA; LSI-R; HCR-20; COMPAS. See infra app. A (summarizing risk assessment tools).
98. HCR-20; LSI-R. See infra app. A (summarizing risk assessment tools).
100. Id.
102. PCRA; LSI-R; HCR-20. See infra app. A (summarizing risk assessment tools).
105. Id.
perfectly suited to assessing risk and criminogenic needs, yet likewise concerned that more than a few implicate—directly or by proxy—characteristics for which we are sensitive in terms of exploiting certain attributes to rate and classify individuals, perhaps even to punish. Therefore, reliance upon risk-needs assessments when they incorporate potentially problematic factors in the important arena of criminal justice decisions incites constitutional and moralistic concerns. The constitutional doctrines on point include equal protection, prisoners’ rights, and sentencing law. The moral issues involve political unease when decisions are based on immutable characteristics over which individuals have no personal control or that may serve directly or by proxy to replicate discriminatory practices.

A. Constitutional Considerations

By its nature, the use of risk-needs assessments to inform a host of correctional decisions animates several areas of relevant law. The most applicable constitutional guarantees encompass equal protection, prisoners’ rights, due process, and rights in sentencing. This subsection will address each body of law as applied to risk-needs analysis in criminal justice decisionmaking, albeit recognizing these legal frameworks often overlap to some degree.

1. Equal Protection

The Equal Protection Clause embodies the philosophy that persons who are similarly situated ought to be treated alike.\(^\text{106}\) The right exemplifies the central concept that individuals should be accorded fair treatment in the exercise of fundamental rights and that distinctions between groups based on impermissible criteria should be prohibited. Risk-needs instruments utilize a plethora of factors and characteristics to justify criminal justice decisions that may infringe upon fundamental rights or that differentiate between various groups with respect to benefits or burdens. Both results implicate equal protection issues. Regarding classifications, it should be noted that it is not always evident that any contrast in the treatment between groups normatively should be deemed unconstitutional. The Supreme Court has cautioned that equal protection’s promise “must coexist with the practical necessity that most legislation classifies for one purpose or another, with resulting disadvantage to various groups or persons.”\(^\text{107}\)

The Supreme Court’s development of the law of equal protection has resulted in three tiers of analysis: rational basis review, heightened review, and strict scrutiny. The vast majority of claims will fall within the lowest tier, typically the easiest test

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\(^{106}\) City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 439 (1985). While the Fourteenth Amendment technically only applies to the states, the Supreme Court has ruled that its approach to equal protection claims pertains equally to the federal government via the Fifth Amendment’s Due Process Clause. Adarand Constructors v. Pena, 515 U.S. 200, 217 (1995).

for the government to win in sustaining its disparate treatment of a group. This first tier employs rational basis review, whereby the law or policy challenged will survive so long as it serves a legitimate public purpose and the classifications drawn are “reasonable in light of its purpose.”

The second tier requires a law or policy to receive heightened review if it either constructs classifications involving protected groups or infringes upon fundamental rights. Heightened review involves either intermediate scrutiny or strict scrutiny. To date, the Supreme Court has only sanctioned gender and illegitimacy as quasi-suspect classes deserving intermediate review. A classification subject to intermediate scrutiny fails unless it is substantially related to a sufficiently important governmental interest.

The third and highest tier of analysis, strict scrutiny, has been reserved for infringements on fundamental rights and for just a handful of suspect classifications involving race, ethnicity, and alienage. To withstand strict scrutiny, the law or policy must be narrowly tailored to achieve a compelling governmental purpose and use the least restrictive means. As the lower level of analysis of rational basis review is the presumptive tier without a permitted basis for heightened review, the analysis begins there.

a. Rational Basis Review

Risk-needs instruments depend upon historical data extracted from group samples. Hence, risk-needs tools utilize group-based statistics, meaning that classification—at the heart of equal protection doctrine—is immanently embedded in contemporary risk-needs assessment. For example, a tool may, rate young, undereducated persons with a drug habit to have a higher risk of recidivism and a greater need for rehabilitative programming than people not encompassed within those groupings.

The vast majority of the classifications made by risk-needs tools are subject to rational basis review. The Supreme Court made clear that the mere recognition that a group might be stigmatized or otherwise lack equal political power is insufficient to qualify for heightened review. To this end, courts have ruled that rational basis review is sufficient to analyze classifications based on age, economic

status, personality type, mental illness, mental disability, and physical disability, and applies to policies that differentiate in the treatment of alcoholics and drug users. Despite appealing arguments otherwise, socioeconomic class is not accorded any special status in equal protection law.

Importantly, the rational basis test is quite deferential to government officials. To survive rational basis review a law or policy must have a legitimate purpose and be rationally related to that purpose. The government is not required to prove to the court the correctness of its judgment. Rather, the Supreme Court affirmed that challengers must convince the court that the “facts on which the classification is apparently based could not reasonably be conceived to be true by the governmental decisionmaker.” Even if the claimant provides evidence that the government’s judgment was mistaken, she will not prevail if the issue remains debatable in the sense that officials relied on other evidence that is at least reasonable. Further, a court should not inquire into the correctness of the theoretical reasons for making classification distinctions as officials can still make reasonable judgments for “practical considerations based on experience.”

In theorizing a rational basis review, one might first try to identify the likely purposes that criminal justice officials may specify for implementing risk-needs tools. The pragmatic and direct aims are to inform individual decisions concerning bail, sentencing, prison assignment, programming needs, and parole, to name just a few. The more relevant purposes for equal protection analysis, however, would be more theoretical and abstract, such as public safety, prison security, and rehabilitation. For rational basis review, the purpose merely needs to be a legitimate one. Courts have consistently and forthrightly accepted these goals as legitimate in a variety of criminal justice circumstances. In the pretrial context, the Supreme Court, reflecting on its precedence regarding classifications of pre-adjudication detainees, stated that “[a]mong the legitimate objectives recognized by the Supreme Court are ensuring a detainee’s presence at trial and maintaining safety,

122. Hibbs, 538 U.S. at 735.
internal order, and security within the institution.”

A lower court authorized classification judgments in post-conviction placement and programming decisions as “there is a legitimate governmental interest to have inmates placed in [community corrections] facilities appropriate for their needs and concomitant with the public right to safety.” Indeed, courts have routinely accepted that criminal justice officials can readily justify the higher standard of having a compelling interest in such expansive concepts of public safety, hindering flight, preventing crime, and rehabilitation. Thus, to the extent the government is convincingly able to couch its argument in terms of any one or more of these goals, the legitimate purpose portion of the test will be met. Considering that the laws and policies at issue here apply in the criminal justice system where crime control, public safety, and institutional security are core objectives, this burden of establishing a legitimate interest ought to be relatively easy to meet in most cases, except in situations where officials are relying upon truly arbitrary rationales.

Still, assuming a legitimate state interest exists, the next step is to determine whether risk-needs tools, including the factors and resulting classifications they inevitably create, are rationally related to one of the foregoing legitimate interests. From available case law, only one opinion appears to have directly addressed the use of a risk-based instrument in the context of an equal protection challenge. In the 2013 case of People v. Osman, the defendant argued that scoring him with the sexual recidivism risk tool Static-99 was unconstitutional. One of the variables that Static-99 utilizes is having cohabited with an intimate partner. A negative response is adjudged at higher risk than a positive one. The court determined that such a distinction between groups—cohabiting v. non-cohabiting—did not implicate any protected group, such that rational basis review was applicable.

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137. Id. at *3.
138. Id.
139. Id. at *14–15.
The court then summarily upheld the use of the risk tool in defendant’s sentencing.140 The court explained that studies had shown cohabitation experience negatively predicted sexual recidivism and, consequently, employing that factor was rationally related to legitimate interests in predicting the potential for recidivism and protecting the public.141

Despite the dearth of case opinions directly on point, other decisions in the area of criminal justice support the idea that authorities may easily link decisions they commonly make to legitimate interests, including when they are based on unprotected demographic and personal characteristics. A few examples may suffice. Regarding bail decisions that discern based on wealth-related circumstances, a scholar cites several cases to explain the reasonable assertion that “[t]he extremely permissive rational basis standard applicable to wealth discrimination would likely doom an equal protection challenge, as the bail system, for all its faults, is not wholly irrational.”142 Courts, in a variety of situations, have upheld classifications based on drug use, holding that the behavior is related to safety risk143 and the likelihood of reoffending,144 and that persons with a history of drugs require special supervision in treatment.145 Similarly, a state court denied an equal protection claim of a burglary defendant who argued he was given a longer sentence than others guilty of the same offense because of his narcotics addiction; the court ruled the distinction was valid as the state had a compelling interest in providing long-term drug treatment as experience had shown that addiction and crime are correlated.146 In another case example, a judge upheld under an equal protection challenge a policy that required consideration of prior drug use in decisions on prison transfers, as drug history was considered rationally related to proper institutional placement.147

Judges have found, as well, that prison officials possess proper reasons under rational basis review to distinguish violent offenders. In one case, the court concluded the prisoners “fail[ed] to establish that either their placement in the class of ‘violent’ offenders, their treatment within the class of violent offenders, or the difference in treatment of violent and non-violent offenders, is irrational or

140. Id. at ¶15.
141. Id. at ¶15.
arbitrary and not in furtherance of a legitimate governmental interest.” In another case, the court denied an equal protection claim where the rational basis for parole authorities to separate out violent offenders was “self-evident: preventing the early release of potentially violent inmates who may pose a greater danger to the safety of others.”

Further, though there is no evident case law directly on point, there likely is even less concern from an equal protection standpoint of the likelihood a court would rule unconstitutional the use of factors that adjudge procriminal attitudes. A person’s mindset towards antisocial causes seems reasonably relevant to a host of criminal justice outcomes, such as judgments about the individual’s culpability, likely future behavior, and amenability to supervision and treatment.

In sum, excluding for now those factors that may be subject to heightened review, it appears feasible that officials will be able to justify the use of risk-needs instruments in decisionmaking as a general rule and the vast majority of the factors within them will survive equal protection scrutiny. Several other scholars also appear to assume that risk-needs tools likely can withstand constitutional challenge (as long as race/ethnicity, and perhaps gender, are not express factors), though they generally do not undertake a comprehensive equal protection inquiry.

In a recent article, Sonja Starr remonstrates the vision of evidence-based sentencing practices as hardly progressive, contending current methods of risk assessment are unconstitutional when they incorporate any variables implicating race, gender, or socioeconomic status. As for socioeconomic-related considerations, she maintains that such factors as employment, education, income, and reliance upon governmental assistance are constitutionally suspect, with her rationales interweaving equal protection and due process law. The creative claim offered is that while the Supreme Court has not definitively found wealth to be a suspect class, the Court’s previous decisions on the matter are not as relevant to judgments regarding the use of socioeconomic status in a criminal justice context: “The treatment of indigent criminal defendants has for more than a half-century been a central focus of the Supreme Court’s criminal procedure jurisprudence. Indeed, the Court has often used very strong language concerning

148. Riddle v. Mondragon, 83 F.3d 1197, 1207 (10th Cir. 1996). Curiously, the opinion peremptorily declares the state articulated why the classifications were reasonably related to legitimate penological interests and the court declared it could think of others, yet none are listed in the opinion. Id.
150. Tonry, supra note 14, at 169 (opining that equal protection is unlikely to “impede the use of particular factors in prediction instruments” as the Court’s “jurisprudence is largely toothless as far as criminal justice system decision making is concerned”); Eaglin, supra note 12, at 216 (posing race/gender potentially unconstitutional factors in risk assessment); Skeem & Monahan, supra note 9, at 38 (generally assuming that all factors are acceptable risk factors except race).
151. Starr, supra note 72, at 805.
152. Id.
153. Id. at 830–36.
the importance of *eradicating* wealth-related disparities in criminal justice.\footnote{154} In support thereof, the author cites two high court cases: *Griffin v. Illinois*, in which the Supreme Court struck down a requirement that convicted defendants pay court costs to receive a trial transcript, a document statutorily required to be submitted in order to appeal,\footnote{155} and *Bearden v. Georgia*, wherein the Court concluded that automatically revoking probation for a defendant’s inability to pay a fine was unconstitutional.\footnote{156} Starr points to rather broad language in these opinions to support her assertion that the Court’s intention has been to entirely “eradicat[e] wealth-related disparities” across criminal justice decisions.\footnote{157} In *Griffin*, the Court referred to states being prohibited in criminal trials from discriminating on the basis of poverty, just as they cannot discriminate on account of religion, race, or color.\footnote{158} In *Bearden*, the Court ruminated on the unfairness of punishing a person for his poverty.\footnote{159}

However, these two decisions do not appear adequate to sustain a broader claim that socioeconomic status can virtually never be included in a classification-oriented decision in criminal justice. A blanket prohibition on the use of wealth, much less on religion or race, would vitiate the carefully crafted three-tiered tests and otherwise thoroughly undermine the need for any equal protection analysis. Further, *Bearden* itself has been read in a far more limited manner than suggested. A few courts have rightly interpreted *Bearden* as only applying to classifications of indigency versus nonindigency as a dichotomous grouping.\footnote{160} Notably, the economic status-related variables in risk-needs tools do not pursue such a bifurcated structure; instead, such measures attempt to provide information about economic needs for which services can be tailored or which may correlate to failure in the community. In other cases, judges clarified that the *Bearden* ruling merely meant that probation cannot be revoked *solely* because of inability to pay.\footnote{161} This assessment is reasonable considering language from the *Bearden* opinion itself:

> We have already indicated that a sentencing court can consider a defendant’s employment history and financial resources in setting an initial punishment. Such considerations are a necessary part of evaluating the entire background of the defendant in order to tailor an appropriate sentence for the defendant and crime. But it must be remembered that the State is seeking here to use as the

sole justification for imprisonment the poverty of a probationer who, by assumption, has demonstrated sufficient bona fide efforts to find a job and pay the fine and whom the State initially thought it unnecessary to imprison.162

Hence, even in *Bearden* the Court accepted that a sentencer could properly rely upon wealth-related information in considering punishment.

The *Griffin* ruling was also more limited than suggested. The Court later framed *Griffin* (and other relevant precedents) with the requisite circumstances that led to overturning policies requiring a fee from those unable to pay:

The individuals, or groups of individuals, who constituted the class discriminated against in our prior cases shared two distinguishing characteristics: because of their impecunity they were completely unable to pay for some desired benefit, and as a consequence, they sustained an absolute deprivation of a meaningful opportunity to enjoy that benefit.163

The *Griffin* ruling concerning wealth, therefore, required indigency *plus* a complete deprivation of a right. As a consequence, lower courts in the context of criminal justice decisions have since held that wealth classifications do not qualify for heightened review164 and indigency is not itself a suspect class.165 Indeed, wealth-related factors are generally considered relevant to the risk of recidivism across situations. For example, it has been opined that “[i]ncome level is not an inherently invidious basis for classification, and it is hardly irrational to conclude that a parolee without a lawful source of income is likely to return to crime to make ends meet.”166 In the end, it is unlikely that equal protection law is a sufficient

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162. 461 U.S. at 671 (emphasis added).
163. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 20–21 (1973). The Court further opined the inability to conceptualize a definitive group of “poor” and the effect of the law not amounting to an absolute deprivation of a fundamental right meant no disadvantaged class existed deserving heightened review. *Id.* at 25.
166. Paul J. Larkin, Jr., *Managing Prisons by the Numbers: Using the Good-Time Laws and Risk-Needs Assessments to Manage the Federal Prison Population*, 1 HARV. J. L. & PUB. POL’Y 1, 18 (2014) (Federalist ed.); see also United States v. Kerr, 686 F. Supp. 1174, 1179–80 (W.D. Pa. 1988) (indicating while *Bearden* may have implied a more sensitive review of wealth-based classifications in criminal justice, “lack of employment and of legitimately obtained financial resources does indicate that the defendant is likely to commit further crimes, and the deprivation of liberty may be based upon it”).

On an entirely alternative front, a critic might argue that risk-needs tools should fail even rational basis review because of numerous empirical and methodological problems therein suggesting they may not be adequately validated from a scientific perspective and thereby cannot be sufficiently related to achieve the government’s goals.\footnote{168 See generally Melissa Hamilton, Adventures in Risk: Predicting Violent and Sexual Recidivism in Sentencing Law, Ariz. St. L.J. (forthcoming 2015) [hereinafter Hamilton, Adventures], available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2416918 (enumerating empirical issues with popular risk assessment instruments for violent and sexual recidivism, namely Static-99 and VRAG); Kelly Hannah-Moffat, Actuarial Sentencing: An “Unsettled” Proposition, 30 JUST. Q. 270 (2013) (discussing logical and methodological limitations with risk tools); Melissa Hamilton, Public Safety, Individual Liberty, and Suspect Science: Future Dangerousness Assessments and Sex Offender Laws, 83 TEMPLE L. REV. 697, 720–735 (2011) [hereinafter Hamilton, Dangerousness] (reviewing scientific flaws and adversarial bias in sexual recidivism risk assessment tools).} If so, then perhaps the classifications are too arbitrary to withstand equal protection. Notwithstanding, a classification does not fail rational basis review simply because it “is not made with mathematical nicety or because in practice it results in some inequality.”\footnote{169 Heller v. Doe, 509 U.S. 312, 321 (1993) (internal quotes omitted).} The Supreme Court realized that “[t]he problems of government are practical ones and may justify, if they do not require, rough accommodations—[however] illogical, it may be, and unscientific.”\footnote{170 Id. at 321 (quoting Metropolis Theatre Co. v. Chicago, 228 U.S. 61, 69–70 (1913)).} Thus, while the science underlying risk-needs tools has been doubted by some, and there certainly may be questions about the empirical validity of some of the factors used in them, the reality is that the tools are generally accepted by the forensic mental health community and widely depended upon by experienced criminal justice officials. Their appropriateness for the decisions they inform is at the very least still debatable enough to survive the low bar of rational basis review under equal protection analysis.

\textit{b. Heightened Review: Gender}

Impeaching risk-needs tools under heightened review might fare better. Legal opinions differ as to whether the use of gender in risk-needs tools could survive intermediate scrutiny.\footnote{171 Skeem & Monahan, supra note 9, at 38.} A few commentators simply assume that gender would constitute a constitutionally acceptable risk factor as a general rule.\footnote{172 Id. at 321 (quoting Metropolis Theatre Co. v. Chicago, 228 U.S. 61, 69–70 (1913)).} Contrarians,
though, contend that considering gender in risk assessment practices could likely be judged unconstitutional.\footnote{Starr, supra note 72, at 824 n.82; Eaglin, supra note 12, at 216. See also Carissa Byrne Hessick & F. Andrew Hessick, Recognizing Constitutional Rights at Sentencing, 99 CAL. L. REV. 47, 55 (2011) (noting gender an impermissible consideration in sentencing).}

The doubting arguments often cite the decision of United States v. Maples, decided by the Fourth Circuit in 1974, in which the court “deem[ed] the factor of sex an impermissible one to justify a disparity in sentences.”\footnote{United States v. Maples, 501 F.2d 985, 987 (4th Cir. 1974).} Importantly, the Maples court in the very same breath qualified its holding: “absent any proof that rehabilitation or deterrence are more easily accomplished in the case of females rather than males.”\footnote{Id.} The conditional is significant here as substantial disparities by gender typically exist in recidivism rates\footnote{E.g., MATTHEW R. DUROSE ET AL., DEP’T OF JUSTICE, RECIDIVISM OF PRISONERS RELEASED IN 30 STATES IN 2005 3 tbl.2 (2014); PATRICK A. LANGAN & DAVID J. LEVIN, DEP’T OF JUSTICE, RECIDIVISM OF PRISONERS RELEASED IN 1994 7 tbl.8 (2002); Jennifer E. Cobbina, et al., Men, Women, and Postrelease Offending: An Examination of the Nature of the Link Between Relational Ties and Recidivism, 58 CRIME & DELINQ. 331, 338 tbl.1 (2012); Hessick & Hessick, supra note 173, at 82 n.189 (citing studies).} and rehabilitation potential.\footnote{E.g., Kelley Blanchette & Kelly N. Taylor, Reintegration of Female Offenders: Perspectives on “What Works,” CORRECTIONS TODAY, Dec. 2009, at 61, 62; Solveig Spjeldnes & Sara Goodkind, Gender Differences and Offender Recentry: A Review of the Literature, 48 J. OFFENDER REHABILITATION 314 (2009); Kirk Heilbrun et al., How “Specific” are Gender-Specific Rehabilitation Needs?: An Empirical Analysis, 35 CRIM. JUST. & BEHAV. 1382 (2008); Bernadette M.M. Pelissier et al., Gender Differences in Outcomes from Prison-based Residential Treatment, 24 J. SUBSTANCE ABUSE TREATMENT 149, 149 (2003).} A recent study of a large cohort of prisoners in Florida, for instance, found a gendered difference in the impact of imprisonment as compared to a community sanction to recidivism.\footnote{Daniel P. Mears, et al., Gender Differences in the Effects of Prison on Recidivism, 40 J. CRIM. JUST. 370 (2012).} The results suggested that imprisonment had a greater deterrence effect for women.\footnote{Id. at 376–77.} A meta-analysis involving multiple studies supported gendered differences, too, with researchers concluding that a longer sentence was a negative predictor of violent recidivism for male offenders but a positive predictor for women.\footnote{Rachael E. Collins, The Effect of Gender on Violent and Nonviolent Recidivism: A Meta-Analysis, 38 J. CRIM. JUST. 675, 681 (2010).}

Statistical correlations between gender and prison behavior, risk of recidivism, and rehabilitation potential should be sufficient to qualify as a substantial relationship to the important government interests of institutional security, prevention of crime, public safety, and programming. Admittedly, the Supreme Court in a decades-old case implicating gender discrimination rejected as insufficient the state’s statistical argument that a proportionate difference between sexes in offense rates justified disparate treatment. In Craig v. Boren, the state rationalized a law permitting women at a lower age than men to purchase beer, arguing the available

\footnote{Starr, supra note 72, at 824 n.82; Eaglin, supra note 12, at 216. See also Carissa Byrne Hessick & F. Andrew Hessick, Recognizing Constitutional Rights at Sentencing, 99 CAL. L. REV. 47, 55 (2011) (noting gender an impermissible consideration in sentencing).}
data indicated young men were far more likely to be arrested for drunk driving than young women. The Court rejected such argument. The repudiation was not due to the statistical data being uninformative; instead, the justices simply concluded that the data were a poor fit to the state’s purpose of traffic safety. Evidence that 2.00% of young males were arrested for drunk driving (compared to 0.18% of young women) in the jurisdiction was seen as too meager a number to countenance using males as a proxy for drunk driving. Moreover, fitness was further weakened whereby the legislation at issue prohibited the sale—but not the drinking—of beer, such that the relationship to preventing drunk driving became more attenuated.

One commentator who maintains that using gender in risk assessments is unconstitutional conceptualizes Craig as standing for the propositions that equal protection “prohibit[s] . . . inferring an individual tendency from group statistics,” precludes gender-based statistical generalizations, and requires individualistic assessments. Those abstractions seem problematic. The Supreme Court on many occasions has affirmatively approved the use of group-based statistics in decisions involving individuals. For example, the Court upheld a law criminalizing statutory rape for males only, based on broad sex-based generalizations: “Because virtually all of the significant harmful and inescapably identifiable consequences of teenage pregnancy fall on the young female, a legislature acts well within its authority when it elects to punish only the participant who, by nature, suffers few of the consequences of his conduct.” According to the majority, the gendered classification thus was not invidious as it realistically acknowledged the sexes are not similarly situated in all circumstances. In another case, the Court approved differential treatment between male and female naval officers whereby women were permitted a longer time for promotion as the policy “reflects, not archaic and overbroad generalizations, but, instead, the demonstrable fact that male and female line officers in the Navy are not similarly situated with respect to opportunities for professional service.”

The Court in a later case took the opportunity to reflect upon the reasons it had permitted gendered classifications (or not) in various scenarios, summarizing that when males and females are not similarly situated because of proportionate differences in experiences or opportunities, disparities may be appropriate. Instead, “gender-based classifications . . . based solely on administrative conve-

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182. Id. at 204.
183. Id. at 201–02.
184. Id. at 204.
187. Id. at 469.
nience and outworn clichés [which reflect] ‘archaic and overbroad generalizations’” will be prohibited. 189

A lower court has helpfully encapsulated the high court’s case law in gender-based classifications as not requiring any mechanical test, pointing out “at least four particular matters must be explored and weighed: (1) aggregate impact on class; (2) demeaning generalizations; (3) stereotyped assumptions; and (4) flawed use of statistics.” 190 In this regard, Craig is appropriately couched as being much more about the flawed use of statistics plus a weak correlation to the government’s stated interest. 191 In terms of stereotypes, the Supreme Court has defined a stereotype as “a frame of mind resulting from irrational or uncritical analysis.” 192 Thus, the Court upheld a law that gave a monetary preference to women because of its recognition that, on average, females tended to earn less than males, and that such recognition was thereby not considered a stereotype. 193 These decisions approving sex-based distinctions are by their nature using group-based averages to justify the disparate treatment of protected groups, despite the likelihood that many individuals within the groups may not comport with the assumed differences. Empirically-validated and statistically-based differences in risk and needs simply do not constitute demeaning generalizations, stereotyped assumptions, or outworn clichés the justices decry when striking sex-based classifications.

The idea that empirical variations between genders supported by group level studies continue to represent proper statistics to be considered in equal protection analysis in considering if gender is substantially related to the government’s goal is further bolstered by Supreme Court case law in the area of the death penalty. In *Roper v. Simmons*, 194 the Supreme Court blatantly engaged group-based statistics to label an entire group, and in the process vitiated individualization. The classification in *Roper* was not gendered and it was not an equal protection case, but the reasoning is still relevant as it involved capital punishment, a legal decision uniquely individualized in its inquiry. The *Roper* court drew upon generalized statistical studies to label juveniles as lacking maturity, acting irresponsibly, behaving recklessly, being susceptible to peer pressure, and bearing an unformed character. 195 These broad characteristics convinced the *Roper* majority to reject the idea that a factfinder should investigate whether these traits were exhibited at the individual level and, instead, ruled that these group-based observations required the justices to consider juveniles on the whole less culpable than adults and, consequently, undeserving of the death penalty in any case. 196 Indeed, the dissent

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191. Id. at 467.
195. Id. at 569–70.
196. Id. at 571.
criticized the result as using differences between juveniles and adults in the aggregate, despite the probability any such presumptions likely unbefitting many individual cases.197

As a result, the Supreme Court has not banned the use of group-based statistics in equal protection analysis, nor has it required that the government treat each individual as a wholly unique case, even in criminal justice decisions. The key will be whether officials who desire to incorporate gender into risk-needs instruments can offer studies with sufficiently strong correlations between gender and the interest at issue, be it prison behavior, recidivism, or rehabilitation potential. Any gendered differences would mean that the sexes were not similarly situated for equal protection purposes. The second aspect of Craig cannot be disregarded either. The classification made was a poor fit for the government’s interest in preventing drunk driving as it prohibited the purchase, not the drinking, of beer. A strong statistical fit to the government’s interest has been recognized in other cases as sufficient justification, notwithstanding disadvantage to a protected group. For example, the Court agreed that, despite a disproportionate impact based on race, the use of a graded test of verbal skills in qualifying for employment was acceptable where the factfinder determined a correlation between the test and performance in training existed sufficient to validate the test’s usage.198

Nonetheless, there is a wrinkle with the state of current risk-needs tools in terms of gender. The instruments—to date—typically have been normed solely on males and therefore are necessarily not validated for females.199 It has been rightly contemplated that ignoring gender empirically burdens the validity of risk-needs tools for use on women, even with fourth generation instruments:

Men and women are dissimilar as groups in committing crime and rehabilitation. They offend differently in many ways and respond disparately to various forms of treatment and supervision. Yet when it comes to risk assessment officials often assume they are synonymous, perhaps because of discomfort with explicit sex-based practices. Recidivism and career criminal studies consistently show that females are less involved in criminal behavior, are less likely to commit violent crimes, and are less likely to recidivate after being placed on probation or parole. Further, since the “criminal population” is largely male, any instrument that is tested on a total correctional population will naturally misclassify females.200

Forensic risk scientists and criminal justice officials have unfortunately mostly ignored these impediments, such that risk factors and criminogenic needs common

197. Id. at 601 (O’Connor, J., dissenting).
to women often have been excluded, and the science of risk-needs tool for women is in its infancy at best.201 This state of affairs can bankrupt the imposition of any risk-needs tool that excludes gender-based considerations on women.

Other parties acknowledge that the failure to take gender into consideration, at least when predicting recidivism risk, itself is unjust. As one observer comments, “[i]n deed, there seems to be little disputing that males, particularly relatively young men, commit more crimes, particularly violent crimes, than females of any age. If so, it would be irrational not to take those factors into account when predicting future criminality.”202

The potential unreliability of a specific risk instrument to assess women has been recognized by courts in a few cases, though not involving equal protection challenges.203 In two decisions involving evidentiary attacks to sex offender registration classifications, courts recognized the underlying issue. The lower court in one decision found the state’s sex offender review board “arbitrarily and capriciously failed to evaluate evidence of the effect of gender, both on the potency of existing risk factors in predicting reoffense, and as a risk factor in its own right.”204 The other case determined that available sexual recidivism risk tools and statistics for men were inapplicable to women and thus the judge expressly considered the available statistical evidence that female sexual offenders rarely reoffend.205 These opinions exemplify evidentiary issues and shed light on potential equal protection issues. Further, in the event that officials were to use an instrument normed solely on males for men in an institution and not on women, it would appear that such a classification would not violate equal protection as men and women for this purpose would not be similarly situated. The instrument, validated on men, would be inapplicable to women in this regard. Hopefully, in this event, officials would be working toward norming an instrument on women to achieve its goals with respect to that group as well.

Notably, the inclusion of gender, instead of representing a negative and discriminatory purpose, actually serves the interests of institutions and defendants. Gender remains a critical classification method in criminal justice as group-based

201. Hannah-Moffat, supra note 168, at 280 (noting feminist criminologists excoriate forensic scientists for treating females as “afterthoughts”).

202. Larkin, supra note 166, at 18; see also Christopher Slobogin, Risk Assessment and Risk Management in Juvenile Justice, 27 CRIM. JUST. 10, 14 (2013) [hereinafter Slobogin, Risk] (contending age and gender constitutionally relevant in sentencing considering both related to recidivism).

203. Karsjens v. Jesson, 6 F. Supp. 3d 958, 967–68 (D. Minn.) (noting, in case challenging female’s sex offender civil commitment programming, experts’ testimony that actuarial risk tools normed on male sex offenders are inapplicable to females); In re Risk Level Determination of S.S., 726 N.W.2d 121, 123 (Minn. Ct. App. 2007) (noting expert declined to score a sexual recidivism risk tool for a female defendant as it had not been validated on women).


statistics show that the sexes differ in risk and needs in relevant ways.\textsuperscript{206} As an illustration, relevant studies regularly show that female defendants are less likely to be violent, commit a serious crime, or play a major role in crimes involving multiple offenders, and women present a lower security risk when institutionalized.\textsuperscript{207} In terms of criminogenic needs, female offenders are more likely to have been violently victimized and to suffer from medical, physical, and mental problems.\textsuperscript{208} Individually and collectively, these factors are relevant to culpability, predicting in-prison behavior, post-conviction functioning, and risk of antisocial attitudes, and thus should be distinctly considered when decisions are made about women as compared to men.\textsuperscript{209}

To this end, evidence-based practices have appropriately evolved beyond just a half sighted focus on risk as a unitary vision of the likelihood of reoffending. Today, risk-needs tools are used to also evaluate criminogenic needs and interventions to better reduce recidivism and promote rehabilitation. Both the National Institute of Corrections and the Crime & Justice Institute promote gender-based orientations as a component of evidence-based practices.\textsuperscript{210} Overall, contemporary research reinforces the idea that there are significant differences in risk and needs between genders and, as has been examined in this sub-section, with sufficient validation, variables regarding gender properly ought to be included in risk-needs tools. Plus, their inclusion should often be upheld under even heightened review so long as government officials can provide the proper empirical support between gender and the important interest at issue.

c. Strict Scrutiny: Race, Alienage, and Fundamental Rights

In equal protection law, strict scrutiny applies to policies that involve classifications based on race/ethnicity and alienage or infringements on fundamental rights. Equal protection analyses regarding race/ethnicity and alienage distinguish between whether the offending policy clearly discriminates on its face versus constituting a facially neutral policy that disparately impacts a protected group.

\textsuperscript{206} See supra notes 176–180 and accompanying text; Karsjens, 6 F. Supp. 3d at 967–68 (recognizing expert testimony that female sex offenders differ for risk and needs purposes).
\textsuperscript{207} Kristy Holtfreter & Katelyn A. Wattanaporn, The Transition From Prison to Community Initiative: An Examination of Gender Responsiveness for Female Offender Reentry, 41 CRIM. JUST. & BEHAI. 41, 42 (2014) (citing studies); Emily M. Wright et al., Gender-Responsive Lessons Learned and Policy Implications for Women in Prison: A Review, 39 CRIM. JUST. & BEHAI. 1612, 1614 (2012) (citing studies).
\textsuperscript{208} Wright et al., supra note 207, at 1615–16 (citing studies).
\textsuperscript{209} Id. at 1617 (citing studies).
The contrast between them in practice concerns whether the court must enquire about the officials’ purpose. When a classification is explicit, no inquiry into the government’s intent to discriminate is required.211 A facially neutral law, on the other hand, warrants strict scrutiny only if the claimant can prove that the policy was motivated by a discriminatory purpose or object, or if it is unexplainable on any other grounds.212 The Supreme Court instructed that the governmental purpose to be ascertained here “implies more than intent as awareness of consequences.”213 A violation arises only when a public official takes an action “because of, not merely ‘in spite of,’ its adverse effects upon an identifiable group.”214

Several scholars presume that direct measures of race and ethnicity would represent unconstitutional considerations as a general rule in criminal justice decisions.215 In contrast, Michael Tonry concludes that race and ethnicity likely would be upheld as constitutional if they were among a variety of other factors being considered in risk-needs tools. In his observation, the Supreme Court’s constitutional law has been “toothless” with respect to criminal justice officials’ use of race/ethnicity as profiling factors.216 However, Tonry admits that race and ethnicity are unlikely to be explicitly incorporated in scoring tools because they are “widely regarded as unseemly.”217 None of the currently popular risk-needs tools explicitly utilize either within their scored variables,218 which buttresses Tonry’s observation.

Nonetheless, it is worth addressing whether they could do so and still pass constitutional muster because many studies show disparities by race with both recidivism219

212. Id. at 546 (citations omitted).
214. Id. (citations omitted).
215. Starr, supra note 72, at 812; Christopher Slobogin, Prevention as the Primary Goal of Sentencing: The Modern Case for Indeterminate Dispositions in Criminal Cases, 48 SAN DIEGO L. REV. 1127, 1168 (2011) [hereinafter Slobogin, Prevention]; Skeem & Monahan, supra note 9, at 38.
217. Id. Other scholars concur. “Instead of engaging in ordinary constitutional analysis when defendants challenge [sentencing] factors, courts have swept constitutional concerns under the proverbial rug based on the ungrounded conclusion that the sentencing process is somehow unique and thus shielded from constitutional review.” Hessick & Hessick, supra note 173, at 57.
218. In the risk-needs tool in the federal post-conviction system (PCRA), ethnicity is rated but not scored. Johnson et al., supra note 64, at 29 app.1.
and rehabilitation outcomes, and that criminogenic needs may vary by racial/ethnic groupings. Moreover, where differences achieve statistical significance, the inclusion of race or ethnicity even explicitly could at least conceivably allow for material improvements in the statistical models from a predictive validity perspective and, therefore, render the tools better suited to address the compelling governmental interests in public safety, institutional security, and rehabilitative success.

Professor Oleson engages an equal protection analysis using the three-factor strict scrutiny test concerning the use of race and ethnicity in risk-needs assessments. He concludes that Supreme Court precedent suggests that the explicit use of race when found to correlate with recidivism risk may survive strict scrutiny analysis, requiring that the policy at issue be narrowly tailored to achieve a compelling government purpose and use the least restrictive means. This conviction appears to be most befitting equal protection law analysis and as applied to the facts specifically regarding risk-needs assessments in criminal justice. For one, commentators who assert that the use of race and ethnicity are unconstitutional imply that this is true that the conclusion of illegality applies automatically and across scenarios. Yet this perspective disserves the law of equal protection. Race and ethnicity are suspect classifications, to be sure, but not entirely forbidden. Racial and ethnic groupings can survive even strict scrutiny analysis if the government meets its heightened burden. If such classifications were necessarily precluded, there would be no reason to even begin to assess whether the rationale was compelling, whether the law was narrowly tailored, or if less restrictive means were available.

The seminal case of Regents v. Bakke set forth the perspective that while the explicit use of race raises great suspicions, it is not entirely forbidden. There, the Court affirmatively permitted the use of race and ethnicity as one consideration among other factors in a college admissions procedure as the state met its requisite burden under equal protection. Recently, in the context of criminal justice, the Court in Johnson v. United States recognized again that even the explicit use of race can survive strict scrutiny as “special circumstances... may justify racial classifications in some contexts.” Indeed, citing Johnson, lower courts have
found circumstances sufficient to vindicate the blatant use of race in prison cell placements.\textsuperscript{226}

In any event, one can flesh out the argument that risk-needs assessments could use race/ethnicity and still pass strict scrutiny. As institutional security, public safety, and rehabilitation have qualified as compelling interests, it is appropriate to move onto the other two parts of the strict scrutiny test. Could the use of race be narrowly tailored to fulfill the goals of public safety, prison security, and rehabilitation? “Narrow tailoring does not require exhaustion of every conceivable race-neutral alternative.”\textsuperscript{227} As reported earlier, many studies show that race/ethnicity is associated with reoffending rates and rehabilitation success.\textsuperscript{228} As another example, a recent meta-analysis including multiple United States samples found that age, sex, and race were strongly correlated with violent recidivism in that youth, males, and non-whites were more likely to violently reoffend.\textsuperscript{229}

Thus, if racial and ethnic variables significantly improved the predictive validity of risk-needs models, then including them would appear to be narrowly tailored to the government’s compelling interests. Moreover, if significant improvements in predictive ability do exist, excluding those variables undermines the state’s capability of achieving its compelling needs. Considering that one of the purposes of risk assessment is to be better able to identify, and potentially isolate, high risk or potentially violent offenders, any measure that substantially assists in that endeavor should at least not be heedlessly excluded from consideration. Notice, though, the inclusion of caveats made here. If, instead, scientific studies underlying a particular risk-needs tool found that race or ethnicity was not a significant correlate with the relevant outcome (recidivism, failure to appear, rehabilitation success, etc.), then developers should, practically and constitutionally, exclude it because there would be no fit with the policy’s compelling need, and certainly the use of the classification would not be narrowly tailored.

The final factor in the test includes the consideration of alternatives. There can be little doubt that criminal justice officials have over time considered and employed a plethora of options in order to achieve their compelling needs. Based on the widespread patronage of evidence-based practices across jurisdictions today, substantial evidence exists that, at least at this time, risk-needs instruments are likely the least restrictive alternative. The underlying ideology is consistent therewith. As policy analysts with profound experience in correctional interventions recognize, “[t]he risk principle states that, for the greatest impact on


\textsuperscript{228} See supra notes 219–220.

recidivism, the majority of services and interventions should be directed toward higher risk individuals.\footnote{James et al., supra note 33, at 825.} Evidence-based practices, in attempting to reduce reliance upon incarceration and to release into the community more offenders earlier in the process, certainly appear to have a goal of infringing upon the liberty interests of fewer people and, where imprisonment is justified, to a lesser degree. The criminogenic needs portion of the third and fourth generation instruments also appear to qualify as least restrictive means in which specific rehabilitative programs are to be reserved for those with true need for them. Plus, responsivity considerations of the fourth generation further target culturally-relevant services accordingly. Hence, the later generation risk-needs tools appear to epitomize being narrowly tailored and represent the least restrictive alternative.

It is important to emphasize here that this analysis considers the use of race amongst a host of other factors within risk-needs tools. The analysis might shift if the question was whether race on its own could drive criminal justice outcomes. The argument herein draws from the recognition in the \textit{Bakke} opinion that race could appropriately be one of many relevant factors in a decision. Still, we need not attempt such an investigation here in terms of considering whether a tool using race as the sole criterion would stand up to equal protection review. It is unlikely any tool would focus solely on race because doing so presumably would not achieve sufficient predictive ability from a statistical standpoint to justify its value. The tool would be too unitary to comply with the principles of evidence-based practices. The practice might well indicate discriminatory intent by ignoring other clearly established predictors and thus fail equal protection analysis for these reasons.

To be clear, the contention here that the direct use of race and ethnicity in risk-needs tools may be able to withstand equal protection scrutiny with strong enough empirical foundations is not meant as an unreflective recommendation \textit{per se} that these factors must be incorporated. As will be discussed further below, the blatant use of race and ethnicity as considerations in criminal justice decisions face ethical and normative concerns.\footnote{The point instead is that the assumption that race and ethnicity have no legally cognizable role in risk-needs assessment is not compelled by equal protection law. A political decision to ignore them is another matter, though consequences follow. See infra Part III.B.} The final demographic variable of concern to be addressed in strict scrutiny is alienage. As the primary example, the federal Pretrial Risk Assessment includes citizenship as a predictor.\footnote{OFFICE OF PROBATION AND PRETRIAL SERVICES, FEDERAL PRE-TRIAL RISK ASSESSMENT INSTRUMENT: SCORING GUIDE (2013).} Few relevant opinions exist in available case law. In corrections, classifications involving deportable aliens have been upheld.\footnote{Marshall v. Reno, 915 F. Supp. 426, 432 (D.D.C. 1996) (upholding policy limiting community confinement options for deportable aliens).} For instance, one court explained its rationale of treating illegal aliens disparately with
respect to programming: “The United States may treat deportable aliens and citizens disparately. There is no primary interest in reformation of deportable persons. That’s an interest of the country to which they may be deported. Deterring further illegal reentry is a legitimate interest of the United States as well as saving expenses.”234 Whether the PTRA can withstand strict scrutiny, as well, is not so easily resolved as the instrument’s division is not set at being deportable; it rates as a positive predictor for failure any legal or illegal alien. Still, similar to the analysis with race, if this variable is significantly correlated with the interests of pretrial services in bail decisions regarding the likelihood of failure to appear, arrest, and technical violations if released, then it might survive even strict scrutiny.

Strict scrutiny outside of classifications is also reserved for policies that infringe upon fundamental rights. To date, available equal protection case law do not reveal an instance in which any actuarial tool has been excluded from informing criminal justice decisions that serve to infringe upon fundamental interests based upon arguments concerning the unfairness of including specific factors. A single case, though, is on point. In a recent case styled People v. Osman, the defendant argued that the actuarial risk tool Static-99 for sexual recidivism assigned points for never having lived with an intimate partner for at least two years, in violation of his First Amendment right regarding freedom of religion.235 He claimed his faith as a devout follower of Islam prohibited him from living with a lover prior to marriage.236 Rejecting this challenge, the court upheld the actuarial scoring as the state maintained a secular purpose of identifying a convicted sex offender’s likelihood of recidivism; further, the tool did not expressly appraise religious faith.237 The Static-99 did not classify by religion on its face, yet it provides a reminder that equal protection arguments can still rely on facially neutral laws and policies.

d. Proxies

Disparate impact cases depend on the idea that a law or policy may be facially neutral while in effect imposing a disproportionate impact on a select group. While I have argued that risk-needs tools could survive equal protection analysis even with the most protected categories of race and ethnicity and using the stringent test of strict scrutiny (assuming the statistical footing was adequately strong), others quarrel with this notion. Some have voiced concerns that many of the factors in the instruments are merely proxies for demographic characteristics and should be eliminated on the same terms.238 Scholars note that education and employment are

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236. Id.
237. Id. at *10–12.
238. Pari McGarraugh, Note, Up or Out: Why “Sufficiently Reliable” Statistical Risk Assessment is Appropriate at Sentencing and Inappropriate at Parole, 97 MINN. L. REV. 1079, 1102 (2013) ("In order to create a risk
correlated with race and social class, \(^{239}\) potentially even serving as statistical stand-ins for race. \(^{240}\) Even a staunch proponent of risk-needs results in correctional decisions contends that wealth-based measures may be seen as proxies for race and, therefore, ought to be scrutinized carefully by judges as to their legitimacy. \(^{241}\)

However, disproportionate impact, including burdening a racial minority, is not the only measure for finding unconstitutional discrimination in equal protection law. \(^{242}\) Per the Supreme Court, “our cases have not embraced the proposition that a law or other official act, without regard to whether it reflects a racially discriminatory purpose, is unconstitutional solely because it has a racially disproportionate impact.” \(^{243}\) The “settled rule” is that equal protection “guarantees equal laws, not equal results.” \(^{244}\)

Thus, the Supreme Court has generally rejected proxy arguments absent proof of discriminatory intent, such as holding that a law that restricted low income housing was not regarded as intentionally targeting race, despite clear evidence of disproportionate impact on racial minorities. \(^{245}\) The Court has not been persuaded by disproportionate results in other cases. Claimants’ “naked statistical argument” of a welfare policy’s disproportionate impact on a minority group was insufficient in itself to show the requisite racial motivation. \(^{246}\) In another case, an employment qualification test involving verbal ability, vocabulary, and reading comprehension for police officers was upheld even though it resulted in fewer black applicants passing; the creation and implementation of the test was not deemed to exemplify a discriminatory purpose. \(^{247}\)

Indeed, stark statistical contrasts in the impact of a policy on protected groups have not sufficed for courts to presume discriminatory intent. Thus, an employment preference given to veterans was inadequate evidence of discriminatory intent based on gender, even when ninety-eight percent of veterans were male. \(^{248}\) In addition, a federal sentencing law requiring much longer sentences for crack cocaine defendants than powder cocaine offenders was not deemed to have a discriminatory purpose, notwithstanding evidence that ninety-four percent of

\(^{239}\) Tonry, supra note 14, at 167.
\(^{240}\) Slobogin, Risk, supra note 202, at 14.
\(^{241}\) Larkin, supra note 166, at 18.
\(^{243}\) Id. at 239.
\(^{247}\) Davis, 426 U.S. at 245.
\(^{248}\) Feeney, 442 U.S. at 274–75.
crack offenders were black.\textsuperscript{249} Other appellate courts have agreed that the disparate impact of longer crack cocaine sentences than cocaine, though a distinct proxy for race, was insufficient to constitute an equal protection violation where the evidence of racial animus or discriminatory intent by officials was, at most, contradictory, and other racially neutral reasons were provided.\textsuperscript{250}

As a general rule, proxy arguments in terms of disparate impact in the context of risk-needs instruments would likely fail from an Equal Protection Clause perspective. Despite the reality that many of the variables therein disproportionately impact groups based on race, gender, and socioeconomic status, equal protection law will not itself exclude them. There is simply no evidence that the criminologists, forensic scientists, policy advocates, criminal justice officials, or politicians who have embraced evidence-based criminal justice practices in general, and risk-needs assessments in particular, did so for any reason related to a discriminatory animus of a group subject to heightened scrutiny. Certainly, the intent has been to bias high risk and violent offenders specifically, however these do not constitute protected groups, and the resulting relevant rational basis review clearly condones their disparate treatment.

2. Prisoners’ Rights

The use of risk-needs tools to inform correctional decisions regarding security classification, institutional placement, programming, probation, parole, and supervisory conditions may implicate civil rights outside of equal protection. A criminal defendant under the supervision of criminal justice authorities, whether pretrial or post-conviction, retains his constitutional rights to the extent they “are not inconsistent with his status as a prisoner or with the legitimate penological objectives of the corrections system.”\textsuperscript{251} Nevertheless, this area of constitutional law governing prisoners’ rights has taken interesting and unique turns in the course of the last few decades.

For various important legal issues, the Supreme Court has adopted far more lenient standards of review for potential constitutional violations in the context of correctional practices. An exception to the leniency is sentencing, which carries its own legal structure and is addressed separately later. The decisions of correctional officials are treated differently and receive deference from the courts because, “courts are ill equipped to deal with the increasingly urgent problems of prison administration and reform.”\textsuperscript{252} The Court recognized that the penal system offers a

\begin{itemize}
  \item \textsuperscript{249} United States v. Blewett, 719 F.3d 482, 487 (6th Cir. 2013), overruled by en banc court on other grounds, 746 F.3d 647 (6th Cir. 2013).
  \item \textsuperscript{250} United States v. Moore, 644 F.3d 553, 558 (7th Cir. 2011); United States v. Clary, 34 F.3d 709, 713–14 (8th Cir. 1994); United States v. Singleterry, 29 F.3d 733, 741 (1st Cir. 1994).
  \item \textsuperscript{251} Pell v. Procunier, 417 U.S. 817, 822 (1974).
  \item \textsuperscript{252} Procunier v. Martinez, 416 U.S. 396, 405 (1974).
\end{itemize}
distinctly unique background in which officials are attempting to manage in a uniquely dangerous environment.253

Running a prison is an inordinately difficult undertaking that requires expertise, planning, and the commitment of resources, all of which are peculiarly within the province of the legislative and executive branches of government. Prison administration is, moreover, “a task that has been committed to the responsibility of those branches, and separation of powers concerns counsel a policy of judicial restraint.”254

As a result, judges are reluctant to intervene in issues of correctional and supervision practices.255 Thus, judgments regarding prison operation and security “are peculiarly within the province and professional expertise of corrections officials, and, in the absence of substantial evidence in the record to indicate that the officials have exaggerated their response to these considerations, courts should ordinarily defer to their expert judgment in such matters.”256 Prisoners’ rights law is implicated in two areas, regarding decisions that infringe upon fundamental rights or trigger due process protections.

a. Fundamental Rights

Correctional subjects do not entirely lose constitutional guarantees, though the Supreme Court has reduced the standard of review for infringements upon most of those rights to a unitary and deferential test. Per the seminal case in prisoners’ rights litigation of Turner v. Safley, a correctional policy that otherwise trespasses upon a constitutional right is “valid if it is reasonably related to legitimate penological interests.”257 The Court explained its reasoning for such a low standard in spite of transgressing a fundamental right that would trigger heightened scrutiny in other areas of the law (such as equal protection): “Subjecting the day-to-day judgments of prison officials to an inflexible strict scrutiny analysis would seriously hamper their ability to anticipate security problems and to adopt innovative solutions to the intractable problems of prison administration.”258

The Court has used the Turner v. Safley rationale when evaluating claims by correctional subjects involving intrusions on such fundamental rights as speech,259

255. Safley, 482 U.S. at 89; Pell, 417 U.S. at 827 (deferring to prison administrators’ implementation of policies to ensure order and security).
256. Safley, 482 U.S. at 86 (quoting Pell, 417 U.S. at 827).
257. Id. at 89.
258. Id.
association, search, and self-incrimination. This means that in the realm of most correctional practices, risk-needs assessments will presumably withstand constitutional muster for a host of decisions, even if the consequences otherwise breach important individual rights. At one point, the Court generally declared that the Turner standard of review “applies to all circumstances in which the needs of prison administration implicate constitutional rights.”

Still, the Court has since clarified that the deferential stance in favor of the decisions of prison officials is subject to at least one exception: equal protection analysis of explicit race-based prison cell assignments. In the 2005 case of Johnson v. United States addressing automatic cell assignments based solely on race and ethnicity, a majority maintained that the permissive Turner test was appropriate for “rights that are ‘inconsistent with proper incarceration,’” and the “right not to be discriminated against based on one’s race . . . is not a right that need necessarily be compromised for the sake of proper prison administration.”

The decision was controversial though, with a 5:3 vote (one justice not participating) and a scathing dissent that would have retained Turner’s presumptive deference.

Deservedly, Johnson has fostered confusion about other potential exceptions to the Turner standard. Courts are in disagreement, for instance, about whether equal protection claims in corrections law cases regarding other protected categories, such as gender or alienage, continue to be subject to the lenient Turner test or instead deserve protected status. If the answer is the former, then the government’s use of gender and alienage in risk-needs tools fare even better in the prisoners’ rights area than the previous equal protection analysis requiring a heightened review suggested. Almost certainly, an argument that significant differences in recidivism risk and criminogenic needs between genders or citizenship status is at least reasonably related to governmental interests in a correctional context, per the lax Turner test, could succeed given statistical justification. Thus, the use of risk-needs tools in correctional decisionmaking (distinguishing race-based variables and in the context of sentencing for now) is generally free of constitutional trouble.

There is another caveat, however. Even under the lenient Turner standard, there may be a cognizable challenge to risk assessment with respect to pretrial defen-

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265. 543 U.S. 499, 510–11 (2005) (preventing racial discrimination “bolsters the legitimacy of the entire criminal justice system [because] such discrimination is ‘especially pernicious in the administration of justice[,]’ and public respect for our system of justice is undermined” when racial discrimination is permitted).
dants (as compared to post-conviction) based on the government interest in rehabilitation. Clearly, one of the main values of the latest instruments is the incorporation of a focus on identifying criminogenic needs specifically in order to change them through treatment, supervision, and services. In other words, the needs aspect of evidence-based corrections practices is focused on improving rehabilitation potential. The Court has deemed rehabilitation programming to be a legitimate penological interest for the *Turner* test and therefore has approved the use of risk-based classifications to tailor rules for rehabilitation purposes even though they result in infringements upon personal rights. Lower courts have given wide latitude to prison officials in crafting treatment programs to pursue rehabilitation. The crux of the matter, though, is that the acceptance of a legitimate governmental interest in rehabilitation distinguishes between pretrial and post-conviction defendants. The Supreme Court explained that “it would hardly be appropriate for the State to undertake in the pretrial detention period programs to rehabilitate a man still clothed with a presumption of innocence.” Consequently, rehabilitation does not qualify as a legitimate governmental interest in a pretrial context. As a result, at least where risk-needs instruments are utilized for any pretrial decision impacting a constitutional right, even the deferential *Turner* test would not countenance reliance upon a governmental interest in reformation. Officials will face greater difficulty in explaining the connection between variables that implicate criminogenic needs and some other interest, such as security and public safety, as the evidence-based practices literature is resplendent and consistent in its direct connection between needs (rather than risk) and reformation. This recognition, which evidently has gone unnoticed, has a significantly unfortunate consequence to one of the important goals of evidenced-based practices, which is to situate treatment and support services earlier in the process, even pre-adjudication with pretrial programming that may permit diversion from imprisonment. In support thereof, officials with the federal Office of Probation

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267. LESSONS FROM THE STATES, supra note 36, at 6.
272. Houchins v. KQED, 438 U.S. 1, 37–38 (1978) (Stevens, J., dissenting) (noting punishment, deterrence, and rehabilitation inapplicable to pretrial detainees); McGarry v. Pallito, 687 F.3d 505, 513 (2d Cir. 2012) (“[I]t is clearly established that a state may not ‘rehabilitate’ pretrial detainees.”); United States v. El-Hage, 213 F.3d 74, 81 (2d Cir. 2000) (“Where the regulation at issue imposes pretrial, rather than post-conviction, restrictions on liberty, the legitimate penological interests served must go beyond the traditional objectives of rehabilitation or punishment.”).
and Pretrial Services published an article outlining efforts to focus on appropriate treatment in the community prior to trial. But perhaps that same document suggests acceptable alternative interests in many cases: reducing the risks of arrest, violating release conditions, and failing to appear. Of course these explanations would not necessarily save the use of risk-needs for the purpose of rehabilitation of pretrial detainees remaining in confinement.

For the foregoing reasons, constitutional debates about risk-needs tools must differentiate in the application of the law most appropriate to the context. To date, the best reading of explicit Supreme Court doctrine indicates that equal protection law and its heightened review does not apply to sentencing or to correctional decision-making outside the explicit use of race-based decisions serving prison administrative purposes. With respect to the latter, the majority in Johnson could have made further exceptions and was likely aware of the potential ambiguity resulting therefrom, but the fact that they did not so pontificate leaves as precedent the prior, unambiguous assertion that the Turner standard continues to apply outside of Johnson’s limited application. This means that, analyzed under prisoners’ rights law, the risk-needs tools, with all of the variables currently in use (as none explicitly score race/ethnicity), are subject to the low bar of Turner and, therefore, likely to withstand scrutiny for the reasons stated herein. At this point, assuming risk-needs assessments pass the requisite constitutional test, the next issue relates to the idea of transparency and is addressed in the context of due process.

b. Due Process

Risk-needs assessments may implicate due process protections when they result in an infringement upon an individual’s liberty interest. A claimant can derive a liberty interest from the Constitution (‘by reason of guarantees implicit in the word ‘liberty’’) or from a statute or regulation that creates a liberty expectation. Due process law in the correctional context has differentiated between pretrial detainees and post-conviction defendants in terms of the appropriate tests as both already involve liberty restrictions, albeit at varying degrees. For pretrial detainees, conditions of confinement and other restrictions do not implicate due process if they are reasonably related to a legitimate and nonpunitive governmental purpose. It has been aptly noted that the substantive due process standard for assessing pretrial detainees’ claims (requiring a rational relationship to a legitimate

274. Cadigan et al., supra note 51, at 3, 5.
governmental objective) is akin to the *Turner* test (requiring a reasonable relationship to a legitimate penological interest).\(^ {278}\) In any event, as the foregoing due process test suggests, “[i]nt every disability imposed during pretrial detention amounts to ‘punishment’ in the constitutional sense.”\(^ {279}\) For example, conditions that are reasonably related to a penal institution’s interest in maintaining jail security typically pass constitutional muster.\(^ {280}\)

The substantive due process inquiry is distinct for defendants in a post-conviction state. In this context, due process protections are required if the restriction or deprivation either (1) creates an “atypical and significant hardship” by subjecting the subject to conditions much different from those ordinarily experienced by large numbers of inmates serving their sentences in the customary fashion, or (2) inevitably affects the duration of one’s sentence.\(^ {281}\) Opinions have somewhat fleshed out this area of law in terms of what types of correctional conditions qualify (or not) for due process protections. The Court determined that the Due Process Clause does not create a liberty interest in an inmate’s classification status or eligibility for rehabilitative or educational programs, even if the result presents a grievous loss to him.\(^ {282}\) Likewise, “conditions of confinement having a substantial adverse impact on the prisoner are not alone sufficient to invoke the protections of the Due Process Clause ‘[a]s long as the conditions or degree of confinement to which the prisoner is subjected is within the sentence imposed upon him.’”\(^ {283}\) Lower court decisions similarly have recognized that prisoners do not have a constitutionally recognized liberty interest in avoiding transfer to another placement even with the new accommodation resulting in more adverse conditions of confinement,\(^ {284}\) or in their security classification or placement,\(^ {285}\) including when the assignment is based on an assessment of future security risk.\(^ {286}\)

The Supreme Court ruled specifically that there is no liberty interest for due process purposes in a transfer from low- to maximum-security prison because “[c]onfinement in any of the State’s institutions is within the normal limits or range of custody which the conviction has authorized the State to impose.”\(^ {287}\) Conversely, the Court found certain placements in institutions that would qualify as representing “atypical and significant hardship” in conditions in two distinct scenarios. Assignment to the state’s Supermax prison required due process where


\(^{279}\) *Bell*, 441 U.S. at 537.

\(^{280}\) Id. at 540.


\(^{287}\) *Meachum*, 427 U.S. at 225.
Supermax was the state’s most restrictive institution, inmates were held in isolated and extremely controlled conditions for indefinite periods, and the possibility of parole was suspended. The second circumstance entailed the involuntary transfer of a prisoner to a mental health facility where the latter necessitated far greater limitations on freedom of movement, imposed significant stigmatizing consequences, and invoked “mandatory behavioral modification systems,” which, together, constituted a major change in the conditions of confinement. This Court was particularly troubled by the stigmatizing classification as mentally ill, though it also found relevant a state law that created an expectation that a prisoner would not be transferred to a mental hospital without proper procedures.

Case law has also developed rules about liberty interests in other correctional decisions. Regarding prisoners sentenced to a term of imprisonment, the Constitution does not itself create a protected liberty interest in a pre-term expectation of parole. However, a state’s parole law or regulations could provide such an expectation and thus trigger due process protection. Once the system grants parole, even under the condition that the individual comply with release terms, due process protections attach to the decision to revoke parole as it qualifies as a significant change in circumstances and hardship. The same is true for probation revocation.

Overall, many of the decisions for which authorities may use risk assessment regarding placement, transfer, prison conditions, and rehabilitation programming will qualify as reasonably related to legitimate and nonpunitive governmental purposes for pretrial subjects, and will not result in consequences that amount to an “atypical and significant hardship” for post-conviction defendants. Thus, the Due Process Clause will often not apply.

Nevertheless, as the foregoing case law review indicates, there will be times when substantive due process is triggered. Assuming a cognizable liberty interest is established and the requirement of due process invoked, the next question is what procedures are necessary to satisfy the infringement. No singular standard has emerged as there can be no one-size-fits-all procedural methods. Rather, the determination depends on the significance of the infringement, the risk of erroneous judgment, and the burdens to the state of substitute safeguards.

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290. Id. at 494; see also Toevs v. Reid, No. 06-cv-01620, 2010 U.S. Dist. LEXIS 115696, at *16 (D. Colo. Oct. 28, 2010) (finding long-term administrative segregation program with behavioral modifications constitutes atypical and significant restraint).
292. Id. at 12.
In the context of correctional decisions that rise to the level of requiring due process, the procedural requisites at times are rather minimal. In the case of finding a liberty interest in being free of assignment to a Supermax prison, the Supreme Court found acceptable policies whereby prison officials provide the inmate a brief summary of the factual basis underlying the placement decision and a “fair opportunity for rebuttal.” These procedures were seen as commensurate “safeguards against the inmate’s being mistaken for another or singled out for insufficient reason.” Regarding the case involving transfer to a mental hospital, the Court found adequate procedures requiring notice, time to prepare arguments, a hearing at which the inmate can present evidence and witnesses and cross-examine state witnesses, an independent decisionmaker, and a written statement of the evidence and rationale supporting a decision to transfer.

If a state establishes an expectation of parole, the procedure approved for a parole decision included the parole board’s review of the inmate’s record and an informal interview permitting the inmate to offer letters and statements; procedural niceties not required were a formal hearing or a specification of the information in the file that led to denial. In contrast, the minimum requirements of due process for revocation of probation or parole are far more expansive and include (a) written notice of the claimed violations; (b) disclosure of evidence against him; (c) opportunity to be heard in person and to present witnesses and documentary evidence; (d) the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation); (e) a “neutral and detached” arbiter; and (f) a written statement by the factfinder as to the evidence relied on and reasons for revoking probation or parole.

The procedural question at issue here is the scope of access the institution must afford to the individual’s risk-needs assessment. One might rightly ponder a defendant desiring any one or more of the following: the risk-needs outcome; scoring sheets; an accounting of the information and sources thereof the rater referenced; the instrument’s user guides and manuals; the original research the developer undertook in creating the tool; validation studies; or any other data on the tool’s predictive ability. Of course, the answer will vary depending on the breadth and extent of one’s procedural rights as just outlined. When the decision is the denial of parole where a state has created a liberty interest, the minimal procedure there did not even require a statement of information relied upon, so the prisoner likely has little right to his risk-based materials. The other types of decisions implicate greater disclosures of information and rights to challenge. Thus, in the context of placement in Supermax, the statement of facts might need

297. Id. at 226. The state’s procedure also required multiple levels of review. Id.
to incorporate at least the risk-needs instrument results and a “fair opportunity for rebuttal” may require more detail about scoring and the data depended upon for the particular defendant’s assessment.

With liberty infringing circumstances actuating greater procedural protections, such as the transfer to a mental hospital or probation/parole revocation, in which the government must outline the evidence upon which it relied and permit cross-examination, more disclosure is presumably necessary for procedural due process to the extent a risk-needs tool was important to the decision. Again, more than the final scores or ranking would seemingly be required. The information and sources for the data on which the assessor depended would be useful in affording the defendant a fair opportunity to challenge any factual errors. Arguably, the person(s) who conducted the risk assessment ought to be made available and the defendant given an opportunity to cross-examine in order to challenge erroneous scoring and the evaluator’s qualifications. The disclosure of supplemental materials may also be procedurally necessary to permit the defendant the ability to challenge the appropriateness from a scientific perspective of using the specific tool itself or at least to argue to the decisionmaker why so much emphasis should (or should not) be placed on the results.301

On the other hand, a court may well determine that some of the foregoing procedural niceties would improperly turn the proceedings into overly adversarial and lengthy exercises that are too burdensome from an administrative perspective. Whereas the employment of risk-needs tools in criminal justice decisions is relatively recent and legal practitioners generally have only a nascent familiarity with them such that few challenges exist to date, case law has not yet developed with respect to these procedural due process queries. It is beyond the scope of this paper to refine possible approaches, but it appeared to be befitting at least to introduce these issues for perhaps the first time.

3. Sentencing

The law of sentencing has generally been accorded a somewhat special stature in criminal procedure in terms of the types of information that qualify as valid considerations. On the one hand, in determinations of pretrial release, it is commonplace to evaluate residency, employment, community ties, mental health status, and substance abuse as such factors are related to the risk of failing to appear for trial and rearrest.302 In addition, corrections officials can cite a

301. Admittedly, the presence of counsel would often be necessary pragmatically to make these types of arguments considering the intellectual difficulties the risk sciences pose. An author suggests risk instruments ought to be admissible for sentencing but not for parole decisions because only the former entails procedural protections, such as a right to counsel who can examine the appropriateness of risk tool used and the outcome, opportunity to appeal, and presence of a qualified factfinder. McGarraugh, supra note 238, at 1109–10.

substantial body of empirical evidence to support the use of data about criminogenic needs, requiring much information about personal and social functioning, to rather informally assign the most appropriate programming and resources to further rehabilitation success. On the other hand, the question as to whether those same factors are appropriate considerations in the adversarial stage of sentencing, with its often myopic focus on culpability, deserves its own investigation.

Relevant legal literature discloses stark disagreement as to whether future risk may be considered at all for the specific purpose of sentencing. Legal proponents stridently champion evidence-based practices as quite suited to, and comprise best practices for, sentencing proceedings.303 Policy groups are on board as well. The Vera Institute, as an example, promotes judges being routinely informed by risk-needs results in determining whether a nonprison sentence is appropriate and, if so, in considering appropriate community-based services attuned to the individual defendant’s needs.304 A broadly subscribed initiative known as “justice reinvestment” envisions sentencing judges habitually incorporating risk-needs information in decisionmaking about whether to imprison the defendant or choose an alternative, to divert the offender to a specialty court, or to assign appropriate supervisory conditions and services during probation.305 Justice reinvestment adapts the traditional judicial role to one that is not bent just on ascribing appropriate punishment in sentencing, but instead involves judges as participants in evaluating needs and responsivity per the rehabilitative side of the evidence-based model.

Critics, however, are concerned that risk-needs tools are inherently unbefitting for sentencing purposes.306 A prominent criminologist expresses caution about using actuarial risk results in the sentencing process, outlining a host of methodological, pragmatic, and evidentiary issues with them.307 These include the legitimacy of classifying individuals based on group data, the tendency to conflate facts about “character” including physical and mental condition, family ties, employment, financial resources, length of time in the community, and community ties. 18 U.S.C. § 3142(g) (2012).


304. VERA MEMORANDUM, supra note 39, at 10.


307. See generally Hannah-Moffat, supra note 168 (citing concerns such as offense to moral and legal norms and county-specific constitutional values, the de-individualization of punishments, lack of consideration of limitations of science of risk, and unfamiliarity with technology).
correlation with causation, the questionable operationalization of the recidivism variable, the potential for race and gender discriminatory impacts, the lack of transparency in scoring, the potential need for a higher evidentiary standard if a risk tool is used to increase a sentence, and the likelihood of transferring discretion in sentencing from judges to risk tool developers.

More often the qualms are ideological in nature, drawing on the long-standing debate about the relative roles in sentencing of retributive, deterrence, utilitarian, and rehabilitative concerns. A retributive system is backward-oriented such that future predictions are innately irrelevant. John Monahan contends that risk-needs tools are appropriate for civil commitment and sexual predator civil commitment decisions (for which he claims only variables concerning race and ethnicity should be excluded), but not for sentencing.\footnote{308 Monahan, \textit{infra} note 306, at 427–428.} His reason is that theoretically the focus of sentencing should be on culpability, such that concerns of future risk, being unconnected to blameworthiness, are irrelevant.\footnote{309 \textit{Id.} at 427–34.} Punishment, he argues, should not consider anything else a person is (e.g., a gender), anything else a person has (e.g., a disorder), or anything else that has been done to a person (e.g., being abused as a child).\footnote{310 \textit{Id.} at 428.} Blame attaches to what a person has done. Past criminal behavior is the only scientifically valid risk factor for violence that unambiguously implicates blameworthiness, and therefore the only one that should enter the jurisprudential calculus in criminal sentencing.\footnote{311 \textit{Id.}}

Similarly, Paul Robinson opines that relying on even scientifically validated risk factors for future violence which do not index blameworthiness is offensive to a system of just punishment; he posits that a person does not deserve extra punishment simply because he might be young and without a father.\footnote{312 Paul H. Robinson, \textit{Punishing Dangerousness: Cloaking Preventive Detention as Criminal Justice}, 114 \textit{Harv. L. Rev.} 1429, 1440 (2001).} A commentator likewise warns that any “marginal improvements that can be gained by adding demographic considerations must be balanced against the sizable equitable costs of imposing such a regime. There is a risk in detaching punishment from the punishable act.”\footnote{313 Netter, \textit{infra} note 306, at 728.} U.S. Attorney General Eric Holder recently announced his opposition to the use of static and immutable characteristics in risk assessment at sentencing, arguing that punishment should be individualized to assure equal justice and further noted “they may exacerbate unwarranted and unjust disparities that are already far too common in our criminal justice system and in our society.”\footnote{314 Eric Holder, Attorney General, Remarks at NACDL (Aug. 1, 2014), http://www.justice.gov/iso/opa/ag/speeches/2014/ag-speech-140801.html.} A separate U.S. Department of Justice memorandum further highlights the position that risk assessment is uniquely inappropriate for sentenc-
ing purposes as it introduces an unacceptable level of uncertainty in a system that should mete out sure, swift, and fair punishments.\textsuperscript{315} A deterrence regime in a sentencing system would also find risk-needs data ill-suited, at least to the extent they are based on immutable characteristics which cannot be altered and are thus not deterrable.

In opposition, sentencing regimes adopting alternative philosophies with future orientations would find predictions palatable. A more utilitarian jurisdiction would adjudge risk-needs tools greatly attractive, perhaps even necessary, to achieve instrumental goals.\textsuperscript{316} To the extent a sentencing system incorporated prison population reduction targets, it inherently seeks the ability to identify low-risk candidates for community corrections. A sentencing scheme embracing rehabilitation as a proper objective would present the most accommodating regime to risk-needs assessments.

Admittedly, no definitive answer overall can be given here about the suitability of risk-needs to sentencing from an ideological perspective as legislatures are lawfully welcome to adopt any one or more of the foregoing theories in their sentencing laws and policies. The resolution based simply on ideological grounds, thus, may vary by jurisdictional requisite.

Regardless of the jurisdiction’s underlying sentencing philosophy, interested observers note that unease about the types of variables used in risk-needs tools are heightened in the context of sentencing as compared to other criminal justice decisions.\textsuperscript{317} Michael Tonry concludes that factors such as race, ethnicity, religion, and gender may properly be used for decisions as to culturally-appropriate program assignments, yet be unsuitable for decisions involving punishment.\textsuperscript{318} Few proponents or critics have seemed to notice one particular legal pitfall.\textsuperscript{319} The use of certain demographic variables in risk-needs tools potentially violates state statutes. Sentencing laws in many states require that sentence decisions be neutral of a variety of status variables, including race, ethnicity, national origin, gender, and religion, and some prelude other characteristics which would make risk-needs assessments even more vulnerable considering the host of variables within the tools that implicate them, of social status and economic status.\textsuperscript{320}  

\textsuperscript{315} Letter from Jonathan J. Wroblewski, Director, Office of Policy and Administration, Department of Justice, to Judge Patti B. Saris, Chair, U.S. Sentencing Commission 7 (July 29, 2014), available at http://www.ussc.gov/sites/default/files/pdf/training/annual-national-training-seminar/2014/doi-annual-report.pdf. The Department of Justice distinguishes the use of risk-needs assessments in sentencing, for which it opposes, but lauds them for reentry purposes. Id. at 1–8.

\textsuperscript{316} Slobogin, Prevention, supra note 215, at 1159–60.

\textsuperscript{317} Tonry, supra note 14, at 171 (problematicizing demographic and lifestyle choice factors “less acute in contexts other than sentencing.”).

\textsuperscript{318} Id.

\textsuperscript{319} But see Sidhu, supra note 167, at 28–29 (noting many risk-needs variables violate federal sentencing statutes); Hannah-Moffat, supra note 168, at 283 (noting same).

Sentencing may differ from other criminal justice decisions for another reason. A controversy continues as to whether the tests of scrutiny applied to protected groups under equal protection law are relevant in the first instance to sentencing challenges. Many commentators and judges simply assume, as an example, that race-based considerations at sentencing are absolutely prohibited—without exception.\textsuperscript{321} Some case opinions have taken a broad swath, asserting a defendant’s race “may play no adverse role in . . . sentencing.”\textsuperscript{322} The constitutional origin of such an absolute ban is unclear. Other courts convey the legal situation that is likely more accurate, reflecting the use of race in sentencing as still subject to the Equal Protection Clause whereby strict scrutiny applies.\textsuperscript{323} The Tenth Circuit perhaps provides the best interpretation of the state of the law here in recognizing that strict scrutiny still applies to the use of race in sentencing, citing the Supreme Court’s criminal justice decision in Johnson applying strict scrutiny to race-based prison cell assignments.\textsuperscript{324} If the Tenth Circuit’s conclusion is correct, then the analysis of the use of variables of race, ethnicity, and alienage provided previously in the equal protection analysis pertains equally to sentencing. In opposition, if those who believe that race is automatically forbidden as a sentencing consideration are right, such a legal ruling cannot be explained by equal protection law necessitating an analysis of governmental objectives and need, even in heightened scrutiny. Thus, assuming the Supreme Court at some future time were to expressly impose a sort of strict liability bar to any consideration of a protected category at sentencing, the ruling would most assuredly reflect judicially-imposed reasons of public policy, rather than any sort of traditional constitutional analysis.\textsuperscript{325}

The nature of the legal tests for protected groups aside, few cases appear to have addressed the use of risk-needs instrument results in determining criminal punishment. An Indiana appellate court at one point ruled that reliance upon the structured professional judgment instrument’s (LSI-R) results applied in the case to aggravate punishment was improper because the tool merely represented algorithmic data and constituted an exercise that failed to exemplify an appropriate substitute for an independent analysis of the facts, an exercise which sentencing


\textsuperscript{322} United States v. Kaba, 480 F.3d 152, 156 (2d Cir. 2007); United States v. Leung, 40 F.3d 577, 586 (2d Cir. 1994).


\textsuperscript{324} United States v. Smart, 518 F.3d 800, 804 n.1 (10th Cir. 2008) (opining use of race in sentencing decision would not violate equal protection if compelling reasons to justify it).

\textsuperscript{325} United States v. Lyman, 261 F. App’x 98, 100 (10th Cir. 2008).}
decisions demand. However, this treatment of risk-needs assessment results was shortly thereafter effectively overturned by the state’s supreme court. In *Malenchik v. State*, the higher court affirmatively encouraged evidence-based practices as a whole, and as a part thereof favored the ability of sentencers to use information from risk-needs tool results in order to craft appropriate sentencing options with an eye toward fostering reformation. In response to Malenchik’s argument that it was incorrect for a sentencer to consider socioeconomic factors, which were a component of LSI-R, the higher court responded that state rules required socioeconomic information in pre-sentence reports and such facts were relevant at sentencing to understanding the likelihood of recidivism and criminogenic needs. Thus, at least there is some precedent in favor of risk assessment in sentencing and the pertinence of socioeconomic factors therein.

Assuming that risk-needs assessments are appropriate evidence for sentencing purposes, a separate rationale may distinguish sentencing from other correctional decisions from the perspective of transparency. Defendants in general enjoy greater procedural rights at sentencing than in other correctional situations. The question posed here is what rights do sentencing defendants have in receiving evidence regarding the risk-needs tool if one was relied upon in the sentencing process? This query parallels the previous discussion in the prisoners’ rights arena as to the level of access a defendant might enjoy to information about scoring, the tool’s guides, validation studies, etc. Yet, in sentencing, more robust procedural rights must mean that a defendant is entitled to a greater degree of disclosure than in any prisoners’ rights circumstance, including at least some information about the risk-needs component of a sentencing decision.

Several courts have assumed defendants enjoy no due process right to have access to all the information on which the sentencing decisionmaker based its decision. Still, due process requires that information relied upon in sentencing be relevant, reliable, and accurate. The Supreme Court itself ruled that a sentence formed on materially-untrue assumptions about the defendant’s criminal history violates due process. Thus, courts have found that a defendant must be given the factual information on which the sentencer relied and a meaningful opportunity to rebut it. It is also noted that a sentence must normally be vacated

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326. Rhodes v. State, 896 N.E.2d 1193, 1195 (Ind. Ct. App. 2008). The court also complained LSI-R rated factors duplicating considerations the sentencing judge would already have included in the base punishment, such as criminal history, education, and employment. *Id.*

327. 928 N.E.2d 564, 574 (Ind. 2010).

328. *Id.* at 574–75.


where the sentencing judge relies on prejudicial pre-sentence material from unidentified sources that the defendant was not given an opportunity to rebut.\textsuperscript{333} More specifically as to the issues presented herein, information on which a judge relies in determining the defendant’s potential for future dangerousness ought to be disclosed.\textsuperscript{334} The \textit{Malenchik} opinion, mentioned earlier, confirmed this position, pontificating a bit on the defendant’s access to a risk assessment’s scoring sheet completed by probation as part of its pre-sentence investigation:

\begin{quote}
A defendant is entitled to a copy of the pre-sentence report prior to his sentence being imposed. . . . Thus the defendant will be aware of any test results reported therein and may seek to diminish the weight to be given such test results by presenting contrary evidence or by challenging the administration or usefulness of the assessment in a particular case.\textsuperscript{335}
\end{quote}

As risk tools become offered in a greater number of sentencing cases in the future, assuming they pass the potential constitutional barriers discussed herein, it is likely that the number of defendants gaining access to risk assessment information and attempting to rebut the information underlying the scoring and to correct scoring, even to challenge the applicability of the tool itself as the \textit{Malenchik} decision implies, will soar. This should be an advantage to litigants generally. Transparency is valued at sentencing and, overall, more knowledge should be publicized and shared about the advantages and deficits of risk-needs methodologies across criminal justice decisions. In sum, the evaluation of risk-needs information may be differentially oriented in sentencing as compared to other criminal justice contexts. The differing theoretical purposes of sentencing yield varying results. Retributive and deterrence orientations are less amenable to evidence-based practices while utilitarian and rehabilitative foci would embrace them. Practitioners must also be wary of whether certain factors may violate sentencing statutes. With clarity, due process concerns are heightened in sentence decisionmaking whereby more information on risk-needs assessments ought to be provided to defendants and shared among the relevant professional communities to foster understanding and further improve evidence-based practices.

\begin{flushleft}
\textbf{B. Ethical and Normative Concerns}
\end{flushleft}

In addition to voices claiming that certain aspects of risk-needs tools are illegal, many contend that they contain a host of factors that should be deemed unethical—regardless of their constitutionality—to use in a criminal justice context. One concern is that risk-needs tools may serve to punish normative lifestyle choices that individuals in a free society are otherwise at liberty to make, such as whether

\begin{flushleft}
\textsuperscript{333} United States v. Huff, 512 F.2d 66, 71 (5th Cir. 1975).
\textsuperscript{334} United States v. Hamad, 495 F.3d 241, 246 (6th Cir. 2007).
\textsuperscript{335} Malenchik v. State, 928 N.E.2d 564, 575 (Ind. 2010) (citation omitted).
\end{flushleft}
to marry, pursue an education, remain employed, or purchase a home. The ethics-based complaints most often center around the idea that immutable characteristics should be excluded, such as race, ethnicity, religion, gender, and perhaps age. A scholar cites generalized human rights legislation that prohibits the use of age, sex, race, and disability in discriminatory ways. Another believes that the idea of “[p]laying a penalty justified only by an immutable personal characteristic runs counter to nationwide trends in equity and imposes serious societal costs,” including detaching punishment from the culpable act, unfortunately segregating individuals within predictive groups, and suffering many false positives.

Other commentators are likewise concerned with the idea of culpability. It may appear unethical and immoral to base decisions that impact liberty interests on immutable characteristics considering individuals bear no responsibility for them, or on any other characteristic for which the individual has little control, such as mental or physical health status. A quotation from the Supreme Court may support this idea, whereby equal protection law is at times concerned with a classification based on an immutable characteristic which its possessors are powerless to escape or set aside. While a classification is not per se invalid because it divides classes on the basis of an immutable characteristic, it is nevertheless true that such divisions are contrary to our deep belief that “legal burdens should bear some relationship to individual responsibility or wrongdoing,” and that advancement sanctioned, sponsored, or approved by the State should ideally be based on individual merit or achievement, or at least on factors within the control of an individual.

In contrast, scholars who favor risk-needs tools in criminal justice provide counter arguments. Despite the quotation just given, it is notable that equal protection law does not absolutely prohibit the use of protected categories if there is a legally cognizable reason to differentiate on those bases. It may be the case, too, that the use of static factors that individuals cannot control may be justified as

336. Tonry, supra note 14, at 171.
340. Tonry, supra note 14, at 171.
341. CHRISTOPHER SLOBOGIN, PROVING THE UNPROVABLE: THE ROLE OF LAW, SCIENCE, AND SPECULATION IN ADJUDICATING CULPABILITY AND DANGEROUSNESS 113 (2007); Thomas Nilsson et al., The Precarious Practice of Forensic Psychiatric Risk Assessments, 32 INT’L J. L. & PSYCHIATRY 400, 406 (2009) (“A basic demand on just legislation is that all offenders are to be treated equally and fairly, which is hardly the case judging from the way society has singled out the category of mentally disordered subjects as especially perilous. They are supposed to be extensively scrutinised and, when there is a risk for relapse into criminality, they are handed over to an unlimited form of detention with considerably reduced individual rights.”).
343. Larkin, supra note 166, at 18.
they may simply be proxies to other, more palatable risk-based characteristics. Relatedly, Christopher Slobogin explains that risk-based dispositions are ultimately based on a prediction of what a person will do, not what he or she is. Immutable risk factors are merely evidence of future conduct, in the same way that various pieces of circumstantial evidence that are not blameworthy in themselves (e.g., presence near the scene of the crime, possession of a weapon) can lead to a finding of guilt.\footnote{Slobogin, \textit{Risk}, supra note 202, at 15.}

There is the pragmatic approach as well. For example, because being male and of a young age consistently correlate with recidivism, it might be unreasonable not to include these factors as predictor variables.\footnote{Larkin, \textit{ supra note 166, at 18.} 345

The foregoing concerns are often not couched in legal terms \textit{per se} but are largely political in nature in recognition of social consequences. They have been persuasive in some cases. A staunch proponent of risk-needs instruments observes that indigency seems relevant to whether, for example, a person on parole may resort to crime, but he is willing to be more politically correct: “If, however, there is too great a risk that correctional officials might use poverty as camouflage for race, then courts can carefully scrutinize use of that particular feature or eliminate it altogether without condemning risk-needs assessments in the process.”\footnote{Id.}

Several developers of risk-needs tools have succumbed to these sociopolitical concerns. The developers of an actuarial risk tool for sentencing purposes noted they intentionally excluded race and ethnicity as variables, vaguely referring to “stakeholder sensitivities.”\footnote{Richard Berk & Justin Bleich, \textit{Forecasts of Violence to Inform Sentencing Decisions}, 30 J. QUANTITATIVE CRMINOLOGY 79, 87 (2014), available at www-stat.wharton.upenn.edu/berk/SentCART%20copy.pdf.}

The developers of HCR-20 were forthright about the matter: “Some risk factors, despite showing statistical associations with violence in the population, may be considered \textit{prima facie} objectionable to include in an assessment for the purpose of estimating violence risk. Examples include race, gender, and minority ethnic status.”\footnote{Kevin S. Douglas et al., \textit{Historical-Clinical-Risk Management-20, Version 3 (HCR-20V3): Development and Overview}, 13 INT'L J. FORENSIC MENTAL HEALTH 93, 96 (2014).}

Virginia officials developed the state’s own risk instrument, in the end intentionally excluding race as a rated variable, despite its statistically significant correlation with recidivism; interestingly, their justification was based on race as a proxy for social and economic disadvantage rather than the reverse.\footnote{Richard P. Kern & Meredith Farrar-Owens, \textit{Sentencing Guidelines with Integrated Offender Risk Assessment}, 16 FED. SENT’G REP. 165, 165 (2004).} As another example of political correctness, the creators of the federal system’s post-conviction risk tool (PCRA) purposely removed gender from the final instrument, even though their original regression model found being
female was statistically significant as a negative predictor of recidivism. Developers who are so motivated generally have reacted by resorting to regrettably unsophisticated and unempirical methods by merely eliminating ethically questionable predictors without compensating for the lost predictive value.

Overall, the promise of evidence-based practices envisioned by many policy groups, forensic risk investigators, criminal justice officials, and academics has been foreshadowed by equally fierce animosity by other professionals within those same fields. The censure of risk-needs instruments variously espouses constitutional challenges and moralized objections. The criticisms have appeared to convince at least some developers to simply boycott what might otherwise be significant predictors from their models to appease censors.

IV. THE FUTURE OF SOCIODEMOGRAPHIC FACTORS

This Article has outlined various constitutional, ethical, and normative objections to risk-needs instruments. Many have objected to the incorporation of various factors immutable in nature—thereby unchangeable—and thus deemed offensive or otherwise create apprehension when they form the basis of risk prediction in criminal justice decisions. In the sentencing regime, opponents voice philosophical opposition as representing improper considerations in sentencing regimes that ought to be focused on culpability.

Regarding the purportedly offensive factors, race and ethnicity appear to cause the greatest unease. Bernard Harcourt is entirely against prediction models to reduce prison populations because he views risk as merely a proxy for race. Critics also target gender, other immutable characteristics, and socioeconomic factors. Of course, the million-dollar question is what to do since evidence-based practices essentially rely upon empirical risk-needs tools? The clear alternatives are (1) to go all in, employing any empirically validated tool regardless of the factors therein; (2) to cease risk-needs assessments altogether, as Harcourt suggests; or (3) to choose something in between, such as eliminating politically offensive variables.

The third option attracts much attention. Choosing this posited alternative of simply jettisoning disquieting factors comes with unfortunate consequences to the overall platform and aspirations of evidence-based practices. Empirical value will necessarily be compromised as the tools typically include only variables found to

350. Johnson et al., supra note 64, at 19 tbl.1. PCRA creators simply noted that subsequent analyses determined the variable involving gender did not sufficiently improve the predictive validity of the model overall. Id. at 22.
352. See supra notes 309–316 and accompanying text.
353. Harcourt, supra note 238.
354. Id. at 9.
be statistically significant to the risk or need of interest. Simply discarding politically sensitive variables and their proxies from risk-needs tools can critically jeopardize predictive ability.\(^{355}\) The values of empiricism, objectivity, and transparency also depreciate when sociopolitical concerns are elevated over science. To the contrary, a commentator who contends that risk-tools instruments should exclude, for equal protection reasons, variables related to race, gender, and wealth-based factors asserts that doing so would not compromise the predictive validity of tools as a general rule. The support cited by the commentator as justification is a single study that ostensibly “suggests that demographic and socioeconomic factors could be excluded from risk prediction instruments without losing any significant predictive value.”\(^{356}\) This conceptualization of the research overreaches for several empirical reasons.

First, the cited study investigated a subset of a database compiling information on defendants sentenced in 1980 in a few counties from a single state.\(^{357}\) Thus, the study appears too old and too geographically limited to be generalizable. Second, the study actually did not test any risk instrument, or anything analogous to one. The research predated most second-generation risk assessment tools and all third and fourth generation tools. Instead of testing any existing tool, the researchers examined a surfeit of criteria that at the time were often used by various criminal justice officials to make unstructured judgments about risk across the areas of sentencing, probation supervision, and parole guidelines.\(^{358}\) Thus, the study cannot stand as a representative example of any actuarial based model or structured professional judgment tool and the results cannot be generalized across past, existing, or future instruments. Third, regarding the allegation that none of the demographic or socioeconomic factors held predictive ability, the study’s findings on the full sample only showed that a few of the race-correlated status variables failed to improve predictive ability in the full sample. Several status factors uncorrelated with race had already been included in the statistical analysis and, together with other untainted factors, already had been shown to perform better than chance.\(^{359}\) As the authors of the study themselves concluded, “dropping status factors from guidelines would do very little to reduce racial disparities in sentencing, probation supervision, and parole decisions. It might, in fact, increase them by removing criteria that make a greater number of white offenders look like bad risks” because most of the race-correlated status variables affected white

\(^{355}\) Hannah-Moffat, supra note 168, at 284.

\(^{356}\) Starr, supra note 72, at 851 (citing Joan Petersilia & Susan Turner, Guideline-Based Justice: Prediction and Racial Minorities, 9 CRIME & JUST. 151, 161 (1987)).

\(^{357}\) Petersilia & Turner, supra note 356, at 161.

\(^{358}\) Id. at 158 tbl.1.

\(^{359}\) Id. at 171 fig.1. The untainted status variables included high school graduate, mental illness, age, employed, and living with a spouse. Id. at 164–65 tbl.2 (referencing full sample of prisoners and status variables designated with * as not correlated with race).
felons adversely. On the whole, this study is insufficient on its own to justify broader claims and it is still the case that removing statistically significant demographic variables, particularly a large number of them, would reduce predictive ability.

Curiously, some scholars who most staunchly object to the incorporation of many of the variables in risk-needs instruments remain willing to retain criminal history. If the argument is that gender and race, any proxies for gender and race, and/or socioeconomic factors should be excluded because it is simply unjust or politically incorrect to use them for criminal justice decisions, then the same assumption seemingly ought to apply at least as equally to criminal history. Studies consistently show that criminal history is strongly correlated with gender, race, and socioeconomic factors. One of these authors at least attempts to explain the apparent contradiction by arguing that criminal history is distinguishable as one has personal autonomy and control over committing crimes. This contrast is nebulous, as individuals do not entirely lack the ability to alter their sociodemographic positions. Further, the assumption that criminal history measures used in risk-needs tools only cover incidents in which the person actually committed the criminal offense scored is amiss. Many of the tools count as criminal history any evidence of offending, even without some formal confirmation such as a conviction, an arrest, or an official record of any sort; most still count juvenile crimes and offenses for which the individual was officially exonerated as well.

More ideological reasons caution against excluding variables for reasons other than empirical weakness or failure to be reasonably related to governmental interests. Simply excising significant factors begins to grievously undermine other core foundations of evidence-based practices. Recall that the advancements most favored in the third and fourth generation of instruments were the incorporation of dynamic factors, the philosophy that criminogenic needs should be addressed to reduce recidivism and that attention should be focused on responsivity to culturally-relevant services. The factors that are the subject of criticism are generally the same factors that are highly relevant to needs and responsivity, thereby to decisions fostering successful rehabilitative programming. Importantly, recent studies typically show that culturally-sensitive considerations of race, ethnicity, gender, and other immutable factors are necessary to improve rehabilitation results. Eliminating these factors from the risk-needs assessment necessarily undermines gathering information appropriate to connecting needs and responsiv-

360. Id. at 166.
361. Sidhu, supra note 167, at 70; Starr, supra note 72, at 872.
362. Hannah-Moffat, supra note 168, at 283 (citing studies regarding gender, race, and socioeconomic factors); King, supra note 31, at 547 (citing the influence of race).
363. Sidhu, supra note 167, at 66.
ity to supervision, programs, and services.

As for the philosophical grievances with respect to sentencing specifically, prohibiting risk-needs consideration at all in sentencing decisions poses another assault on a fundamental goal of evidence-based practices, which is the incorporation of judges at sentencing into the broader enterprise. Justice reinvestment includes molding the judicial role at sentencing into one in which risk-needs data can inform judges when considering whether to imprison, the desirable length of sentence, the appropriateness of alternative sanctions, and the choice of probation conditions and service needs. Either stance against evidence-based practices, whether because of a philosophical focus on culpability or because of legal and ethical concerns about certain variables therein, severs or curtails this crucial component of the evidence-based model reliant upon judicial involvement and participation.

Admittedly, elsewhere I have argued in opposition to the incautious dependence upon actuarial risk assessments for criminal justice decisions because of empirical concerns about reliability and validity.365 My editorials included tribulations about certain risk instruments having been normed on foreign samples yet indiscriminately scored on domestic offenders, high rates of false positives, exaggerations of predictive validity measures, evidence of adversarial bias in scoring, the lack of standardization in sufficiently training raters, and the inherent inability of group-based statistics to permit individualized predictions of risk.366 These concerns remain, and because they persist, it is even more deeply troubling that heedlessly removing statistically significant factors further renders the instruments increasingly less reliable and valid from a statistical perspective. Here, though, the contention is that as long as embedding risk-needs instrument results to inform criminal justice decisions continues to be performed in practice, then at least it makes sense to permit officials to rely upon the best science available, instead of destabilizing the very foundations upon which evidence-based practices emerged.367

In any event, a counter perspective might point out the potential unfairness where, if officials are obeying the empirically-driven dictate that a tool should not be used to rate a person or group for whom it was not validated, many individuals or groups cannot then be so assessed. In other words, they may be treated differently, which raises legal suspicions and undermines uniformity and consistency. These concerns are real, but should not be dispositive. First, it must be recognized that we have no national uniformity in criminal justice practices in the

367. I am little concerned that using immutable traits, even gender and race, in risk-needs will be viewed by many as evidence of animus or indicative of any derogatory discriminatory purpose. There are simply no signs that evidence-based practices embody any nefarious intent toward any group except for those offenders for whom empirically validated instruments using a variety of variables rate as high risk. Simply ignoring an abundance of evidence that differences exist in risk, needs, and responsivity, even with race, gender, and socioeconomic status, sacrifices empiricism for political correctness.
first instance. A defendant may be rated on a risk-needs tool in one state but not in another simply due to variations in state practices. An inmate in one jail may be subject to a risk-needs analysis whereas an inmate in another jail even in the same city may not. No equal protection problem arises, though, as these inmates are not similarly situated.368 Second, even if groups within the same institutional placements are differentially rated on risk measures because of validation concerns, there is also no evident issue to the extent they also are then not similarly situated. The benefits of evidence-based practices should not be suspended until the instruments are validated on everyone in the institution. Third, even if the institution’s practice is to assess all offenders anyway, there is the potential for overrides to the extent the assessor considers the individual to differ in some risk or needs-relevant way(s) not addressed by the tool. Finally, in terms of potentially disserving groups based on immutable characteristics, an additional consequence of removing those factors is that the practice diminishes officials’ ability to protect potential future victims sharing those same characteristics as studies typically indicate that offenders often commit crimes against those with similar demographic and status traits.369

Another value will be lost by abridging evidence-based practices: innovation. If we cease risk-needs assessments or abbreviate them by removing important variables to assuage political sensitivities, we lose valuable information, experience, and data that scientists could mine to greatly improve their models and use to conduct further studies in order to cross-validate the instruments on more and more groups. Advancements in empirically driven risk-needs tools are critical to criminal justice decisions. As has been recognized,

> [t]he application of accurate and up-to-date information, including all known and empirically validated risk factors, thereby ensures that hearing examiners have the tools they need to arrive at individualized classification determinations. “Such determinations must be grounded in a corpus of objective facts and data, necessarily dynamic and evolving to revise collective understanding of the risk that various individuals pose to the public.”370

The deeper the knowledge researchers are able to accumulate and study, the greater progress evidence-based practices can achieve. Evidence-driven decisions are seen to hold the key to reducing reliance on over-incarceration, targeting services to offenders who most need them, and reducing recidivism. If risk-needs tools are censored or if constitutionally or ethically suspect variables are excised therefrom, it is likely that fact-finders would consider risk and the factors of race,

368. Beaulieu v. Ludeman, No. 07-1535, 2008 U.S. Dist. LEXIS 119324, at *37 (D. Minn. Feb. 8, 2008) (“Detainees at one facility or unit are not considered to be ‘similarly-situated’ to detainees at other facilities or units for Equal Protection purposes.”).
gender, and socioeconomic status in criminal justice decisions informally anyway, rendering their use less reliable, transparent, and consistent.371

V. CONCLUSIONS

It may be somewhat true that assessing risk is akin to predicting the winner in a horse race.372 Still, criminal justice officials rightly seek out scientifically validated methods to enhance risk prediction capabilities and gauge criminogenic needs. The review herein of the evolution of risk-needs instruments highlighted interdisciplinary advancements among numerous private and public industries. These endeavors have, at the same time, spawned controversies. Evidence-based practices in criminal justice represent, contradictorily, either a panacea of best practices or a harbinger of unfair and unconstitutional biases. Risk-needs instruments incorporate a host of variables that are scientifically shown to be statistically significant, yet many of them also inflame certain political sensitivities. The utility of risk-needs instruments also varies depending upon the type of criminal justice decision and whether its preferred philosophy underlying it is retributive, deterring, incapacitative, or rehabilitatory in nature. Legal scholars, forensic professionals, and policy analysts continue to struggle with these paradoxes.

This article reviewed these constitutional and moral quandaries for the use of risk-needs assessment across multiple criminal justice decisions. Certainly, hard choices must be made. But this state of affairs is not a new predicament in criminal justice. Trying to make amends for a history of discrimination can lead officials to sacrifice when making decisions to improve public safety in order to appease stakeholder and public sensitivities. Further, policymakers continue to debate the most appropriate philosophical orientation to employ. In the end, after critically analyzing the various legal and political arguments, I conclude that modern risk-needs methodologies—assuming empirical validation and statistical significance—need not for constitutional or moral reasons be forsaken or truncated. The country holds compelling reasons to innovate to curb its record incarceration rate, offer appropriate rehabilitation, and improve institutional safety, to the mutual benefit of all.

372. QUINSEY ET AL., supra note 199, at 36.
APPENDIX A: POPULAR RISK ASSESSMENT TOOLS

1. Second Generation Tools

<table>
<thead>
<tr>
<th>Instrument</th>
<th>Factors Rated</th>
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| Violent Risk Appraisal Guide (VRAG)\textsuperscript{373} | • Nonviolent criminal history score  
• Failure on prior conditional release  
• Age  
• Marital status  
• Lived with both biological parents to age 16  
• Elementary school maladjustment  
• Alcohol problems  
• Victim Injury  
• Female victim  
• Personality disorder  
• Schizophrenia  
• Psychopathy checklist score |
| Static-99\textsuperscript{374} | • Number of prior sex offense charges  
• Prior convictions for a non-contact sex offense  
• Convictions for an index non-sexual violence  
• Convictions for non-sexual violence before index  
• Number of prior sentencing dates  
• Age  
• Lived with intimate partner for 2 years  
• Nonfamilial victims  
• Stranger victims  
• Male victims |

\textsuperscript{373} Id. at 237–238.  
2. Third Generation Tools

<table>
<thead>
<tr>
<th>Instrument</th>
<th>Factors Rated</th>
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<tbody>
<tr>
<td>HCR-20³⁷⁶</td>
<td>Historical</td>
</tr>
<tr>
<td></td>
<td>• Previous violence</td>
</tr>
<tr>
<td></td>
<td>• Prior supervision failure</td>
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<td></td>
<td>• Young age at first violent incident</td>
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<td></td>
<td>• Relationship instability</td>
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<td>• Employment problems</td>
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<td>• Early maladjustment</td>
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<td>• Substance use problems</td>
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<td>• Major mental illness</td>
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<td>• Psychopathy</td>
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<td>• Personality disorder</td>
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<tr>
<th>Instrument</th>
<th>Factors Rated</th>
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<tr>
<td>HCR-20 (cont.)</td>
<td>Clinical</td>
</tr>
<tr>
<td></td>
<td>• Lack of insight</td>
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<td></td>
<td>• Negative attitudes</td>
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<td></td>
<td>• Active symptoms of major mental illness</td>
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<td></td>
<td>• Impulsivity</td>
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<td></td>
<td>• Treatment nonresponse</td>
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<td>Risk Management</td>
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<td></td>
<td>• Plans lack feasibility</td>
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<td></td>
<td>• Exposure to destabilizers</td>
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<tr>
<td></td>
<td>• Lack of personal support</td>
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<td>• Noncompliance with remediation</td>
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<tr>
<td>LSI-R\textsuperscript{377}</td>
<td>Criminal History</td>
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<tr>
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<td>• Prior adult convictions</td>
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<td>• Number of current offenses</td>
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<td>• Prior incarceration</td>
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<td>• Escape history</td>
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<td>• Punished for institutional misconduct</td>
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<td>• Community supervision violation</td>
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<tr>
<td></td>
<td>• History of violence</td>
</tr>
<tr>
<td>Education/Employment</td>
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</tr>
<tr>
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<td>• Employment history</td>
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<td>• Educational attainment</td>
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<tr>
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<td>• Participation in school activities</td>
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<td></td>
<td>• Peer interactions</td>
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<tr>
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<td>• Interactions with authorities</td>
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\textsuperscript{377} New South Wales Dept. of Corrective Serv., LSI-R Training Manual (2002).
<table>
<thead>
<tr>
<th>Instrument</th>
<th>Factors Rated</th>
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<tbody>
<tr>
<td>LSI-R (cont.)</td>
<td>Financial</td>
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<td>Financial</td>
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<tr>
<td>• Financial problems</td>
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<tr>
<td>• Reliance on social assistance</td>
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<tr>
<td>Family/Marital</td>
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<td>• Dissatisfaction with marital situation</td>
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<td>• Interaction with parents</td>
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<td>• Criminal family</td>
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<td>Accommodations</td>
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<td>• High crime neighborhood</td>
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<td>Leisure/Recreation</td>
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<td>• Participation in organized activity</td>
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<td>• Appropriate use of time</td>
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<td>Companions</td>
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<td>• Socially isolated</td>
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<td>• Criminal acquaintances</td>
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<tr>
<td>Alcohol/Drugs</td>
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<td>• Drug problems</td>
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<td>• Alcohol/drugs contributed to law violations</td>
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<td>Emotional/Personal</td>
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<td>• Distress</td>
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<td>Attitudes/Orientation</td>
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<td>• Attitude toward supervision</td>
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3. Fourth Generation Tools

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<td>Federal Post Conviction Risk Assessment (PCRA)³⁷⁸</td>
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<td>• Employment status</td>
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<td>• Work history</td>
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<td>• Alcohol problems</td>
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<td>• Family problems</td>
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<td>• Lack of social support</td>
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<td>• Motivated to change</td>
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<td>COMPAS³⁷⁹</td>
<td>• Criminal involvement</td>
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<td>• History of noncompliance</td>
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<td>• Vocational or educational</td>
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³⁷⁸ Johnson et al., supra note 64.
<table>
<thead>
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