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**ORANGE IS THE NEW EQUAL PROTECTION VIOLATION:  
HOW EVIDENCE-BASED SENTENCING HARMS  
MALE OFFENDERS**

Shaina D. Massie\*

INTRODUCTION

Picture, for a moment, two criminal offenders. Suppose that the respective offenders committed the same, exact victimless crime in the same, exact manner. Accept that they both are guilty, have no valid defenses, and are subsequently convicted. Perhaps they were arrested for drug possession—possibly marijuana. It could well be that fraud proved the downfall of these two offenders. Maybe they engaged in some grand larceny. For present purposes, though, the particular offense is not nearly as important as the identity of the individuals who committed it.

Imagine, further, that both offenders are the same age—in their mid to late twenties. Both are currently unmarried, and neither has a history of domestic violence as either a victim or perpetrator. Both have a high school diploma and have been employed in low-skilled labor positions for the past several years with dependable regularity. Both offenders have similar extrinsic support systems. Like most individuals, they both have a network of loved ones—parents, siblings, cousins, and friends—who are willing to offer guidance and provide assistance. So far, so good. Right?

Assume, however, like all individuals who find themselves cloaked in the tell-tale orange of the criminal justice system, that the offenders are imperfect. Each has a prior juvenile, nonviolent felony conviction, again for an identical crime. Both have close companions and associates who are also known criminals. Both display certain antisocial attitudes such as a lack of respect for authority and the law. Both possess problems with self-control and occasionally exhibit behaviors that are defiant, even reckless. Both have had problems with drugs and alcohol. Recall that both committed the same, exact crime in the same, exact manner.

Surely, the two offenders receive the same, exact sentence. Certainly, if the adage that “justice is blind” holds true, any result to the contrary would be inconceivable. Given this nation’s guiding principle and promise that everyone shall receive equal treatment under the law, such a dissimilar outcome would undoubtedly be unconstitutional.<sup>1</sup> This, however, is precisely the unimaginable outcome that faces the two criminal offenders: they do not receive the same punishment even though they committed

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<sup>1</sup> See U.S. CONST. amend. XIV, § 1; *id.* amend. V.

the same, exact crime. In many states, it is entirely possible that one offender may serve prison time while the other is diverted from incarceration to undergo an alternative penological treatment. One offender has his liberty interests stripped to their very core, confined behind bars in the six-by-eight-foot prison cell. The other offender is free to carry on her life in the shared presence of family, friends, and community, albeit under the watchful eye of a case manager or probation officer.

How is this outcome possible? Simple. The offenders are identical in every respect save one. The criminal offender who is faced with a prison sentence is a man, and the criminal offender who is diverted from the penitentiary system is a woman. This hypothetical scenario has almost certainly played out in states that employ actuarial sentencing practices that use gender as a factor in determining risk assessment scores<sup>2</sup> incorporated into pre-sentencing reports.

Professor Sonja B. Starr lists the notion that judges “should not follow a policy of increasing the sentences of male defendants, or reducing those of female defendants, on the explicit basis of gender” among generally accepted sentencing “don’ts.”<sup>3</sup> Many jurisdictions, however, are encouraging judges to do just that through regimes that utilize evidence-based sentencing (EBS).<sup>4</sup> Evidence-based sentencing can be defined as judicial decision-making premised upon empirical research or actuarial assessment of factors such as age, gender, marital status, criminal history, education, and employment in order to determine a particular defendant’s recidivism risk.<sup>5</sup> According to Judge Roger K. Warren, President Emeritus of the National Center for State Courts (NCSC), the general objectives driving the use of evidence-based sentencing include “improv[ing] the effectiveness of sentencing outcomes,” “reduc[ing] reliance on long-term incarceration as a criminal sanction,” and “promot[ing] the

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<sup>2</sup> See Christopher Slobogin, *Risk Assessment*, in THE OXFORD HANDBOOK OF SENTENCING AND CORRECTIONS 196, 198 (Joan Petersilia & Kevin R. Reitz eds., 2012). Slobogin defines “risk assessment” as “the identification of ‘risk’ factors and ‘protective’ factors that make involvement in crime more or less likely.” *Id.* at 196. He notes that such factors can be either static or dynamic. *Id.* Static factors, such as “gender, age, and prior criminal history,” can be classified as “phenomena that cannot be changed through human intervention.” *Id.*

<sup>3</sup> Sonja B. Starr, *Evidence-Based Sentencing and the Scientific Rationalization of Discrimination*, 66 STAN. L. REV. 803, 804 (2014).

<sup>4</sup> See *id.* at 805.

<sup>5</sup> See, e.g., *id.* (“‘Evidence,’ in this formulation, refers not to the evidence in the particular case but to empirical research on factors predicting criminal recidivism.”); Matthew Kleiman, *Using Evidence-Based Practices in Sentencing Criminal Offenders*, in 44 THE BOOK OF THE STATES 299, 299–300 (Council of State Gov’ts ed., 2012), [http://knowledgecenter.csg.org/kc/system/files/matthew\\_kleiman\\_2012.pdf](http://knowledgecenter.csg.org/kc/system/files/matthew_kleiman_2012.pdf) [<http://perma.cc/FER7-76J6>] (“Evidence-based sentencing refers to judges using information about offender risk, needs and responsivity to inform the most appropriate sentence for a convicted offender.”); Richard E. Redding, *Evidence-Based Sentencing: The Science of Sentencing Policy and Practice*, 1 CHAP. J. CRIM. JUST. 1, 3–4 (2009) (noting that evidence-based sentencing typically includes assessment of risk factors, protective factors, and criminogenic needs, estimation of recidivism risks, and identification of the most effective sentencing regime).

development, funding, and utilization of community-based alternatives to incarceration for appropriate offenders.”<sup>6</sup> Although these aspirations may be desirable as a matter of public policy, the attendant realities result in outcomes contrary to notions of fairness and justice. As such, the use of gender in evidence-based sentencing subjects the penal system to suspect constructs and is repugnant as a matter of law.

The underlying justification for punishment is the idea that one should answer for the crimes he or she commits singularly, rather than for the sins of the many. In the context of gender, the “many” constitutes a variable half of the population. Penological considerations of gender in sentencing are simply incompatible with abstract notions that criminal offenders appear before the court in their individual capacities.<sup>7</sup> More important, the use of gender in evidence-based sentencing violates the concrete promises of equal protection under the law provided by the Constitution.<sup>8</sup>

Just because a sentencing regime sublimates the use of suspect classifications into acceptability under the guise of questionable social science, actuarial accuracy, and economic efficiency does not—or, at the very least, should not—make such uses any more legitimate in the eyes of the law. Increased reliance on evidence-based practices that incorporate gender discrimination cloaked in the mathematics of empirical “truth,” however, does just that.<sup>9</sup> Surely, this cannot stand if all individuals are to enjoy equal treatment in the eyes of the law. Considerations of gender in risk assessment permit Justice to peek beneath her folds just enough to cast a biased glance against those offenders who happen to possess a Y chromosome.

As of year-end 2013, roughly one in thirty-five adults in America was under the control of the correctional supervision system.<sup>10</sup> Soon, the shared national reality will

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<sup>6</sup> Roger K. Warren, *Evidence-Based Practices and State Sentencing Policy: Ten Policy Initiatives to Reduce Recidivism*, 82 IND. L.J. 1307, 1307 (2007) (quoting TRACY W. PETERS & ROGER K. WARREN, NAT’L CTR. FOR STATE COURTS, GETTING SMARTER ABOUT SENTENCING: NCSC’S SENTENCING REFORM SURVEY 10 (2006), [http://www.ncsc.org/~media/Microsites/Files/CSI/GettingSmarter\\_SentencingReformSurvey\\_FinalPub.ashx](http://www.ncsc.org/~media/Microsites/Files/CSI/GettingSmarter_SentencingReformSurvey_FinalPub.ashx) [<http://perma.cc/5FHB-U8NC>]).

<sup>7</sup> See Starr, *supra* note 3, at 807 (“[I]ndividuals are entitled to be treated as individuals.”).

<sup>8</sup> See U.S. CONST. amend. XIV, § 1; *id.* amend. V.

<sup>9</sup> See Tracey L. Meares, *Three Objections to the Use of Empiricism in Criminal Law and Procedure—And Three Answers*, 2002 U. ILL. L. REV. 851, 866 (2002) (“To the extent that empiricism improves the transparency of the system or enables individuals to better hold criminal justice system actors more accountable, legitimacy of the system may well *increase*.” (citation omitted)); see also BERNARD E. HARCOURT, *AGAINST PREDICTION: PROFILING, POLICING, AND PUNISHING IN AN ACTUARIAL AGE* 3 (2007) (“The perceived success of predictive instruments has made theories of punishment that function more smoothly with prediction seem more natural. . . . Yet these actuarial instruments represent nothing more than fortuitous advances in technical knowledge from disciplines . . . that have no normative stake in the criminal law.”).

<sup>10</sup> LAUREN E. GLAZE & DANIELLE KAEBLE, BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, *CORRECTIONAL POPULATIONS IN THE UNITED STATES, 2013*, at 1 (2014), <http://www.bjs.gov/content/pub/pdf/cpus13.pdf> [<http://perma.cc/2RT2-LS5W>] (“An estimated 6,899,000 persons were under the supervision of adult correctional systems at yearend 2013 . . .”).

be to know someone who is or has been affected by the criminal justice system—not just those who are incarcerated, but children without parents, mothers without partners, parolees without futures, and past offenders without hope. It is not merely a men’s issue or a women’s issue. The problem is pervasive, and any system that contributes to such statistics is patently unjust.<sup>11</sup> Regardless of whether courts take action, the great debate surrounding the national infatuation with mass incarceration needs to include evidence-based sentencing. The invidious use of gender in evidence-based sentencing regimes cannot withstand intermediate scrutiny in an equal protection challenge, because such considerations unduly injure male criminal offenders.

This Note will demonstrate how gender considerations must be excised from evidence-based sentencing regimes in order to assure their constitutionality under the Equal Protection components of the Fifth and Fourteenth Amendments.<sup>12</sup> Part I examines the constitutional framework and legal challenges to the use of gender in criminal sentencing. Part II provides both a brief introduction to the factors that gave rise to discretionary sentencing and an overview of the history behind evidence-based sentencing. Part III discusses how the use of gender subverts not only the policy justifications for using evidence-based sentencing generally, but also how such considerations subvert the justifications for overtly gendered sentencing more specifically. Part IV delves into the empirical data advocating the use of gender in evidence-based sentencing. The conclusion proposes suggestions for states that use evidence-based sentencing going forward.

## I. THE LEGAL ENVIRONMENT

Gender first emerged as a suspect variable in large part due to challenges brought against gender-specific classifications that disadvantaged men.<sup>13</sup> Other equal protection violations take the form of non-gender-specific classifications that have a discriminatory purpose and effect<sup>14</sup> and gender-specific classifications that are intended to benefit women.<sup>15</sup> Commonly, this particular area of controversy has gained the most traction in challenges to gender-specific classifications that disadvantage women.<sup>16</sup>

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<sup>11</sup> See *infra* Part IV for conclusions regarding the use of evidence-based sentencing and mass incarceration.

<sup>12</sup> U.S. CONST. amend. XIV, § 1; *id.* amend. V.

<sup>13</sup> See, e.g., *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127 (1994) (holding that equal protection barred the exclusion of male jurors based on gender); *Craig v. Boren*, 429 U.S. 190 (1976) (holding that a statute prohibiting the sale of non-intoxicating beer to males under twenty-one years old and females under eighteen years old was an equal protection violation).

<sup>14</sup> See, e.g., *Pers. Adm’r v. Feeney*, 442 U.S. 256 (1979) (finding that the government lacked a gender-driven discriminatory purpose in offering veterans preferential treatment).

<sup>15</sup> See, e.g., *Miss. Univ. for Women v. Hogan*, 458 U.S. 718 (1982) (holding that a nursing school’s refusal to admit a male student violated equal protection, absent a history of discrimination against female nurses).

<sup>16</sup> See, e.g., *United States v. Virginia*, 518 U.S. 515 (1996) (holding that the university’s refusal to admit a female student violated equal protection).

In order to withstand an equal protection challenge, state-sanctioned considerations of gender must survive intermediate scrutiny.<sup>17</sup> Under this level of scrutiny, such classifications “must serve important governmental objectives and must be substantially related to achievement of those objectives.”<sup>18</sup> Later cases required an “exceedingly persuasive justification” for gender classifications.<sup>19</sup> Notably, administrative ease and convenience are not sufficiently important governmental objectives.<sup>20</sup> Moreover, the stated objectives “must describe actual state purposes, not rationalizations for actions in fact differently grounded.”<sup>21</sup> Simply put, the state cannot list any hypothetical or conceivable purpose if it expects to survive intermediate scrutiny. Finally, gender-based equal protection precedent has stated on several occasions that “archaic and overbroad generalizations”<sup>22</sup> or “outdated misconceptions”<sup>23</sup> about the genders are also invalid as a matter of justification.<sup>24</sup> Often, gender-driven assumptions are centered on unsupported and old-fashioned notions about the attitudes, behaviors, and financial positions of men and women.<sup>25</sup>

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<sup>17</sup> See *Craig*, 429 U.S. at 197–98.

<sup>18</sup> *Id.*

<sup>19</sup> See *Virginia*, 518 U.S. at 531; *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 136–37 (1994); *Miss. Univ. for Women*, 458 U.S. at 724.

<sup>20</sup> See, e.g., *Frontiero v. Richardson*, 411 U.S. 677, 690 (1973) (holding that administrative convenience is not sufficiently important to justify an increased burden on women in the military to obtain dependent benefits for their husbands); *Stanley v. Illinois*, 405 U.S. 645, 656 (1972) (holding that government efficiency is insufficient to justify dependency proceedings only for unwed fathers upon a mother’s death); *Reed v. Reed*, 404 U.S. 71, 76–77 (1971) (finding that Idaho’s statutory preference for men as estate administrators was unconstitutional, as it was done to eliminate hearings on the merits).

<sup>21</sup> *Virginia*, 518 U.S. at 535–36.

<sup>22</sup> See *Schlesinger v. Ballard*, 419 U.S. 498, 508 (1975) (upholding the U.S. Navy’s promotion rule because it was not based on archaic and overbroad generalizations).

<sup>23</sup> See *Craig*, 429 U.S. at 198–99.

<sup>24</sup> See *Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 441 (1985) (noting that disparate treatment between the genders “very likely reflect[s] outmoded notions of the relative capabilities of men and women”).

<sup>25</sup> For an overview of what constitutes an archaic and overbroad generalization or outdated misconception, compare *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 139 n.11 (1994) (concluding that gender alone predicted juror attitudes in a paternity and child support hearing was unsupported), *Orr v. Orr*, 440 U.S. 268, 282–83 (1979) (finding that alimony obligations for men, but not women, propagated outdated stereotypes), *Califano v. Goldfarb*, 430 U.S. 199, 210–11 (1977) (finding a provision differentiating between the financial needs of widows and widowers was overbroad and archaic), *Stanton v. Stanton*, 421 U.S. 7, 14–15 (1975) (finding that gender differences in child support obligations were based on outdated misconceptions), *Weinberger v. Wiesenfeld*, 420 U.S. 636, 643 (1975) (finding the assumption that males’ earnings were more vital than females’ earnings to support families was overbroad and archaic), *Frontiero*, 411 U.S. at 690 (finding the assumption that male spouses of servicewomen would not be financially dependent on wives was overbroad and archaic), and *Reed*, 404 U.S. at 73 (finding the assumption that men were better estate administrators than women was overbroad and archaic), with *Michael M. v. Superior Court of Sonoma Cty.*, 450 U.S. 464, 476 (1981) (upholding a statutory rape law that applied only to males because it was based on physical differences of the sexes).



The first cases involving the use of gender in criminal punishment far predated current conceptions of equal protection and formulations of intermediate scrutiny.<sup>26</sup> Although current usage of gender in criminal sentencing operates against the liberty interests of men, early gender-based sentencing regimes resulted in harsher or indeterminate sentences for women.<sup>27</sup> As such, early equal protection challenges to such sentencing systems were summarily dismissed.<sup>28</sup> Conversely, in the few modern instances in which gender has overtly been used in criminal sentencing, it has been struck down as an equal rights violation. For example, in *United States v. Maples*,<sup>29</sup> the United States Court of Appeals for the Fourth Circuit recognized—as early as 1974—that gender could not be used to justify the judge’s decision to impose a greater sentence on a male defendant.<sup>30</sup> Likewise, in *Williams v. Currie*,<sup>31</sup> the United States District Court for the Middle District of North Carolina found that the defendant’s equal protection rights were violated because he received a much harsher sentence than his similarly situated female co-defendant simply by virtue of being male.<sup>32</sup>

Cases like *Maples* and *Currie* are rare, however. Such disparate treatment between genders is hardly as manifestly evident now as it was in those cases.<sup>33</sup> Consequently, the problem with gender variables in evidenced-based sentencing regimes is that it is but one of a multitude of factors used to determine an offender’s recidivism risk.<sup>34</sup> As

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concerning pregnancy rather than social norms), and *Schlesinger*, 419 U.S. at 508 (upholding different treatment of male and female naval officers based on available professional opportunities).

<sup>26</sup> See Carissa Byrne Hessick, *Race and Gender as Explicit Sentencing Factors*, 14 J. GENDER RACE & JUST. 127, 133–34 (2010).

<sup>27</sup> See *id.* at 134–35.

<sup>28</sup> See *id.* at 135 (detailing the various reasons courts rejected such challenges, including deference to legislative judgment, psychological and anatomical differences, and biblical references).

<sup>29</sup> 501 F.2d 985 (4th Cir. 1974).

<sup>30</sup> *Id.* at 986–87 (noting that, where the female defendant received a ten-year sentence in prison for a bank robbery but her male co-defendant received a fifteen-year sentence, part of the reason she was shown leniency was based on “the fact that she was a woman”).

<sup>31</sup> 103 F. Supp. 2d 858 (M.D.N.C. 2000).

<sup>32</sup> *Id.* at 868 (holding that gender discrimination accounted for “most, if not all” of the reason that the male defendant received up to thirty-six years in prison while the female codefendant received probation).

<sup>33</sup> See Starr, *supra* note 3, at 824 (“There is . . . considerable statistical research suggesting that judges (and prosecutors) *do* on average treat female defendants more leniently than male defendants. But it is virtually unheard of for modern judges to *say* they are taking gender into account . . .” (citations omitted)).

<sup>34</sup> For an overview of assessment instruments, see PAMELA M. CASEY, ROGER K. WARREN & JENNIFER K. ELEK, NAT’L CTR. FOR STATE COURTS, USING OFFENDER RISK AND NEEDS ASSESSMENT INFORMATION AT SENTENCING: GUIDANCE FOR COURTS FROM A NATIONAL WORKING GROUP app. A, at 4–9 (2011) (discussing the various factors examined by risk assessment instruments and how each is further compartmentalized into indices, scales, and subscales); J.C. Oleson, *Risk in Sentencing: Constitutionally Suspect Variables and Evidence-Based Sentencing*, 64 SMU L. REV. 1329, 1399–1402 app. (2011) (summarizing the variables used in risk instruments).

Professor Starr notes, litigation against the use of suspect variables in evidence-based sentencing has been “slow in coming,” because “[t]he risk-prediction instruments are not very transparent (some are proprietary corporate products), and defendants may not understand the role of poverty and personal characteristics.”<sup>35</sup> Additionally, Christopher Slobogin recognizes that certain risk factors “might serve as a proxy” for other suspect classifications.<sup>36</sup> He notes, however, that such a claim is “likely” to fail unless the intent behind such factors is grounded in a suspect classification.<sup>37</sup> Accordingly, the covert use of gender combined with the institutional obfuscation that often surrounds such evidence-based methods provide high hurdles to constitutional challenges.<sup>38</sup>

Often, the fact that the variables are not uniformly considered creates another basic obstacle to challenging an evidence-based sentencing regime. Not surprisingly, the use of gender in risk assessment scores can appear in several ways.<sup>39</sup> For example, some states automatically assign males a higher score than females.<sup>40</sup> Other states employ different diversion cutoff risk scores for men and women.<sup>41</sup> Other examples include actuarial instruments that are tailored for a specific gender.<sup>42</sup>

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<sup>35</sup> Sonja B. Starr, Opinion, *Sentencing, by the Numbers*, N.Y. TIMES (Aug. 10, 2014), [http://www.nytimes.com/2014/08/11/opinion/sentencing-by-the-numbers.html?\\_r=0](http://www.nytimes.com/2014/08/11/opinion/sentencing-by-the-numbers.html?_r=0).

<sup>36</sup> Slobogin, *supra* note 2, at 204–05 (explaining that “employment and education status could be statistical stand-ins for both race and age”).

<sup>37</sup> *Id.* at 205.

<sup>38</sup> Although a constitutional challenge to actuarial considerations in criminal sentencing has yet to appear in federal court, at least one state supreme court accepted the validity of the Level of Service Inventory—Revised (LSI-R). *See Malenchik v. State*, 928 N.E.2d 564, 573–75 (Ind. 2010) (showing that the court accepted the wholesale validity of the LSI-R without analyzing individual variables).

<sup>39</sup> For example, North Carolina considers gender in its risk assessment, but it is unclear how gender is used. *See* N.C. SENTENCING & POLICY ADVISORY COMM’N, RESEARCH FINDINGS AND POLICY RECOMMENDATIONS FROM THE CORRECTIONAL PROGRAM EVALUATIONS, 2000–2008, at 12 (2009), [http://www.nccourts.org/Courts/CRS/Councils/spac/Documents/correctionalevaluation\\_0209.pdf](http://www.nccourts.org/Courts/CRS/Councils/spac/Documents/correctionalevaluation_0209.pdf) [<http://perma.cc/VS2R-ZMFS>] (listing gender among social factors of risk).

<sup>40</sup> *See* John Monahan & Jennifer L. Skeem, *Risk Redux: The Resurgence of Risk Assessment in Criminal Sanctioning*, 26 FED. SENT’G REP. 158, 163 app.2 (2014) (highlighting that Pennsylvania’s risk assessment instrument assigns females zero points and males one point); BRIAN J. OSTROM ET AL., NAT’L CTR. FOR STATE COURTS, OFFENDER RISK ASSESSMENT IN VIRGINIA, 123 app.D (2002), [http://www.vsc.virginia.gov/risk\\_off\\_rpt.pdf](http://www.vsc.virginia.gov/risk_off_rpt.pdf) [<http://www.perma.cc/6DFD-92G6>] (identifying that Virginia’s risk assessment form assigns male offenders an extra point); WASH. STATE DEP’T OF CORR., STATIC RISK ASSESSMENT 1 (2007), [http://www.ofm.wa.gov/sgc/meetings/2008/06/SGCmeeting\\_20080613\\_StaticRiskAssessment.pdf](http://www.ofm.wa.gov/sgc/meetings/2008/06/SGCmeeting_20080613_StaticRiskAssessment.pdf) [<http://www.perma.cc/3QLJ-GNQK>] (highlighting that Washington’s static risk assessment calculation assigns females no points and males one point).

<sup>41</sup> *See* Edward Latessa et al., *The Creation and Validation of the Ohio Risk Assessment System (ORAS)*, 74 FED. PROBATION 16, 19 (2010) (highlighting that Ohio’s risk assessment system employs different diversion cutoffs for men and women).

<sup>42</sup> *Compare* Don Andrews et al., *LS/CMI*, MULTI-HEALTH SYSTEMS INC., <http://www.mhs.com/product.aspx?gr=saf&id=overview&prod=ls-cmi#scales> [<http://perma.cc/AN5W-JU4R>]



Regardless of the system, such use of gender in evidence-based sentencing regimes would disproportionately harm male offenders. Not only would higher overall risk scores or lower risk cutoffs exclude otherwise appropriate male offenders from diversionary programs, but such gender-driven scores could also lead to harsher punishments.<sup>43</sup> Although scrutiny over the use of suspect variables such as gender in evidence-based sentencing has largely been washed away by the overwhelming tide of support, it is important to note that widespread use or acceptance does not ensure constitutionality.<sup>44</sup> Before examining the effects of evidence-based sentencing on the system as it is now, this Note will look to a brief bit of history as to where the practice has been and how far it has quietly come.

## II. THE MOVEMENT

A confluence of factors led to the explosion of evidence-based practices in the criminal sentencing context, including advancements in social science, related legal decisions, administrative and academic activism, and legislative initiatives.<sup>45</sup> Notably, evidence-based practices measuring risk assessment are not a new idea or invention,

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(listing the LS/CMI ColorPlot Profile for Male Offenders Form among its risk assessment instruments), *with Women*, NORTHPOINTE, <http://www.northpointeinc.com/solutions/women> [<http://perma.cc/9S9S-J6PT>] (describing the Correctional Offender Management Profiling for Alternative Sanctions (COMPAS) version designed specifically for women). *See also* CORR. INST. FOR WOMEN OFFENDERS, *Women's Risk Needs Assessment*, U. CIN., <http://www.uc.edu/womenoffenders.html> [<http://perma.cc/5FWW-HT72>] (describing the joint efforts between the University of Cincinnati and the National Institute of Corrections to create the Women's Risk/Needs Assessment (WRNA), and the Women's Risk/Needs Assessment-Trailer (WRNA-T)). The WRNA examines "both gender-neutral and gender-responsive factors and affords separate forms for probation, prison, and pre-release." *Id.* The WRNA-T is intended to "supplement existing risk/needs assessments such as the Level of Service Inventory—Revised or the Northpointe COMPAS." *Id.*

<sup>43</sup> *See* Starr, *supra* note 35 ("It is naïve to assume judges will use the scores only to reduce sentences. Judges, especially elected ones, will face pressure to harshly sentence those labeled 'high risk.'"); *see also* Slobogin, *supra* note 2, at 205 (noting that, under Virginia's evidence-based sentencing structure, "no young, unmarried, and unemployed male offender who has any other aggravating factor (e.g., a prior crime) is eligible for diversion" (citation omitted)); Simone Weichselbaum & Thomas Zambito, *Judged Bashes Probation Department for Gender Bias in Favor of Leniency for Girls*, N.Y. DAILY NEWS (Dec. 1, 2010, 4:00 AM), <http://www.nydailynews.com/news/crime/judged-bashes-probation-department-gender-bias-favor-leniency-girls-article-1.473763> (noting that the judge found "probation routinely recommended tougher treatment for boys").

<sup>44</sup> *See, e.g.*, *Lawrence v. Texas*, 539 U.S. 558, 572, 577–79 (2003) (criticizing *Bowers v. Hardwick*, 478 U.S. 186 (1986)).

<sup>45</sup> *See infra* notes 48–52 and accompanying text (outlining the development of social science in relation to evidence-based practices); *infra* notes 59–70 and accompanying text (summarizing relevant legal decisions); *infra* notes 71–77 and accompanying text (discussing administrative overtures advocating for evidence based sentencing).

because it has long been the goal of reformers to use science as a means to determine whether a criminal offender will relapse.<sup>46</sup> As Scott VanBenschoten notes, considering the “generations” of tools available to assess the factors underlying criminality is the best way to understand the progression of risk assessment.<sup>47</sup> The first generation of risk prediction was based on the arresting police officer’s “use of his or her clinical judgment.”<sup>48</sup> The second generation of risk assessment began in the 1920s with the Burgess Model,<sup>49</sup> which “used an objective scale to measure static offender characteristics.”<sup>50</sup> The third generation of risk assessment tools started with the Wisconsin Client Management Classification System in the late 1970s, which combined static characteristics with mixed, modifiable factors to predict both the risk and needs of a particular offender.<sup>51</sup> Fourth generation risk prediction and needs assessment tools integrate the case planning and assessment process to create “a systematic intervention and monitoring system” for criminal offenders.<sup>52</sup>

The use of evidence-based risk assessment invariably gained traction shortly after the development of the second generation actuarial methods.<sup>53</sup> For some time, Illinois was the only state that employed an evidence-based instrument in its parole decisions.<sup>54</sup>

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<sup>46</sup> See Starr, *supra* note 3, at 809 (“Recidivism risk prediction instruments have been developed by criminologists over nearly a century and used for a variety of correctional purposes.” (citation omitted)); Oleson, *supra* note 34, at 1348 (“For nearly a century, social scientists have endeavored to predict recidivism.”); Scott VanBenschoten, *Risk/Needs Assessment: Is This the Best We Can Do?*, 72 FED. PROBATION 38, 38 (2008) (“Each generation utilized the most advanced methods of the time to predict the risk of recidivism and then applied the results of the assessment to supervision strategies. As the academic field of criminal justice developed, so did the understanding of the etiology of criminal behavior.”).

<sup>47</sup> VanBenschoten, *supra* note 46, at 38.

<sup>48</sup> *Id.* at 39 (explaining that “clinical judgment” is drawn from the officer’s intuitive knowledge and experience regarding which offenders were most likely to be successful or unsuccessful in community supervision initiatives).

<sup>49</sup> Ernest W. Burgess developed his model after studying thousands of Illinois parolees. See HARCOURT, *supra* note 9, at 1; see also Oleson, *supra* note 34, at 1348 (noting that Burgess’s variables ranged from an offender’s “father’s nationality to psychiatric prognosis”).

<sup>50</sup> VanBenschoten, *supra* note 46, at 39 (noting that the Burgess Model ushered in a wave of further refined second-generation assessment scales, culminating in the 1970s with the federal Salient Factors Score). For an overview of early risk prediction instruments, see Oleson, *supra* note 34, at 1348.

<sup>51</sup> VanBenschoten, *supra* note 46, at 39. The author notes that third-generation tools like the LSI-R weigh negative and positive changes in an offender’s situation. *Id.* The needs assessment is thus used alongside traditional risk prediction in these regimes. *Id.*

<sup>52</sup> *Id.* (identifying the Level of Service Case Management Inventory as the most popular fourth generation tool).

<sup>53</sup> See HARCOURT, *supra* note 9, at 1 (describing how Ferris Laune, one of Burgess’s former students, worked for the Illinois parole board and ushered in the widespread use of actuarial methods into criminal law as early as the 1930s).

<sup>54</sup> See *id.* at 8, 77.

Ohio followed suit in the 1960s, along with California in the 1970s.<sup>55</sup> The federal government also began using risk assessment methods in the 1970s with its introduction of the Salient Factors Score.<sup>56</sup> Several other states added actuarial methods based on this precedent, and the practice exploded during the 1980s.<sup>57</sup> Undoubtedly, the proliferation of evidence-based practices in parole decisions provided a convenient segue into the sentencing context.<sup>58</sup>

Additionally, a line of Supreme Court decisions considerably expanded “the shift toward discretionary sentencing.”<sup>59</sup> Starting with *Apprendi v. New Jersey*,<sup>60</sup> the Supreme Court held that, in order to satisfy the Sixth Amendment’s guarantee to a trial by jury, any factor (other than a prior criminal conviction) that raised a sentence beyond the statutory maximum had to be accepted by the jury beyond a reasonable doubt.<sup>61</sup> In the risk assessment context, Slobogin reasons that “*Apprendi* might also require a jury finding beyond a reasonable doubt with respect to each *individual* risk factor.”<sup>62</sup> He notes, however, that such an outcome is likely to have a “minimal” impact on evidence-based risk assessment because “most non-capital sentences based on risk stay within statutory and guideline ranges.”<sup>63</sup>

In *Blakely v. Washington*,<sup>64</sup> the Supreme Court held that Washington’s sentencing guidelines also violated the Sixth Amendment.<sup>65</sup> In *United States v. Booker*,<sup>66</sup> the following term, the Court held that the Federal Sentencing Guidelines were subject to (and several provisions were subsequently violative of) the Sixth Amendment’s guarantee to a trial by jury.<sup>67</sup> Essentially, the Court excised those portions of the sentencing guidelines that suggested they were mandatory.<sup>68</sup> Presently, judges are therefore allowed to consult the guidelines but are not required to stay within the recommended sentencing bounds.<sup>69</sup> As Peter Krupp notes, “[W]hile trial courts will

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<sup>55</sup> *See id.*

<sup>56</sup> *See* VanBenschoten, *supra* note 46, at 39 (also noting that probationers were examined using the “U.S.D.C. 75 Scale, which was later modified into the Risk Prediction Scale 80”); *see also* HARCOURT, *supra* note 9, at 8, 77.

<sup>57</sup> *See* HARCOURT, *supra* note 9, at 8, 77; Starr, *supra* note 3, at 809.

<sup>58</sup> *See* HARCOURT, *supra* note 9, at 88 (“The meteoric rise of parole-prediction instruments—and especially the development of the federal Salient Factor Score—coincided with a more general turn to actuarial methods in a number of other criminal justice arenas.”).

<sup>59</sup> Starr, *supra* note 3, at 811.

<sup>60</sup> 530 U.S. 466 (2000).

<sup>61</sup> *Id.* at 490.

<sup>62</sup> Slobogin, *supra* note 2, at 203–04.

<sup>63</sup> *Id.* at 204.

<sup>64</sup> 542 U.S. 296 (2004).

<sup>65</sup> *Id.* at 303–04.

<sup>66</sup> 543 U.S. 220 (2005).

<sup>67</sup> *Id.* at 245.

<sup>68</sup> *Id.*

<sup>69</sup> *Id.* at 251–52 (“Judges have long looked to real conduct when sentencing. Federal judges have long relied upon a presentence report, prepared by a probation officer, for information

still be required to consider the Guidelines, they will not be required to impose the Guidelines sentence, and will have to consider other more traditional sentencing factors in each defendant's case."<sup>70</sup> Combined, the rulings in *Apprendi*, *Blakely*, and *Booker* allow both state and federal judges to exercise greater discretion when doling out punishments, discretion invariably swayed by pre-sentencing reports including evidence-based risk assessments.

After the *Apprendi* line of cases came to its logical conclusion, the use of evidence-based sentencing ripened into prevalence in part due to a formal resolution from the Conference of Chief Justices and the Conference of State Court Administrators<sup>71</sup> along with a joint report by the National Center for State Courts (NCSC), the Crime and Justice Institute, and the National Institute of Corrections,<sup>72</sup> both of which were released in 2007.<sup>73</sup> A rash of administrative overtures advocating the spread of evidence-based sentencing followed.<sup>74</sup> In fact, the NCSC has continued to reaffirm its support of evidence-based practices in criminal sentencing.<sup>75</sup> For example, as recently as 2011, a working group for the NCSC enthusiastically embraced

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(often unavailable until *after* the trial) relevant to the manner in which the convicted offender committed the crime of conviction.”).

<sup>70</sup> Peter B. Krupp, *The Return of Judicial Discretion: Federal Sentencing Under “Advisory” Guidelines After United States v. Booker*, 49 BOS. B.J. 18, 18 (2005).

<sup>71</sup> CONFERENCE OF CHIEF JUSTICES & CONFERENCE OF STATE COURT ADM’RS, RESOLUTION 12: IN SUPPORT OF SENTENCING PRACTICES THAT PROMOTE PUBLIC SAFETY AND REDUCE RECIDIVISM (2007), <http://www.ncsc.org/~media/Microsites/Files/CSI/Resolution-12.ashx> [<http://perma.cc/L97Q-HMWE>] (resolving to support states’ adoptions of evidence-based sentencing).

<sup>72</sup> ROGER K. WARREN, NAT’L CTR. FOR STATE COURTS, U.S. DEP’T OF JUSTICE, EVIDENCE-BASED PRACTICE TO REDUCE RECIDIVISM: IMPLICATIONS FOR STATE JUDICIARIES 3, 25, 62 (2007), <https://s3.amazonaws.com/static.nicic.gov/Library/023358.pdf> [<http://perma.cc/MFZ9-9ZLR>] (analyzing how to effectively implement evidence-based sentencing in state courts).

<sup>73</sup> See Starr, *supra* note 3, at 811; Roger K. Warren, *Evidence-Based Sentencing: Are We Up to the Task?*, 23 FED. SENT’G REP. 153, 153 (2010).

<sup>74</sup> See, e.g., DAVID BALL & KARA DANSKY, STANFORD CRIMINAL JUSTICE CTR., COORDINATION AT THE FRONT-END OF SENTENCING: THE JUDICIARY, PROBATION, AND THE PRE-SENTENCE REPORT (2008), [http://www.law.stanford.edu/sites/default/files/child-page/266901/doc/slpublic/Crim\\_030708\\_Report\\_Ir\\_071008.pdf](http://www.law.stanford.edu/sites/default/files/child-page/266901/doc/slpublic/Crim_030708_Report_Ir_071008.pdf) [<http://perma.cc/68UP-883M>] (evaluating the status of pre-sentencing reports in California); RYAN S. KING, SENTENCING PROJECT, THE STATE OF SENTENCING 2007: DEVELOPMENTS IN POLICY AND PRACTICE 24 (2008), [http://www.sentencingproject.org/doc/publications/sl\\_statesentencingreport2007.pdf](http://www.sentencingproject.org/doc/publications/sl_statesentencingreport2007.pdf) [<http://perma.cc/H67Y-6S68>] (identifying “the need to rely upon evidence-based practices to govern policy directions”); ROGER K. WARREN, PEW CTR. ON THE STATES, ARMING THE COURTS WITH RESEARCH: 10 EVIDENCE-BASED SENTENCING INITIATIVES TO CONTROL CRIME AND REDUCE COSTS 1–4 (2009), [http://www.ncsc.org/~media/Microsites/Files/CSI/PEW\\_ArmingTheCourtWithResearch.ashx](http://www.ncsc.org/~media/Microsites/Files/CSI/PEW_ArmingTheCourtWithResearch.ashx) [<http://perma.cc/DU87-XGQW>] (advocating the effectiveness and efficiency of evidence-based practices).

<sup>75</sup> See CASEY, WARREN & ELEK, *supra* note 34.

and endorsed evidence-based practices for reducing recidivism.<sup>76</sup> Evidence-based sentencing has even found support in drafts of the forthcoming revision of the Model Penal Code.<sup>77</sup>

In fact, according to Douglas A. Berman, nearly every state has adopted or considered using evidence-based research in criminal sentencing.<sup>78</sup> Virginia was the first state to adopt an evidence-based risk assessment tool through passage of its Truth-in-Sentencing Act of 1994.<sup>79</sup> Professor Starr's recent analysis revealed that some twenty state courts now officially incorporate evidence-based practices into sentencing decisions.<sup>80</sup> In all, the states that use some form of evidence-based sentencing include: Arizona, Indiana, Kentucky, Michigan, Missouri, Ohio, Oklahoma, Pennsylvania, Utah, Virginia, Washington, West Virginia, Illinois, New Mexico, North Dakota, Maine, Minnesota, North Carolina, Texas, and Wisconsin.<sup>81</sup> As previously discussed, at least one-fourth of those states explicitly include gender as a variable in their evidence-based sentencing regimes.<sup>82</sup> Now that this Note has examined why, how, and where evidence-based sentencing is currently being used, it will turn to the governmental objectives used to support such regimes and the unsettled empirical tailoring behind such actuarial instruments.

### III. THE OBJECTIVES

The prevalence and increased acceptance of evidence-based sentencing make those jurisdictions that consider gender as a measure of risk all the more troubling. Chief amongst the concerns is how such gender-driven mechanisms *uniformly* operate against the liberty interests of male offenders. As Professor Starr notes, "If the instrument includes gender, men will *always* receive higher risk scores than otherwise-identical women . . . even if the context is one in which men and women

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<sup>76</sup> See *id.* at 1–3 (advocating the use of evidence-based sentencing).

<sup>77</sup> See MODEL PENAL CODE: SENTENCING § 6B.09 (AM. LAW INST., Tentative Draft No. 2, 2011).

<sup>78</sup> Douglas A. Berman, *Are Costs a Unique (and Uniquely Problematic) Kind of Sentencing Data?*, 24 FED. SENT'G REP. 159, 160 (2012).

<sup>79</sup> VA. CODE ANN. § 17-235 (West 1995); see also Starr, *supra* note 3, at 809 (discussing how Virginia began the trend towards state adoption of evidence-based sentencing); OSTROM ET AL., *supra* note 40, at 9–10 (discussing Virginia's reasons for adoption); Slobogin, *supra* note 2, at 202 (discussing Virginia's policy justifications and statewide adoption of evidence-based sentencing).

<sup>80</sup> Starr, *supra* note 3, at 809–10 n.11. Professor Starr notes that at least twelve states have incorporated actuarial instruments into sentencing decisions through legislation, state sentencing commission policy, or state supreme court decisions. *Id.* Evidence-based sentencing pilot programs exist in certain jurisdictions of at least three additional states. *Id.* Case law and official reports show that evidence-based sentencing is a *de facto* policy in five more states. *Id.*

<sup>81</sup> See *id.*

<sup>82</sup> See *supra* notes 39–41 and accompanying text.

tend to have similar recidivism risks or in which women have higher risks.”<sup>83</sup> The notion that the inclusion of gender in evidence-based sentencing would survive a constitutional challenge has largely been treated as a foregone conclusion.<sup>84</sup> Such analyses often accept the inclusion of gender in risk assessment instruments as valid without actually going through the heavy legal lifting.<sup>85</sup>

In order to withstand an equal protection challenge under intermediate scrutiny, considerations of gender in the sentencing context “must serve important governmental objectives.”<sup>86</sup> As previously mentioned, administrative ease and convenience are insufficient,<sup>87</sup> and the objectives cannot be theoretical.<sup>88</sup> The Supreme Court has long held that “[t]he ‘legitimate and compelling state interest’ in protecting the community from crime cannot be doubted.”<sup>89</sup> Public safety and, consequently, crime prevention are explicitly at the heart of many evidence-based sentencing regimes.<sup>90</sup> The logic, presumably, is that imprisoning those offenders who pose the highest risk of recidivating will shrink the total number of crimes committed. Additionally, when Virginia adopted its evidence-based sentencing regime in 1994, it was, at least in part, motivated by the desire to reduce incarceration rates.<sup>91</sup> Following Virginia’s example, other states have adopted evidence-based sentencing to divert offenders into alternative sentences as well.<sup>92</sup>

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<sup>83</sup> See Starr, *supra* note 3, at 813 (citation omitted) (noting that risk assessments typically do not account for gender differences such as women’s higher rates of recidivism for drug crimes).

<sup>84</sup> See Oleson, *supra* note 34, at 1376, 1387; Slobogin, *supra* note 2, at 204–05; John Monahan, *A Jurisprudence of Risk Assessment: Forecasting Harm Among Prisoners, Predators, and Patients*, 92 VA. L. REV. 391, 430–32 (2006).

<sup>85</sup> See Starr, *supra* note 3, at 820, 824 (criticizing scholars’ acceptance of evidence-based sentencing’s constitutionality by analyzing due process cases in the Supreme Court).

<sup>86</sup> *Craig v. Boren*, 429 U.S. 190, 197 (1976).

<sup>87</sup> See, e.g., *Frontiero v. Richardson*, 411 U.S. 677, 690 (1973); *Stanley v. Illinois*, 405 U.S. 645, 656 (1972); *Reed v. Reed*, 404 U.S. 71, 76–77 (1971).

<sup>88</sup> *United States v. Virginia*, 518 U.S. 515, 535–36 (1996).

<sup>89</sup> *Schall v. Martin*, 467 U.S. 253, 264 (1984); see also *Brown v. Texas*, 443 U.S. 47, 52 (1979); *Terry v. Ohio*, 392 U.S. 1, 22 (1968); *De Veau v. Braisted*, 363 U.S. 144, 155 (1960).

<sup>90</sup> See KY. REV. STAT. ANN. § 532.007(1) (West 2011) (“The primary objective of sentencing shall be to maintain public safety and hold offenders accountable while reducing recidivism and criminal behavior and improving outcomes for those offenders who are sentenced.”); VA. CODE ANN. § 17.1-801 (West 2011) (“The Commission shall develop discretionary sentencing guidelines to achieve the goals of certainty, consistency, and adequacy of punishment with due regard to the seriousness of the offense, the dangerousness of the offender, deterrence of individuals from committing criminal offenses and the use of alternative sanctions, where appropriate.”).

<sup>91</sup> See OSTROMET AL., *supra* note 40, at 9 n.1 (noting that the Virginia General Assembly wanted the newly formed sentencing commission to assess “the feasibility of placing 25 percent of nonviolent offenders in alternative sanctions based on a risk assessment instrument that identifies offenders with the lowest risk to public safety”).

<sup>92</sup> See, e.g., 42 PA. CONS. STAT. § 2154.7(d) (2010) (“Subject to the eligibility requirements of each program, the risk assessment instrument may be an aide to help determine appropriate



The fact that public safety is a legitimate governmental interest is indisputable. Moreover, crime prevention and reducing incarceration are both important and concrete goals. Neither is a matter of administrative ease or convenience (although the actuarial instruments adopted to achieve such goals arguably are). However, to allow the states that include gender in their evidence-based sentencing regimes to point to a legitimate purpose and simply claim victory would do an injustice to the Court's equal protection jurisprudence. Namely, the states' use of gender classification in evidence-based sentencing regimes must actually "serve" its objectives. Whether the inclusion of gender in actuarial risk assessment instruments truly serves the state's interests is a far more open-ended question.

#### *A. Crime Prevention*

Given the swelling number of individuals in the corrections system,<sup>93</sup> it is understandable that states would branch into evidence-based practices to increase efficiency while reducing the aggregate number of crimes committed. As a matter of general deterrence, however, it is unclear how individual risk assessment furthers the goal of preventing crimes. Logically, sentences influenced by risk assessment scores based on independent characteristics of each offender would have little to no generalizability in the overall population.

Bernard E. Harcourt accepts the notion that "using an accurate parole-prediction tool will likely increase the success rate of parolees," but he questions the overarching rationale behind economic models of discriminatory profiling.<sup>94</sup> Harcourt argues that profiling based on a group trait to predict higher offending will only generate a net benefit to society if "the members of the higher-offending targeted group have the same or greater elasticity of offending to policing."<sup>95</sup> According to Harcourt, profiling will actually increase crime if "the targeted population is less responsive to the change in policing."<sup>96</sup> Just as individual racial minorities respond differently to policing practices,<sup>97</sup> it could well be the fact that assigning higher risk scores to males ignores the underlying causes of their unique patterns of offending. Thus, considerations of gender (and the interposing notion that males are more criminal) in evidence-based sentencing likely have no bearing on overall crime rates.

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candidates for alternative sentencing, including the recidivism risk reduction incentive, State and county intermediate punishment programs and State motivational boot camps.").

<sup>93</sup> See, e.g., Roger K. Warren, *Evidence-Based Sentencing: The Application of Principles of Evidence-Based Practice to State Sentencing Practice and Policy*, 43 U.S.F. L. REV. 585, 589–91 (2009) (highlighting the six-fold increase in federal prison population between 1974 and 2005, as well as an increase in inmates in local jails and on parole or suspension).

<sup>94</sup> HARCOURT, *supra* note 9, at 123.

<sup>95</sup> *Id.* at 122–23.

<sup>96</sup> *Id.* at 123.

<sup>97</sup> *Id.*

It is also questionable whether evidence-based sentencing succeeds in matters of specific deterrence. Apart from those offenders who are recommended for alternative sanctions, recidivism remains a significant problem for those offenders who are, in fact, incarcerated. For example, according to the Bureau of Justice Statistics, “67.8% of the 404,638 state prisoners released in 2005 in 30 states were arrested within 3 years of release, and 76.6% were arrested within 5 years of release.”<sup>98</sup> The Bureau also found that “69.0% of male and 58.5% of female inmates had been arrested at least once” within three years of release, and that “more than three-quarters (77.6%) of males and two-thirds (68.1%) of females had been arrested” within five years of release.<sup>99</sup> Thus, if evidence-based sentencing systems are aimed at reducing rates of recidivism, they still have a great deal of ground to gain.

Moreover, it is possible that an individual’s level of risk in the abstract has little bearing on his or her concrete risk of recidivating in real life. As Professor Starr notes, “There is no intuitive reason to assume that the specific-deterrence effect is determined by, or even correlated with, the defendant’s recidivism risk level. . . . [H]igher-risk defendants . . . might be more *inelastic* to specific deterrence and rehabilitation and might be more vulnerable to the possible criminogenic effects of incarceration.”<sup>100</sup> This effect demonstrates the limited utility of incarceration and its overall diminishing rates of return.<sup>101</sup> It is entirely plausible that those offenders who are incarcerated are more likely to recidivate, given the correlation between time spent in prison and likelihood of becoming a career criminal.<sup>102</sup> Thus, the identification of medium or high-risk offenders through evidence-based sentencing may in fact result in a self-fulfilling prophecy in terms of recidivism.

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<sup>98</sup> MATTHEW R. DUROSE ET AL., BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, *RECIDIVISM OF PRISONERS RELEASED IN 30 STATES IN 2005: PATTERNS FROM 2005 TO 2010*, at 1 (2014), <http://www.bjs.gov/content/pub/pdf/rprts05p0510.pdf> [<http://perma.cc/5FU9-HDQ9>]. From the available data for those prisoners released in 2005, 49.7% recidivated within three years and were sent to prison, and that number rose to 55.1% within five years. *Id.*

<sup>99</sup> *Id.* at 11.

<sup>100</sup> Starr, *supra* note 3, at 857. Starr goes on to state that increasing a high-risk offender’s sentence might contribute to the risk that he or she poses once released. *Id.*

<sup>101</sup> See, e.g., Warren, *supra* note 93, at 593–96 (discussing various findings that incarceration generally does not result in a net reduction of crime).

<sup>102</sup> See, e.g., Lawrence L. Bench & Terry D. Allen, *Investigating the Stigma of Prison Classification: An Experimental Design*, 83 PRISON J. 367 (2003) (suggesting that classification labels are a result of an offender’s behavior rather than a reflection of an offender’s characteristics); M. Keith Chen & Jesse M. Shapiro, *Do Harsher Prison Conditions Reduce Recidivism? A Discontinuity-Based Approach*, 9 AM. L. & ECON. REV. 1 (2007) (finding that those offenders placed in higher-security prisons reoffend at a higher rate than those in lower-security prisons); Gerald G. Gaes & Scott D. Camp, *Unintended Consequences: Experimental Evidence for the Criminogenic Effect of Prison Security Level Placement on Post-Release Recidivism*, 5 J. EXPERIMENTAL CRIMINOLOGY 139 (2009) (finding that higher security levels increase recidivism).

Finally, proponents of gender in evidence-based sentencing hardly consider the external effects such regimes may have. Conversely, the proponents of overtly gendered sentencing almost always do. For example, some academics support the explicit consideration of gender in sentencing based on the notion that gender-neutrality harms women.<sup>103</sup> The effects of gender-neutral sentencing on children are even more concerning.<sup>104</sup> Notably, the use of gender in evidence-based sentencing has done little to improve the situations of individual female offenders,<sup>105</sup> which begs the question of how increased disparate treatment between men and women in the criminal justice system would alleviate the negative externalities of incarceration.

Furthermore, to claim that these problems are uniquely borne by women is a dangerously constrictive viewpoint. Overtly gendered sentencing not only ignores the effects of absenteeism on the children of incarcerated fathers,<sup>106</sup> it also ignores the societal shifts that are constraining men through gender expectations as well.<sup>107</sup> Accordingly, high rates of incarcerated fathers have almost certainly contributed to instances of inter-generational crime.

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<sup>103</sup> See, e.g., Myrna S. Raeder, *Gender-Related Issues in a Post-Booker Federal Guidelines World*, 37 MCGEORGE L. REV. 691, 692 (2006) (“The Guidelines’ concerted effort to produce identical sentences for men and women who commit similar crimes, while never completely successful, imposed draconian costs on families as well as on women who do not resemble the violent male drug dealers who inspired the severe federal drug penalties.”).

<sup>104</sup> See *id.* at 756 (referring to an “orphan-class” of children destined to follow in the footsteps of their incarcerated mothers); see also Randolph R. Myers & Sara Wakefield, *Sex, Gender, and Imprisonment: Rates, Reforms, and Lived Realities*, in THE OXFORD HANDBOOK OF GENDER, SEX, AND CRIME 572, 578 (Rosemary Gartner & Bill McCarthy eds., 2014) (noting that the Adopting and Safe Families Act of 1997 makes it more likely that incarcerated women will lose their children).

<sup>105</sup> For example, from 2010 to 2013—arguably the height of evidence-based sentencing—the national female jail population was “the fastest growing correctional population.” GLAZE & KAEBLE, *supra* note 10, at 1 (noting that the female jail population has increased by an annual average of 3.4%).

<sup>106</sup> See, e.g., Gwyneth Boswell, *Imprisoned Fathers: The Children’s View*, 41 HOW. J. CRIM. JUST. 14, 14 (2002) (researching the effect of incarcerated fathers have on children); Stewart Gabel, *Behavioral Problems in Sons of Incarcerated or Otherwise Absent Fathers: The Issue of Separation*, 31 FAM. PROCESS 303, 303 (1992) (studying the effects of absentee fathers who are incarcerated versus those that are absent for other reasons); Amanda Geller et al., *Beyond Absenteeism: Father Incarceration and Child Development*, 49 DEMOGRAPHY 49, 50–52 (2012) (analyzing the effects of fathers’ incarceration on children and finding increased risks for children with incarcerated fathers when compared with children with absentee fathers); William H. Sack, *Children of Imprisoned Fathers*, 40 PSYCHIATRY 163, 163 (1977) (exploring the consequences of father-separation as a result of imprisonment).

<sup>107</sup> Kirstine Hansen, *Gender Differences in Self-Reported Offending*, in GENDER AND JUSTICE: NEW CONCEPTS AND APPROACHES 32, 37 (Frances Heidensohn ed., 2006) (“[M]any absent fathers face high levels of both financial and emotional strain in maintaining the family home and their relationships with their children despite the fact that they are no longer living as part of that family.”).

Additionally, incarcerating fewer men could remedy many of the “gendered consequences” resulting from mass incarceration. For example, Randolph R. Myers and Sara Wakefield claim that women in high-crime neighborhoods face child care burdens and diminished marriage prospects.<sup>108</sup> According to Myers and Wakefield, women are gradually devoting more time, resources, and money to incarcerated partners.<sup>109</sup> However, such “gendered” problems could easily be remedied if the state reduced the number of men who were incarcerated. Increased emotional stability and financial support from otherwise imprisoned parents and partners would undoubtedly reduce crime rates.

Clearly, evidence-based sentencing regimes pose no logical relationship to theories of general deterrence. Soaring rates of recidivism call into question whether such systems have been more successful in creating high-risk offenders than they have been in identifying low-risk offenders. Finally, if states truly wanted to increase their commitment to public safety, they would excise considerations of gender from their evidence-based sentencing regimes in order to promote intact family units. Crime prevention, however, is only one of the general governmental objectives. On a related, yet distinct note, it is also questionable whether considerations of gender reduce instances of incarceration as well.

### *B. Reducing Incarceration*

Reducing incarceration rates may be a legitimate government interest, but it seems to be working disproportionately better for women relative to the offending population as a whole. For example, Barry Godfrey identifies the long-held notion that women offenders showed “greater promise of reformation.”<sup>110</sup> This notion, Godfrey notes, finds its roots in the Victorian ideal of femininity and “the apparent malleability of the female will.”<sup>111</sup> Thus, it appears as though alternative sentencing has always been geared toward, if not tailor-made for, women.<sup>112</sup> Alternatives to full-blown incarceration, it seems, have long been comfortably nestled in conceptions of gender.

The chivalry thesis, which assumes that stereotypes about the sexes influence sentencing outcomes, supports this notion.<sup>113</sup> This thesis also helps to explain why

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<sup>108</sup> Myers & Wakefield, *supra* note 104, at 579.

<sup>109</sup> *Id.*

<sup>110</sup> Barry Godfrey, *A Historical Perspective on Criminal Justice Responses to Female and Male Offending*, in *THE OXFORD HANDBOOK OF GENDER, SEX, AND CRIME* 158, 168 (Rosemary Gartner & Bill McCarthy eds., 2014).

<sup>111</sup> *Id.*

<sup>112</sup> Such characterizations, if forwarded, would summarily fail considering they are the epitome of “archaic and overbroad.” See *Craig v. Boren*, 429 U.S. 190, 198–99 (1976) (citing *Schlesinger v. Ballard*, 419 U.S. 498, 507–08 (1975)).

<sup>113</sup> See Courtney A. Franklin & Noelle E. Fearn, *Gender, Race, and Formal Court Decision-Making Outcomes: Chivalry/Paternalism, Conflict Theory or Gender Conflict?*, 36 *J. CRIM. JUST.* 279, 279 (2008) (“The chivalry/paternalism hypotheses suggest that women are awarded

men are sentenced more often and for longer periods of time than women.<sup>114</sup> In this sense, considerations of gender in evidence-based sentencing (which impute risk to men at-large) seem to be reinforcing, rather than replacing, the institutional biases they are intended to eradicate.<sup>115</sup> If women offenders automatically received a lower risk assessment score than men,<sup>116</sup> then they will surely be recommended for alternative sentences more often. Thus, a better question in evaluating whether evidence-based sentencing reduces incarceration is asking *whom* the system diverts rather than *how many* the system diverts.

Additionally, in breaking down the types of alternative sentences assigned, incarceration still seems to be very much on the table. In Virginia, for example, a jail sentence of less than twelve months was still imposed in 50.9% of the cases that were eligible for an alternative sentence.<sup>117</sup> At mid-year 2013, nearly 40% of inmates in jail were either sentenced offenders or convicted offenders awaiting sentencing.<sup>118</sup> Notably, since the year 2000, the adult female jail population has increased by 2.6 percentage points (or 31,503 inmates) to encompass 13.9% of the total jail population.<sup>119</sup> Although it is impossible to account for how many women reflected in that figure were in jail due to alternative and, subsequently more lenient, punishments, it is entirely feasible that the uptick could be attributed to discretionary downward departures in lieu of a much longer prison sentence. At any rate, the jailed population still remains relatively high.<sup>120</sup> Thus, another question in evaluating whether evidence-based sentencing reduces incarceration is *where* an offender is incarcerated rather than *if* an offender is incarcerated.

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leniency in sentencing as a result of their inherent biological weaknesses and consequently, their need to be protected and coddled both as offenders and as victims.” (citation omitted)); S. Fernando Rodriguez et al., *Gender Differences in Criminal Sentencing: Do Effects Vary Across Violent, Property, and Drug Offenses?*, 87 SOC. SCI. Q. 318, 320 (2006) (“Sometimes called paternalism, chivalry asserts that women are stereotyped as fickle and childlike, and therefore not fully responsible for their criminal behavior.”).

<sup>114</sup> See Rodriguez et al., *supra* note 113, at 334 (finding that men were more likely to receive prison sentences 3.22 years longer than women); see also Sonja B. Starr, *Estimating Gender Disparities in Federal Criminal Cases 2* (U. Mich. L. & Econ. Res. Paper Series, Paper No. 12-018, 2012), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2144002](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2144002) (finding that men received prison sentences 63% longer than women).

<sup>115</sup> See Rodriguez et al., *supra* note 113, at 335; Starr, *supra* note 114, at 16.

<sup>116</sup> See *supra* note 40 and accompanying text.

<sup>117</sup> See VA. CRIMINAL SENTENCING COMM’N, 2013 ANNUAL REPORT 34 (2013), <http://www.vcsc.virginia.gov/2013AnnualReport.pdf> [<http://perma.cc/PY75-6SMC>]. Supervised probation was the most popular type of alternative sanction (86.3%). *Id.*

<sup>118</sup> TODD D. MINTON & DANIELA GOLINELLI, BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, JAIL INMATES AT MIDYEAR 2013—STATISTICAL TABLES 1 (2014), <http://www.bjs.gov/content/pub/pdf/jim13st.pdf> [<http://perma.cc/VW3J-ZE9Q>].

<sup>119</sup> *Id.* at 6–7 tbls.2–3.

<sup>120</sup> See *id.* at 6 tbl.2 (noting that the mid-year number of jailed inmates totaled 731,208).

Furthermore, as far as nonviolent offenders are concerned, how evidence-based sentencing stacks up to the states' listed purposes can be more concretely determined. For example, Virginia set out with the admirable goal of diverting 25% of its nonviolent offenders when it adopted its "truth-in-sentencing" guidelines in 1994.<sup>121</sup> According to the Virginia Criminal Sentencing Commission in 2013, almost two-thirds (roughly 16,020) of the files it received were for nonviolent crimes.<sup>122</sup> Of those reports, only 41% (or 6,568 cases) were eligible for an alternative sanction.<sup>123</sup> In all, 53% of eligible nonviolent offenders (roughly 3,481 cases) were recommended for an alternative punishment.<sup>124</sup> Of that 53%, only 42% (or roughly 1,462) of those recommended actually received an alternative punishment.<sup>125</sup>

Alone, this statistic seems like no small victory. In light of the larger picture, however, Virginia falls short of its goal to divert 25% of nonviolent offenders. For example, the 1,462 individuals who received alternative sanctions comprise only about 9% of the total non-violent offending population. In order for Virginia to meet its goal in 2013, no less than 61% of eligible nonviolent offenders needed to receive alternative sanctions. In terms of human capital, this means roughly 2,543 more offenders could have been diverted from prison. A final question in evaluating whether evidence-based sentencing reduces incarceration is how many *more* offenders could be diverted rather than how many offenders were diverted.

In sum, although the ends are indisputably noble, it is questionable whether gender considerations in risk assessment instruments truly serve any real, concrete, legitimate governmental objectives related to preventing crime and reducing incarceration. Overall, failures as a matter of general deterrence, high recidivism rates, and familial instability muddy evidence-based sentencing's net effects on overall crime prevention. As far as reducing incarceration rates, risk assessment does seem to marginally help some low-risk offenders, but it is clear that much more could be done. The argument against the use of gender in evidence-based sentencing does not summarily there end, however. Now that this Note has examined the government objectives, it can finally discuss how the use of gender is poorly tailored to fit those ends.

#### IV. THE MEANS

In spite of the fact that gender-driven risk assessments often subvert the legitimate objectives behind alternative sentencing regimes, the complicity with which

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<sup>121</sup> VA. CRIMINAL SENTENCING COMM'N, *supra* note 117, at 33.

<sup>122</sup> *Id.*

<sup>123</sup> *Id.* Offenders convicted for distributing cocaine, a violent felony, or a crime that requires a mandatory minimum sentence are ineligible for the risk assessment. *Id.* Nonviolent offenders recommended for probation based on the guidelines are not eligible for assessment. *Id.* This could inflate the figure somewhat, but the numbers were not provided in the commission's report.

<sup>124</sup> *Id.*

<sup>125</sup> *Id.*



gender has been enveloped in evidence-based practice is quite troubling. The presumption driving this unquestioning inclusion, it seems, is that gender can be a somewhat reliable (if quite feeble) predictor of adult recidivism.<sup>126</sup> Acceptance of this indicator is bolstered by the simple fact that men commit more crimes than women.<sup>127</sup> Such statements, without more detail, border on the tautological. They add little to no scientific justifications for gender inclusion in evidence-based sentencing, and they hardly assuage fears concerning empirical tailoring when the conversation shifts to employing gender punitively rather than passively studying it.

As a quasi-suspect variable, the government's use of gender classifications must be "substantially related" to the proffered objectives.<sup>128</sup> The doctrine eventually required an "exceedingly persuasive justification" for gender classifications.<sup>129</sup> In other words, the use of gender in criminal sentencing must be closely tied to identifying low-risk offenders who are appropriate for commuted sentences or community release. Rather than peel back the layers of complications, the literature that has thus far examined the use of gender in evidence-based sentencing has shown an almost blind faith in decades' old empirical assessment.<sup>130</sup> Persistent problems surrounding the ill-suited analogies include the acceptable use of suspect variables, the reliability of assumptions drawn from historical data, and the fuzzy conceptions of gender as a social construct.<sup>131</sup> To demonstrate that the use of gender in evidence-based sentencing regimes fails as a matter of fitness, this Section will situate the question in existing constitutional doctrine concerning the totality of factors under consideration, statistical assumptions about the genders, and physical characteristics between the sexes.

#### A. *The Affirmative Action Analogy*

One of the most disconcerting arguments in favor of using suspect variables analogizes the use of gender in evidence-based sentencing to the use of race in the affirmative action context. J.C. Oleson forwards such an argument, claiming that

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<sup>126</sup> See, e.g., Paul Gendreau, Tracy Little & Claire Goggin, *A Meta-Analysis of the Predictors of Adult Offender Recidivism: What Works!*, 34 *CRIMINOLOGY* 575, 576 (1996) (discussing the inclusion and predictive strength of gender in risk assessment instruments); Oleson, *supra* note 34, at 1365–66 (discussing gender as a generally accepted variable); Starr, *supra* note 3, at 828 ("EBS is *all about* generalizing based on statistical averages, and its advocates defend it on the basis that the averages are right.").

<sup>127</sup> See Oleson, *supra* note 34, at 1365 (noting that, regardless of how crime is measured, "males are more criminal than females").

<sup>128</sup> See *Craig v. Boren*, 429 U.S. 190, 197 (1976) (citing *Reed v. Reed*, 404 U.S. 71, 75 (1971)).

<sup>129</sup> See *United States v. Virginia*, 518 U.S. 515, 531 (1996); see also *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 136–37 (1994); *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982).

<sup>130</sup> For example, Gendreau, Little, and Goggin's oft-cited meta-analysis of recidivism markers is nearly twenty years old. See Gendreau, Little & Goggin, *supra* note 126, at 575.

<sup>131</sup> See Meares, *supra* note 9, at 853–57 (discussing the reluctance of lawyers, judges, and others to embrace updated, relevant empirical information and social science data).

such variables invariably survive intermediate scrutiny.<sup>132</sup> In fact, according to Oleson, the inclusion of race in risk assessment may even survive strict scrutiny.<sup>133</sup> Oleson seems to accept that the *overt* use of race or gender alone would hardly pass constitutional muster under the Equal Protection Clause.<sup>134</sup> However, Oleson believes that it is plausible to think that the courts would look favorably upon an evidence-based sentencing regime that blended the use of suspect variables along with traditionally accepted considerations.<sup>135</sup> When used as such, either explicitly or implicitly, Oleson argues that “suspect classifications might operate as ‘plus factors,’ allowing judges to assess risk with greater precision to advance the compelling state interest of public safety.”<sup>136</sup> “Such an approach,” Oleson writes, “may survive constitutional scrutiny.”<sup>137</sup>

In order to lend support to this argument, Oleson points to one of the Supreme Court’s now seminal cases on affirmative action,<sup>138</sup> *Grutter v. Bollinger*.<sup>139</sup> Initially, the fact that Oleson conflates the possibility with not getting into a “top tier” law school with the possibility of spending time in prison is itself concerning. Perhaps the most striking feature of Oleson’s argument, however, is how thoroughly wrong he gets the Court’s analysis in *Grutter* (although, to his credit, he does at least attempt to defend, rather than blasély accept, the use of constitutionally suspect variables in evidence-based sentencing).<sup>140</sup>

In his explanation of how race could be used as an explicit risk assessment factor, Oleson latches onto a few salient features of the *Grutter* opinion. In particular, he points to the Court’s acceptance of racial considerations so long as they were: (1) employed in a “flexible and non-mechanical manner”; (2) applied as “plus factors”; and (3) included among various other relevant variables.<sup>141</sup> Granted, the explicit consideration of gender is but one factor amongst several other highly relevant variables in many evidence-based sentencing regimes, which often compile a large number of both static

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<sup>132</sup> Oleson, *supra* note 34, at 1385–88.

<sup>133</sup> *Id.*

<sup>134</sup> *See id.* at 1377; *see also* U.S. CONST. amend. XIV, § 1; *id.* amend. V.

<sup>135</sup> Oleson, *supra* note 34, at 1377.

<sup>136</sup> *Id.*

<sup>137</sup> *Id.*

<sup>138</sup> *Id.* at 1381–82.

<sup>139</sup> 539 U.S. 306 (2003) (upholding the law school’s use of race in admissions because the program was narrowly tailored to meet the compelling interest of attaining a diverse study body).

<sup>140</sup> *See* Oleson, *supra* note 34, at 1385–88. Importantly, Oleson even uses the *Grutter* argument to justify the explicit use of race in evidence-based sentencing. *Id.* He believes that risk assessments based on race would survive strict scrutiny. *Id.* Even though the race analysis employs a higher level of scrutiny than the one applied to gender, Oleson’s misapplication of the tailoring arguments can just as easily be applied to the use of gender under intermediate scrutiny for reasons that will be explained below.

<sup>141</sup> *Id.* at 1383–84, 1386 (quoting *Grutter*, 539 U.S. at 333–35).

and dynamic inquiries.<sup>142</sup> However, the similarities between affirmative action and evidence-based sentencing sharply end there.<sup>143</sup>

For example, the Court has held that race can be used as a “plus” factor for admission purposes so long as such a consideration does not isolate applicants from the larger pool of candidates competing for available seats.<sup>144</sup> In the university admissions context, race is used as a positive factor.<sup>145</sup> An applicant’s contribution to diversity is considered an overall benefit to the institution.<sup>146</sup> As such, “plus” factors based on race or ethnicity could give such applicants a slight, but not dispositive, edge over racial or ethnic majority applicants.<sup>147</sup> In contrast, when gender is used for purposes of risk assessment, it is a neutral factor for women at best and a negative factor for men at worst.<sup>148</sup> Evidence-based sentencing regimes that automatically add to the risk assessment of men function as “minus” factors instead by increasing the likelihood that male offenders will not be considered for community diversion.<sup>149</sup> Thus, the inclusion of gender in the criminal sentencing context operates contrarily to the accepted practices in the affirmative action context.<sup>150</sup>

Furthermore, the Court in *Grutter* noted that the consideration of race in the admissions program had to “be used in a flexible, nonmechanical way.”<sup>151</sup> Although evidence-based sentencing regimes do not establish quotas or insulate certain groups of offenders from the larger criminal population, evidence-based sentencing has been lauded for its actuarial rigidity and administrative efficiency.<sup>152</sup> In fact, the evidence-based movement was developed to make the law more scientific: actuarial instruments were purportedly more accurate than the clinical judgment of arresting officers or sentencing judges.<sup>153</sup> Thus, advocates for evidence-based sentencing support

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<sup>142</sup> See CASEY, WARREN & ELEK, *supra* note 34, at 4–5 (discussing the numerous factors examined in popular risk assessment instruments).

<sup>143</sup> See, e.g., Starr, *supra* note 3, at 864 (contrasting the state’s differing interests in affirmative action and criminal justice).

<sup>144</sup> See *Grutter*, 539 U.S. at 334 (stating that the University of Michigan Law School used race as a constitutionally permissible “plus factor”); *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 317 (1978) (allowing universities to use race as a factor for admission).

<sup>145</sup> See, e.g., *Grutter*, 539 U.S. at 340–41.

<sup>146</sup> See *id.* at 330.

<sup>147</sup> See *Bakke*, 438 U.S. at 318.

<sup>148</sup> See *supra* notes 39–42 and accompanying text.

<sup>149</sup> See *id.*

<sup>150</sup> In fact, a more apposite comparison to how gender is used in evidence-based sentencing would be an admissions program that *subtracted* points from white applicants.

<sup>151</sup> *Grutter*, 539 U.S. at 334.

<sup>152</sup> See, e.g., Oleson, *supra* note 34, at 1342 (claiming that actuarial risk assessment outperforms clinical judgment); Starr, *supra* note 3, at 850–55 (comparing the accuracy of evidence-based versus clinical judgments); VanBenschoten, *supra* note 46, at 39 (discussing the objectivity of evidence-based risk assessment and its usefulness in case planning).

<sup>153</sup> See VanBenschoten, *supra* note 46, at 38–39.

such practices precisely because they are inflexible and mechanic.<sup>154</sup> Again, the exact opposite of the program in *Grutter*.

Finally, in his myopic pursuit of support, Oleson either ignores or overlooks *Grutter*'s most important hallmark—individual considerations. The law school's admissions program was upheld because it utilized “a highly individualized, holistic review of each applicant's file,” and there was no practice of “automatic acceptance or rejection based on any single ‘soft’ variable” such as demographic information.<sup>155</sup> The statistical averages used to support the use of gender in evidence-based sentencing are incompatible with the *Grutter* Court's conception of a “highly individualized,” let alone “holistic” review of each offender's characteristics.<sup>156</sup>

Although the tailoring analogy between criminal sentencing and higher education may be a novel twist on an otherwise unjustified embrace of suspect variables, the reasoning is inept as applied to the affirmative action doctrine and evidence-based sentencing context. Such an argument might be one of the most disturbing offered to defend evidence-based sentencing, but it is also the easiest with which to dispose. More complex problems are posed by reliance on statistics surrounding the historical patterns and prevalence of male offenders and the notion that criminality is a largely masculine characteristic.

### *B. The Reliability of Historical and Statistical Data*

The gender divide in criminal offending is another factor proponents of evidence-based sentencing highlight in support of gender in risk assessment instruments. For example, Oleson summarizes the general thrust of this line of reasoning when he argues, essentially, that men have committed more crimes and have recidivated at a higher frequency than women since time immemorial.<sup>157</sup> Disciplines outside of the law have lent credence to this claim as well.<sup>158</sup> For example, economic theory defends such statistical discrimination on the basis that it is more efficient.<sup>159</sup> Likewise, concepts of “actuarial fairness” have been used by insurance companies to justify disparate rates among certain groups.<sup>160</sup>

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<sup>154</sup> See Starr, *supra* note 3, at 813.

<sup>155</sup> *Grutter*, 539 U.S. at 337.

<sup>156</sup> In fact, as a matter of comparison, the distribution of points based on gender is more akin to the system struck down in *Grutter*'s companion case, *Gratz v. Bollinger*, 539 U.S. 244 (2003), which held that the University of Michigan's undergraduate admissions program, which automatically assigned one-fifth of the points needed for admission to racial minorities, was not narrowly tailored. *Id.* at 246.

<sup>157</sup> Oleson, *supra* note 34, at 1365–66.

<sup>158</sup> See generally Starr, *supra* note 3 (analyzing the use of actuarial models to reduce recidivism risks).

<sup>159</sup> *Id.* at 827.

<sup>160</sup> *Id.* at 825 n.91.

Much like the affirmative action context, the comparative interests are incompatible. The interest in not going to prison is far more sobering than generalized market forces or paying a lower insurance premium. Furthermore, anecdotally citing base statistics adds little to the argument that the use of gender in evidence-based sentencing should continue to skate by unscathed from criticism. As Tammy Whitlock writes, “To say that crime itself has largely been a historically masculine enterprise is a statistically factual statement but not a particularly revealing one.”<sup>161</sup> Finally, such reedy arguments would certainly bow under intermediate scrutiny.

In more applicable doctrine, the Supreme Court has held that statistical assumptions based on gender cannot serve as a proxy for “other, more germane bases of classification.”<sup>162</sup> This is true even when such gender classifications have been statistically supported.<sup>163</sup> Statistics played a large role in the state’s case in *Craig v. Boren*, which relied on arrest statistics to support a law that restricted the sale of non-intoxicating beer to young men.<sup>164</sup> The Court could have been satisfied with the fact that young men were nearly ten times more likely than young women to drive while intoxicated, but the Court was highly skeptical of the assumptions the government wanted it to draw from the data.<sup>165</sup>

Notably, the Court announced that “if maleness is to serve as a proxy for drinking and driving, a correlation of 2% must be considered an unduly tenuous ‘fit.’”<sup>166</sup> In fact, the Court went on to state that it had previously struck down considerations of gender that “rested on far more predictive empirical relationships” than the one presented by the state in *Craig*.<sup>167</sup> In their now seminal study of adult recidivism predictors, Paul Gendreau, Tracy Little, and Claire Goggin found that gender had a mean correlation coefficient of 0.10.<sup>168</sup> If a 2% correlation could not

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<sup>161</sup> Tammy Whitlock, *Masculinities and Crime in Historical Perspective*, in THE OXFORD HANDBOOK OF GENDER, SEX, AND CRIME 191, 202 (Rosemary Gartner & Bill McCarthy eds., 2014).

<sup>162</sup> *Craig v. Boren*, 429 U.S. 190, 198 (1976).

<sup>163</sup> See Starr, *supra* note 3, at 825 (noting that the Court has repeatedly invalidated gender classifications “that are grounded in statistical generalizations about groups—even those with empirical support”).

<sup>164</sup> *Craig*, 429 U.S. at 200–01. The law at issue in *Craig* restricted the sale of non-intoxicating beer to men under the age of twenty-one and women under the age of eighteen. *Id.* at 191–92. In order to demonstrate that its law was tailored to promoting highway safety, the state provided evidence that 2% of eighteen- to twenty-year-old men were arrested for driving under the influence of alcohol as opposed to only 0.18% of young women in the same demographic. *Id.* at 201.

<sup>165</sup> *Id.* at 201 (“Even were this statistical evidence accepted as accurate, it nevertheless offers only a weak answer to the equal protection question presented here.”)

<sup>166</sup> See *id.* at 201–02.

<sup>167</sup> *Id.* at 202 n.13 (citing *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975); *Frontiero v. Richardson*, 411 U.S. 677 (1973); *Reed v. Reed*, 404 U.S. 71 (1971)).

<sup>168</sup> Gendreau, Little & Goggin, *supra* note 126, at 583 tbl.1. As a comparison, criminal history (0.18), history of antisocial behavior (0.13), antisocial personality (0.18), family

suffice for fitness in *Craig v. Boren*, then surely a 0.10 mean predictive average would not suffice for fitness to save gender-driven evidence-based sentencing regimes. If maleness could not serve as a proxy for drunk driving, then it should not serve as a proxy for generalized criminal risk.

In addition to rejecting the weak correlational relationship between gender and drunk driving, the Court went on to note the various other pitfalls of the statistical figures that dampened their value to an equal protection analysis.<sup>169</sup> The Court's most scathing critique of the "methodological problems" behind the surveys notes that the "social stereotypes" reflected in laws based upon gender differentials "are likely substantially to distort the accuracy of [their] comparative statistics."<sup>170</sup> The Court took great issue with the notion that "'reckless' young men who drink and drive are transformed into arrest statistics, whereas their female counterparts are chivalrously escorted home."<sup>171</sup> Thus, at the very least, the Court seemed quite suspect of the blanket notion that the affected young men were criminally more reckless than young women, even though such a notion was nominally grounded in facts.

The methodological issues to which the Court draws attention find support in the larger literature as well. For example, Greg T. Smith notes that "the availability of evidence and the incompatibility or inconsistency of sources" provide significant methodological concerns when attempting to document long-term trends in criminality.<sup>172</sup> Moreover, Smith also identifies additional stumbling blocks when considering historical changes in "legal definitions, prosecutorial practices, police enforcement, and victim-reporting practices."<sup>173</sup>

Smith notes that legal definitions have varied widely over time and across jurisdictions, undermining efforts to draw broad generalizations from the historical data.<sup>174</sup> Additionally, Smith also notes that fluctuations in female convictions were likely a byproduct of changing prosecutorial practices and discretion, with women often being tried "in other venues."<sup>175</sup> Godfrey also highlights this concept, noting that highly localized criminal justice systems were reluctant to impose formal punishments

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rearing practices (0.15), criminogenic needs (0.18), and social companions (0.18) were all more effective than gender at predicting adult recidivism. *Id.* Only personal distress (0.05), socioeconomic status (0.06), and intellectual functioning (0.07) provided weaker predictive values of recidivism. *Id.*

<sup>169</sup> *Craig*, 429 U.S. at 202–03. Specifically, the Court noted that the state's studies: (1) failed to account for the "dangerousness of 3.2% beer as opposed to alcohol generally"; and (2) made no effort to "relate their findings to age-sex differentials" involved in the case. *Id.* at 203.

<sup>170</sup> *Id.* at 202 n.14.

<sup>171</sup> *Id.*

<sup>172</sup> Greg T. Smith, *Long-Term Trends in Female and Male Involvement in Crime*, in *THE OXFORD HANDBOOK OF GENDER, SEX, AND CRIME* 139, 140 (Rosemary Gartner & Bill McCarthy eds., 2014).

<sup>173</sup> *Id.* at 144; see also *id.* at 140–41 (discussing the difficulties in documenting trends in sex-specific crimes).

<sup>174</sup> *Id.* at 140.

<sup>175</sup> *Id.* at 150.



on women.<sup>176</sup> Godfrey supports the notion that police practices played a large role in the statistics as well.<sup>177</sup> Finally, reporting stigmas also most likely skewed crime statistics. Smith notes that men faced humiliation if they reported assaults perpetrated against them by women.<sup>178</sup> Likewise, the legal concept of *femme covert* meant that married men would have to answer for the crimes of their wives.<sup>179</sup>

Another bias reflected in the statistics around the criminal sex divide is that historians have typically focused on those salacious, sensational, and typically violent crimes that rise to the occasion of a cause célèbre.<sup>180</sup> This is problematic in several respects. By focusing on violent crimes, for which men are disproportionately responsible,<sup>181</sup> historical statistics ignore the largest category of offenses—minor and petty crimes.<sup>182</sup> As such, historians have undoubtedly glossed over an important indicator of female criminality.<sup>183</sup> As for the evidence-based sentencing context, the focus on the gender gap in violent crime is probably moot.<sup>184</sup> Notably, the gender gap between men and women who commit nonviolent crimes is far less pronounced.<sup>185</sup> This trend is also reflected in recent upticks in the incarceration rates of women relative to men starting in the 1980s, which was in part due to women’s increased participation in drug crimes.<sup>186</sup>

Of course, as scholars are quick to point out, men have always committed more crimes than women.<sup>187</sup> The historical data, however, portrays a much more nuanced picture when contextualized by the laundry list of methodological issues. Moreover,

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<sup>176</sup> Godfrey, *supra* note 110, at 160 (noting that women often received less severe sentences than men because the costs of child-rearing would otherwise be shifted to taxpayers).

<sup>177</sup> *Id.* at 161 (“The attitudes of male (usually working-class) police officers . . . were key in defining crimes and in pushing some people towards the courts, while others were ordered to go home.”).

<sup>178</sup> Smith, *supra* note 172, at 141.

<sup>179</sup> *Id.*

<sup>180</sup> *Id.*

<sup>181</sup> *See id.* at 142–43 (discussing the historical proportion of homicides committed by men and women respectively).

<sup>182</sup> *Id.* at 141.

<sup>183</sup> *See id.*

<sup>184</sup> Diversion recommendations will generally apply only to those offenders who committed nonviolent crimes. Moreover, some risk assessment instruments are only considered in nonviolent or petty offenses. *Compare* VA. CODE ANN. § 17.1-803(6) (West 2011) (stating that the risk assessment instrument shall not be applied to any violent or serious felony), *with* 42 PA. CONS. STAT. § 2154.7(a) (2010) (permitting the use of risk assessment instruments for defendants “who plead guilty or nolo contendere to or who were found guilty of felonies and misdemeanors”), *and* WASH. REV. CODE § 9.94A.500 (2014) (permitting risk assessment reports in cases where the defendant has not been sentenced to life in prison or capital punishment).

<sup>185</sup> *See* Smith, *supra* note 172, at 147–50 (discussing the historical patterns of nonviolent crime). In some instances, women offenders actually outnumbered men for certain property and economic crimes. *Id.* at 148.

<sup>186</sup> *See* Myers & Wakefield, *supra* note 104, at 575.

<sup>187</sup> *See, e.g.,* Oleson, *supra* note 34, at 1365–66 nn.301–06.

such sweeping generalizations lose much of their steam when accounting for the gender divide in nonviolent crime, which is certainly the focus of evidence-based sentencing. Statistical assumptions based on the notion that men are more criminal than women would likely fail to justify considerations of gender in risk assessment, even though they may be supported by “facts.” The government’s tailoring argument does not hinge solely upon failed comparisons to affirmative action or faulty statistics. The notion that criminality is a decidedly male characteristic manifests in other iterations of the same argument.

### *C. The Physicality of Gendered Criminality*

The Court has been somewhat permissive in allowing gender discrimination when the classification has been based upon physical differences between the sexes. As the Court warned in *United States v. Virginia*, although “[p]hysical differences between men and women . . . are enduring,” such differences could not be used “for denigration of the members of either sex or for artificial constraints on an individual’s opportunity.”<sup>188</sup> The Court has repeatedly held, however, that the physical differences in the sexes’ contributions and commitments to childbirth can be substantially related to sufficient governmental objectives.<sup>189</sup> In *Michael M. v. Superior Court*, the Court upheld a statutory rape law that applied only to men.<sup>190</sup> Likewise, in *Nguyen v. I.N.S.*, the Court upheld a statute that made it more difficult for the progeny of citizen fathers (rather than citizen mothers) who were born out of wedlock abroad to obtain citizenship.<sup>191</sup>

In *Nguyen*, the Court went on to state that “[m]echanistic classification of all our differences as stereotypes would operate to obscure those misconceptions and prejudices that are real.”<sup>192</sup> Classifying criminality, or lack thereof, as an irreducible physical feature does just that—it obscures the very real and present prejudice that men are riskier than women and therefore deserve to be punished more severely. Such platitudes not only reflect stereotypes rooted in faulty statistics, they also confuse the central issue by conflating concrete physical characteristics with abstract

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<sup>188</sup> 518 U.S. 515, 533 (1996). Specifically, the Court noted that gender classifications could be used to remedy past discrimination against women, but they could not be used “to create or perpetuate the legal, social, and economic inferiority of women.” *Id.* at 533–34.

<sup>189</sup> See *Nguyen v. I.N.S.*, 533 U.S. 53 (2001); *Michael M. v. Superior Court of Sonoma Cty.*, 450 U.S. 464 (1981).

<sup>190</sup> 450 U.S. at 471 (“We need not be medical doctors to discern that young men and young women are not similarly situated with respect to the problems and the risks of sexual intercourse. Only women may become pregnant, and they suffer disproportionately the profound physical, emotional, and psychological consequences of sexual activity.”).

<sup>191</sup> 533 U.S. at 64 (“Given that the mother is always present at birth, but that the father need not be, the facially neutral rule would sometimes require fathers to take additional affirmative steps which would not be required of mothers.”).

<sup>192</sup> *Id.* at 73.

personality traits. These notions undeniably mistake sex, a biological trait, for gender, a social construct.

Pregnancy and its disparate burdens are phenomena undeniably rooted in biology. Criminality and its risks of recidivism patently are not.<sup>193</sup> As Professor Starr notes, “[A] generalization about a behavioral tendency like criminal recidivism is simply not comparable to a physical difference.”<sup>194</sup> In fact, gender is best defined as “socially produced in the ongoing interactions of everyday life.”<sup>195</sup> Thus, increased criminality in the male gender can be better understood as the byproduct of social (rather than physical) forces.

Criminologists certainly have helped to reinforce, if not perpetuate, this observation. For example, Jody Miller notes that “[m]any criminologists remain primarily concerned with explaining men’s offending.”<sup>196</sup> This intense focus has led to the notion that male offending is the “norm,” rather than treating gender as “a feature of social organization that requires careful interrogation.”<sup>197</sup> As such, crime has largely been defined in terms of “masculinity.”<sup>198</sup> More important, ephemeral notions of “masculinity,” or what it means to be a man, are even further removed from physicality than notions of gender, although the two concepts are somewhat circular.

In order to better understand how expectations of masculinity can lead to increased rates of crime among men, James W. Messerschmidt’s theory of “hegemonic masculinity” provides a rather insightful lens.<sup>199</sup> Messerschmidt defines “hegemonic masculinity” as “the idealized form of masculinity in a given historical setting.”<sup>200</sup> Further, the theory of “hegemonic masculinity emphasizes practices toward authority, control, competitive individualism, independence, aggressiveness, and the capacity for violence.”<sup>201</sup>

<sup>193</sup> As of yet, the research has not been able to identify a definitive biological basis for increased criminal behavior in males. See Jill Portnoy et al., *Biological Perspectives on Sex Differences in Crime and Antisocial Behavior*, in THE OXFORD HANDBOOK OF GENDER, SEX, AND CRIME 260, 261–76 (Rosemary Gartner & Bill McCarthy eds., 2014) (examining genetics, brain structures, neuropsychology, and psychophysiology to find relationship between sex and crime and finding inconclusive results).

<sup>194</sup> Starr, *supra* note 3, at 829.

<sup>195</sup> Jody Miller, *Doing Crime as Doing Gender? Masculinities, Femininities, and Crime*, in THE OXFORD HANDBOOK OF GENDER, SEX, AND CRIME 19, 19 (Rosemary Gartner & Bill McCarthy eds., 2014).

<sup>196</sup> *Id.* at 22. Miller also notes that such studies often fail to account for exactly how “gender is implicated in male offending.” *Id.*

<sup>197</sup> *Id.* at 23 (citation omitted).

<sup>198</sup> See Whitlock, *supra* note 161, at 197 (“Because crime, especially violent crime, was seen as a man’s game, women involved in particularly violent crimes . . . might be labeled as ‘masculine.’”).

<sup>199</sup> See JAMES W. MESSERSCHMIDT, MASCULINITIES AND CRIME: CRITIQUE AND RECONCEPTUALIZATION OF THEORY 81–83 (1993); see also R.W. Connell & James W. Messerschmidt, *Hegemonic Masculinity: Rethinking the Concept*, 19 GENDER & SOC’Y 829 (2005).

<sup>200</sup> MESSERSCHMIDT, *supra* note 199, at 82.

<sup>201</sup> *Id.* (citation omitted).

In context, the concept of hegemonic masculinity illuminates why men commit crimes in light of the particular social pressures of a given time. For example, this concept can help explain the downward trend in violent crimes committed by men.<sup>202</sup> Whitlock notes that several studies identify a decline in “positively viewed masculine violence,” starting with the upper classes as early as the eighteenth century and eventually trickling down the lower strata of the social spheres.<sup>203</sup> This decline can no doubt be attributed to the idealized hegemonic masculinity of the civilized “home Englishman” in the Victorian era.<sup>204</sup>

Likewise, Connell and Messerschmidt note that “research in criminology showed how particular patterns of aggression were linked with hegemonic masculinity, not as a mechanical effect for which hegemonic masculinity was a cause, but through the pursuit of hegemony.”<sup>205</sup> This pursuit of dominance can explain a great deal of crime in the modern context. Miller argues that crime can be seen as a “masculine-validating resource,” which can serve as means to retake power in certain emasculating situations.<sup>206</sup> Miller points out that this behavior is particularly salient for African American men, who are reacting to a “unique history of racial oppression and persistent denial of access to legitimate avenues of mainstream masculinity construction.”<sup>207</sup>

The implications of gender classifications are far more complex than binary risk assessment scales or cutoff points suggest. Treating criminality like a physical characteristic ignores the nuanced, subtle, and, at times, competing expectations society has crafted for the genders. Unlike pregnancy, criminality has no foundation in an individual’s biological makeup. Rather, gender is the result of external social forces that have unfortunately reinforced the notion that crime is a largely “male” pursuit. Furthermore, crime often provides the only viable channel in which to seek the power or authority that has been denied to certain subgroups. At any rate, such considerations often pose difficult questions that simply cannot be answered by comparisons to physical differences between the sexes.

In summary, affirmative action analogies, statistical and historical predictions, and physical characteristics do not provide “exceedingly persuasive” justifications for the use of gender in evidence-based sentencing systems. Moreover, given the logical flaws, methodological shortcomings, and shallow assumptions that plague such arguments, they could hardly be considered “substantially related” to the goals of preventing crime or reducing incarceration. As such, in addition to failing to

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<sup>202</sup> See Smith, *supra* note 172, at 142–43 (discussing a decrease in men’s lethal violence between twelfth-century England and seventeenth- and eighteenth-century England); Whitlock, *supra* note 161, at 194–97 (highlighting a decline of positively viewed masculine violence in the eighteenth century).

<sup>203</sup> Whitlock, *supra* note 161, at 194–95.

<sup>204</sup> See Smith, *supra* note 172, at 146–47.

<sup>205</sup> Connell & Messerschmidt, *supra* note 199, at 834 (citation omitted).

<sup>206</sup> Miller, *supra* note 195, at 24.

<sup>207</sup> *Id.* at 25 (quoting CHRISTOPHER W. MULLINS, HOLDING YOUR SQUARE: MASCULINITIES, STREETLIFE, AND VIOLENCE 25 (2006)).

further the governmental objectives, inclusion of gender in risk assessment also misses the mark as a matter of tailoring.

#### CONCLUSION

The utilization of evidence-based sentencing, to be sure, enjoys and will likely continue to enjoy its widespread, almost unanimous support.<sup>208</sup> In the abstract, the proffered objectives behind evidence-based sentencing are both lofty and legitimate. Whom among us would not support a sentencing regime that actually prevented crime<sup>209</sup> and reduced incarceration?<sup>210</sup> The issue arises, however, when such desirable objectives are premised upon undesirable means.<sup>211</sup> Yes, arguably everyone may want fewer crimes and incarcerations, but should the equal treatment of men be sacrificed in order to achieve that end? Therein lies the rub: How do evidence-based sentencing regimes balance constitutionality with predictive accuracy?<sup>212</sup> The answer is simple.

The LSI-R<sup>213</sup> strikes an equilibrium between statistically accurate recidivism prediction without relying on gender to root it in constitutionally suspect footing. In fact, the LSI-R uses risk factors from non-suspect criminogenic domains to shape sentencing decisions.<sup>214</sup> As a matter of equal treatment, the LSI-R's desirability is in part derived from the fact that it draws upon dynamic, rather than static, factors.<sup>215</sup> In fact, at the time of their meta-analysis, Gendreau, Little, and Goggin recommended the LSI-R as a useful actuarial measure of adult recidivism.<sup>216</sup> The LSI-R thus serves the government's desire to identify risk and divert appropriate offenders out of the

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<sup>208</sup> See *supra* Part II.

<sup>209</sup> See *supra* Part III.A.

<sup>210</sup> See *supra* Part III.B.

<sup>211</sup> See *supra* Part IV.

<sup>212</sup> Christopher Slobogin highlights the dilemma as follows:

[R]isk assessment is only likely to be sufficiently and knowably accurate if it is based on actuarial instruments, but it is only likely to avoid constitutional, justice, and fairness objections if it relies on demonstrably less accurate unstructured clinical judgement that eschews use of demographic information and other immutable traits.

Slobogin, *supra* note 2, at 209.

<sup>213</sup> Don Andrews and James Bonta developed the LSI-R in 1995. See CASEY, WARREN & ELEK, *supra* note 34, at 5 app.A.

<sup>214</sup> Such criminogenic factors include criminal history, education and employment, personal finances, personal relationships, accommodations, leisure and recreation, substance use, mental health, and attitudes. See *id.*; Anthony W. Flores et al., *Validating the Level of Service Inventory—Revised on a Sample of Federal Probationers*, 70 FED. PROBATION 44, 45 (2006).

<sup>215</sup> Paula Smith et al., *Can 14,737 Women Be Wrong? A Meta-Analysis of the LSI-R and Recidivism for Female Offenders*, 8 CRIMINOLOGY & PUB. POL'Y 183, 197 (2009) (“This approach not only increases the predictive power of the LSI-R but also directs attention to sources of offender recidivism that can be changed and thus are amenable to treatment.”).

<sup>216</sup> Gendreau, Little & Goggin, *supra* note 126, at 575, 591.

prison system without doubly punishing male offenders for both their crimes and the crimes of their gender.

For twenty years, the LSI-R has predicted adult recidivism risk without relying on constitutionally suspect variables. In spite of the LSI-R's proven utility, however, some argue that gender neutrality poses greater harms for women<sup>217</sup> and that the LSI-R has varying levels of success between the genders.<sup>218</sup> When subjected to statistical analysis, however, such arguments do not hold true. In fact, the LSI-R predicts recidivism risk almost identically for both men and women.<sup>219</sup> At least one state has independently reached this conclusion.<sup>220</sup> The North Carolina Sentencing and Policy Advisory Commission expressed concerns about the constitutionality of gender considerations in its offender risk assessment.<sup>221</sup> Additional statistical analysis omitting gender overwhelmingly "confirmed the predictive validity of the revised risk score."<sup>222</sup> As such, the use of gender in criminal risk assessment is not only constitutionally unsound, it is statistically superfluous.

To be sure, evidence-based practice is not the enemy. Efforts to make the criminal justice system more reliable, more predictable, and more efficient should be applauded. The law, however, cannot and must not embrace such systems if the cost is equal protection under the law. Simply put, the use of gender in evidence-based sentencing is repugnant to the Constitution. Based on the proffered governmental objectives, evidence-based sentencing has a great deal of ground to cover before it meets its stated goals. Based on the empirical tailoring, the use of gender has arguably hindered, rather than helped, these goals.

Through continued scientific and constitutional scrutiny, evidence-based sentencing regimes will undoubtedly play a large role in remedying America's mass-incarceration problem. By excising gender in risk assessment instruments, the states that rely on evidence-based sentencing will be able to root such practices in sound constitutional principles without abandoning actuarial accuracy. Only then will the two hypothetical offenders receive the same, exact sentence for the same, exact crime. Only then will both women and men receive the appropriate intervention and diversion. It just might save this nation. It just might save some young man's life.

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<sup>217</sup> See Raeder, *supra* note 103, at 2 (arguing that gender neutrality in criminal sentencing imposes "draconian costs" on female offenders).

<sup>218</sup> Kristy Holtfreter & Rhonda Cupp, *Gender and Risk Assessment: The Empirical Status of the LSI-R for Women*, 23 J. CONTEMP. CRIM. JUST. 363, 364 (2007) (claiming that the LSI-R does not apply to all offenders equally); Michael D. Reisig et al., *Assessing Recidivism Risk Across Female Pathways to Crime*, 23 JUST. Q. 384, 400 (2006) (arguing that the LSI-R misclassifies marginalized women).

<sup>219</sup> See Smith et al., *supra* note 215, at 193 tbl.1 (summarizing studies of LSI-R's risk prediction rate between genders).

<sup>220</sup> See N.C. SENTENCING & POLICY ADVISORY COMM'N, *supra* note 39, at 13.

<sup>221</sup> See *id.*

<sup>222</sup> *Id.*