

# DEFINING THE PROPER ROLE OF “OFFENDER CHARACTERISTICS” IN SENTENCING DECISIONS: A CRITICAL RACE THEORY PERSPECTIVE

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## ABSTRACT

*In 2016, the news media in the United States widely reported the case of Brock Turner, a young white college athlete from Stanford who was convicted of sexual assault but spared the mandatory term of imprisonment. The American public was outraged at the leniency of the sentence imposed. A campaign was launched to remove from the bench the judge who rendered the sentence, and commentators accused him of racial and gender bias. However, this case was hardly an isolated incident of apparent privilege in criminal justice. In this Article, I argue that the problem resides primarily in the tradition of the law, not the fairmindedness of the judge. I specifically argue that the way in which courts weigh offender characteristic factors in sentencing is unfair and unjust. That court practice emerged in the late nineteenth century with a call to punish offenders according to their individual character. During that historical period, the word “character” was commonly understood to refer to inherent traits that were often associated with race. The assertion that non-white people had inferior character was cited as justification for their social oppression. The law about offender characteristic factors developed in accordance with that understanding of what constitutes good character. Thus, good character was assessed largely in terms of intrinsic (racial) superiority and material success. I argue that white cultural values are deeply embedded in the practice of weighing offender characteristic factors at sentencing, such that judges often cite the incidents of privilege in mitigation, e.g., educational attainment and employment status. Similarly, judges often cite the incidents of disadvantage in aggravation. I reject that logic under both retributive and utilitarian perspectives, arguing that fair sentencing requires dismantling the logic of privilege in sentencing.*

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## INTRODUCTION

In 2016, Brock Turner described to a California judge how dramatically his life had changed within a year: “I’ve lost my chance to swim in the Olympics. I’ve lost my ability to obtain a Stanford degree. I’ve lost employment opportunities, my reputation and most of all, my life.”<sup>1</sup>

Indeed, in 2015, Turner was a Stanford freshman and competitive swimmer from the Midwest—blond-haired, blue-eyed, tall, and athletic.<sup>2</sup> One night in January, two young men happened upon him sexually assaulting an unconscious woman behind a dumpster.<sup>3</sup> When they confronted him, Turner tried to flee the scene.<sup>4</sup> The men jumped on Turner and held him down while waiting for the police.<sup>5</sup> When police arrived, the woman was still splayed out on the ground with her intimate parts exposed—disheveled, unresponsive, and covered with dry pine needles.<sup>6</sup> One of the men who had intervened in the assault was sobbing because he was so disturbed by what he had just seen.<sup>7</sup> A year later, at his trial, Turner testified that he had believed that the encounter was consensual,<sup>8</sup> but the jury did not believe him. Its verdict was guilty on all three counts of sexual assault.<sup>9</sup>

Thus, on June 2, 2016, Turner stood before the court for sentencing.<sup>10</sup> He faced a minimum sentence of three years imprisonment, but nonetheless pleaded for the judge to sentence him to probation.<sup>11</sup> California law did allow for judges to impose probation instead of the mandatory prison sentence in “unusual cases where the interests of justice would be served.”<sup>12</sup> And this judge did precisely that.<sup>13</sup> First,

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1. Letter from Brock Turner attached to Probation Report, *People v. Turner*, Santa Clara County, Super. Ct. no. B1577162 (filed June 2, 2016), available at <http://documents.latimes.com/people-v-brock-allen-turner-89/>.

2. Incident Report at 3, Stanford Univ. Dept. of Pub. Safety, Office of the Sheriff, Santa Clara County, case no. 15-018-0019U, available at <http://documents.latimes.com/people-v-brock-allen-turner-19/>.

3. *Id.* at 8–12.

4. *Id.*

5. *Id.* at 6.

6. *Id.* at 5.

7. *Id.* at 8.

8. Sam Levin, *Brock Turner Laughed After Bystanders Stopped Stanford Sex Assault, Files Show*, *GUARDIAN* (Aug. 26, 2016, 3:43 PM), <https://www.theguardian.com/society/2016/aug/26/brock-turner-stanford-sexual-assault-victim-testimony-laugh>.

9. Probation Report, *People v. Turner*, Santa Clara County, Super. Ct. no. B1577162 (filed June 2, 2016), available at <http://documents.latimes.com/people-v-brock-allen-turner-89/>. Specifically, Turner was convicted of Count One – Assault with Intent to Commit Rape (Cal. Pen. Code § 220(a)(1)); Count Two – Sexual Penetration when Victim was Intoxicated (Cal. Pen. Code § 289(e)); and Count Three – Sexual Penetration where Victim was Unconscious of Nature of Act (Cal. Pen. Code § 289(d)). *Id.* at 1.

10. *Id.*

11. Turner Letter, *supra* note 1.

12. CAL. RULES OF COURT, Rule 4.413 (2007).

13. Sam Levin, *Stanford Sexual Assault: Read the Full Text of the Judge’s Controversial Decision*, *GUARDIAN* (June 14, 2016, 6:00 PM), <https://www.theguardian.com/us-news/2016/jun/14/stanford-sexual-assault-read-sentence-judge-aaron-persky>.

under California Criminal Rule 4.413,<sup>14</sup> Judge Aaron Persky made findings to overcome the presumption against probation, namely, that Turner was youthful and had no significant record of prior criminal offenses.<sup>15</sup> Having determined that Turner was eligible for probation, the judge further decided to impose a term of probation on Turner pursuant to the criteria laid out in Rule 4.414.<sup>16</sup> These criteria fall under one of two categories: facts relating to the crime (part (a)) and facts relating to the defendant (part (b)).<sup>17</sup>

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14. In 2016, Rule 4.413 stated:

Rule 4.413. Probation eligibility when probation is limited.

(a) Consideration of eligibility

The court must determine whether the defendant is eligible for probation.

(b) Probation in unusual cases

If the defendant comes under a statutory provision prohibiting probation “except in unusual cases where the interests of justice would best be served,” or a substantially equivalent provision, the court should apply the criteria in (c) to evaluate whether the statutory limitation on probation is overcome; and if it is, the court should then apply the criteria in rule 4.414 to decide whether to grant probation.

(c) Facts showing unusual case

The following factors may indicate the existence of an unusual case in which probation may be granted if otherwise appropriate:

(1) Facts relating to basis for limitation on probation

A factor or circumstance indicating that the basis for the statutory limitation on probation, although technically present, is not fully applicable to the case, including:

(A) The factor or circumstance giving rise to the limitation on probation is, in this case, substantially less serious than the circumstances typically present in other cases involving the same probation limitation, and the defendant has no recent record of committing similar crimes or crimes of violence; and

(B) The current offense is less serious than a prior felony conviction that is the cause of the limitation on probation, and the defendant has been free from incarceration and serious violation of the law for a substantial time before the current offense

(2) Factors limiting defendant’s culpability

A factor or circumstance not amounting to a defense, but reducing the defendant’s culpability for the offense, including:

(A) The defendant participated in the crime under circumstances of great provocation, coercion, or duress not amounting to a defense, and the defendant has no recent record of committing crimes of violence;

(B) The crime was committed because of a mental condition not amounting to a defense, and there is a high likelihood that the defendant would respond favorably to mental health care and treatment that would be required as a condition of probation; and

(C) The defendant is youthful or aged, and has no significant record of prior criminal offenses.

CAL. RULES OF COURT, Rule 4.413.

15. *See* Levin, *supra* note 13.

16. *Id.*

17. Rule 4.414 stated:

Rule 4.414. Criteria affecting probation Criteria affecting the decision to grant or deny probation include facts relating to the crime and facts relating to the defendant.

(a) Facts relating to the crime

With respect to Turner, Judge Persky discussed the following factors as mitigating: that Turner was drunk at the time that he assaulted the victim; that his actions did not demonstrate criminal sophistication; that he had not abused a position of trust or confidence to commit the assault; that he had no prior criminal convictions and had been well-behaved since the offense; that Turner had the ability to comply with probation, as indicated by his age, education, health, mental faculties, history of alcohol or other substance abuse, family background and ties, and other relevant factors; that the felony conviction was having severe collateral consequences in Turner's life and that a prison sentence would have a severe impact on him as well; that the judge believed that Turner was genuinely remorseful; and that Turner would not pose a danger to others while out in the community on probation.<sup>18</sup> During the sentencing hearing, the judge referred four times to letters that he had received from Turner's family and friends vouching for his character.<sup>19</sup> The judge even quoted from a letter from Turner's childhood friend, which he found particularly compelling.<sup>20</sup> A letter from Turner's father told the judge that Turner was

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Facts relating to the crime include:

- (1) The nature, seriousness, and circumstances of the crime as compared to other instances of the same crime;
- (2) Whether the defendant was armed with or used a weapon;
- (3) The vulnerability of the victim;
- (4) Whether the defendant inflicted physical or emotional injury;
- (5) The degree of monetary loss to the victim;
- (6) Whether the defendant was an active or a passive participant;
- (7) Whether the crime was committed because of an unusual circumstance, such as great provocation, which is unlikely to recur;
- (8) Whether the manner in which the crime was carried out demonstrated criminal sophistication or professionalism on the part of the defendant; and
- (9) Whether the defendant took advantage of a position of trust or confidence to commit the crime.

(b) Facts relating to the defendant

Facts relating to the defendant include:

- (1) Prior record of criminal conduct, whether as an adult or a juvenile, including the recency and frequency of prior crimes; and whether the prior record indicates a pattern of regular or increasingly serious criminal conduct;
- (2) Prior performance on probation or parole;
- (3) Willingness to comply with the terms of probation;
- (4) Ability to comply with reasonable terms of probation as indicated by the defendant's age, education, health, mental faculties, history of alcohol or other substance abuse, family background and ties, employment and military service history, and other relevant factors;
- (5) The likely effect of imprisonment on the defendant and his or her dependents;
- (6) The adverse collateral consequences on the defendant's life resulting from the felony conviction;
- (7) Whether the defendant is remorseful; and
- (8) The likelihood that if not imprisoned the defendant will be a danger to others.

CAL. RULES OF COURT, Rule 4.414

18. Levin, *supra* note 13.

19. *Id.*

20. *Id.*

devastated by the verdicts and had become depressed and lost his appetite.<sup>21</sup>

The sentencing drew public outrage as national and international media outlets disseminated the news.<sup>22</sup> Within days, a Stanford professor began organizing an effort to have Judge Persky recalled,<sup>23</sup> which culminated in his removal from the bench on June 6, 2018.<sup>24</sup> Many commentators criticized the sentence as epitomizing the unfair influence of white privilege in American criminal justice.<sup>25</sup>

At the same time, many people came to the judge’s defense.<sup>26</sup> Certainly, the judge made some troubling remarks during sentencing.<sup>27</sup> Most problematically, Judge Persky said that he took Turner at his word that he did not intend to assault the victim against her will—even though the twelve members of the jury found Turner guilty beyond a reasonable doubt of the charge of Assault with the Intent to Commit Rape.<sup>28</sup> On the other hand, Judge Persky’s supporters noted that he had followed the law and imposed a sentence well within his discretion to impose.<sup>29</sup> And a close reading of the judge’s remarks indicates that this is true: he carefully applied each of the relevant legal standards as set out in the California Penal Code and Criminal Rules.<sup>30</sup> Even Santa Clara District Attorney Jeff Rosen, the district attorney who prosecuted Turner’s case and who vehemently disagreed with the sentence, opposed the effort to recall Judge Persky from the bench.<sup>31</sup> Instead, Rosen advocated for reforming the sentencing laws of the state of California and authored a bill to that effect.<sup>32</sup> What is more, we can hardly call this case an isolated incident of apparent class bias in sentencing. The Turner sentencing stirred up public interest in how such offenders were being treated in the criminal justice

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21. Letter from Dan A. Turner attached to Probation Report, *People v. Turner*, Santa Clara Cnty. Super. Ct. no. B1577162 (filed June 2, 2016), available at <http://documents.latimes.com/people-v-brock-allen-turner-99/>.

22. Liam Stack, *Light Sentence for Brock Turner in Stanford Rape Case Draws Outrage*, N.Y. TIMES (June 6, 2016), <https://www.nytimes.com/2016/06/07/us/outrage-in-stanford-rape-case-over-dueling-statements-of-victim-and-attackers-father.html>.

23. *Id.*

24. Maggie Astor, *California Voters Remove Judge Aaron Persky, Who Gave a 6-Month Sentence for Sexual Assault*, N.Y. TIMES (June 6, 2018), <https://www.nytimes.com/2018/06/06/us/politics/judge-persky-brock-turner-recall.html>.

25. See, e.g., *id.*; Travis Smiley, *Brock Turner’s Sentence is a Grotesque Example of Unchecked White Privilege*, TIME (June 7, 2016), <http://time.com/4360105/tavis-smiley-brock-turners-sentence-is-a-grotesque-example-of-unchecked-privilege/>; Damon Young, *The Stanford Sexual Assault Case: A White Privilege Cake with Vanilla Frosting on Top*, GUARDIAN (June 9, 2016, 9:55 AM), <https://www.theguardian.com/society/2016/jun/09/standford-rape-case-white-privilege-brock-turner>.

26. Susan Svrluga, Elahe Izadi & Sarah Larimer, *‘Repugnant’—or ‘Fair’? Debate Erupts Over Judge’s Decision in Stanford Sexual Assault Case*, WASH. POST (June 8, 2016), [https://www.washingtonpost.com/news/grade-point/wp/2016/06/08/repugnant-or-fair-debate-erupts-over-judges-decision-in-stanford-sexual-assault-case/?utm\\_term=.a91c4adaa2b5](https://www.washingtonpost.com/news/grade-point/wp/2016/06/08/repugnant-or-fair-debate-erupts-over-judges-decision-in-stanford-sexual-assault-case/?utm_term=.a91c4adaa2b5).

27. See Levin, *supra* note 13.

28. *Id.*

29. Svrluga, *supra* note 26.

30. See Levin, *supra* note 13.

31. Svrluga, *supra* note 26.

32. Dan Simon, *California DA wants tougher sentences for some sexual assaults*, TIME (June 22, 2016), <https://www.cnn.com/2016/06/22/us/california-bill-sexual-assault-victims/index.html>.

system. The media subsequently covered the sentencing of Austin Wilkerson and David Becker, two other young white male athletes sentenced that same summer for rape and similarly spared from prison.<sup>33</sup> Research indicates a statistically significant bias in sexual assault cases in favor of collegiate and professional athletes.<sup>34</sup> It also indicates significant racial disparities in the outcomes of criminal cases on the whole.<sup>35</sup>

So perhaps the problem resided primarily in the structure of the law, not in the judge who applied it. That is the argument I will set forth in this Article. Specifically, I will critically examine the role of “offender characteristic” factors, such as those set forth in California Criminal Rule 4.414(b), in sentencing in the United States. For purposes of this Article, however, I will not attempt to address sentencing practices of each jurisdiction in the United States, let alone at the level of each individual courtroom. Rather, I will focus on the practices in federal courts, with some reference to the Turner case and state court practices. Much previous scholarship has examined the role of male privilege in the criminal justice processing of cases of sexual assault.<sup>36</sup> The intersection between race and sex in rape cases has also been discussed extensively in the literature.<sup>37</sup> This Article focuses on the intersection between race and class in criminal sentencing, which is not limited in relevance to sexual assault cases. Critical race theory is a useful tool for

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33. Christine Houser, *Judge's Sentencing in Massachusetts Sexual Assault Case Reignites Debate on Privilege*, N.Y. TIMES (Aug. 24 2016), <https://www.nytimes.com/2016/08/25/us/david-becker-massachusetts-sexual-assault.html>. During the Turner controversy, I was working as a state prosecutor in the college town of Boulder, Colorado, and assisted with the prosecution of Austin Wilkerson. Our judge was intensely criticized for imposing a term of probation with a two-year alternative jail sentence. Having litigated other cases in that judge's courtroom, I frequently disagreed with his sentencing decisions, which were often light in the prosecution's estimation. Nonetheless, I still perceived him as a good and decent public servant who imposed sentences well within the discretion that the law afforded to him. To the degree that I disagreed with his sentencing, I never perceived overt bias in his reasoning or otherwise questioned his intentions or fitness as a judge. Yet, I did firmly believe Wilkerson's sentence was manifestly unfair. My further reflection on the matter led to the present Article.

34. See Jeffrey Benedict & Alan Klein, *Arrest and Conviction Rates for Athletes Accused of Sexual Assault*, 14 Soc. Sport J. 86 (1997) (finding that professional and collegiate athletes are significantly less likely to be convicted for crimes involving sexual assault).

35. CASSIA C. SPOHN, HOW DO JUDGES DECIDE? THE SEARCH FOR FAIRNESS AND JUSTICE IN PUNISHMENT 196 (2002).

36. See, e.g., Lynn Henderson, *Rape and Responsibility*, 11 LAW & PHIL. 127 (2002). There is an impressive body of literature describing the social construction of men as being the victims of their own uncontrollable sexual impulses. In that sense, the construction normalizes and naturalizes male sexual aggression against girls and women. See Heather R. Hlavka, *Normalizing Sexual Violence: Young Women Account for Harassment and Abuse*, 28 GENDER & SOC. 337 (2014). Bearing in mind this conception of masculinity, we may anticipate that judges who sentence men for rape will be more likely to accept representations of the offender as a person of good character who deviated from his normal conduct in committing the heinous crime at hand.

37. See Cassia Spohn & Katharine Tellis, *The Criminal Justice System's Response to Sexual Violence*, 18 VIOLENCE AGAINST WOMEN 169, 176–77 (2012). The racial disparities in sexual assault case outcomes are particularly unsettling in light of the history of mobs lynching black men accused of raping white women in the American South. See generally DORA APEL, *IMAGERY OF LYNCHING: BLACK MEN, WHITE WOMEN, AND THE MOB* (2004) (discussing the history of extralegal killings, specifically lynching, in nineteenth and twentieth century America).

interrogating sentencing practices because of the insight that area of scholarship has developed about the mechanisms of social stratification; thus, its insight is not limited to non-white offenders, either. It cultivates fairness for all people spread across the socioeconomic spectrum.

In the first part, I will introduce some concepts regarding white privilege to which I will refer in subsequent parts. The first part also includes a discussion of how white privilege operates through the intersection of race and socioeconomic status, such that white people on the whole have increased social and economic opportunities relative to non-white people in the United States. The second part describes the historical development of the contemporary notion of sentencing offenders according to their individual characteristics. It includes a discussion of how nineteenth-century racism influenced the discourse about character and, thus, the development of offender characteristic factors in sentencing practice. I argue that, as a result, white privilege is structurally embedded in American sentencing practice, insofar as judges tend to assess good character in terms of incidents of socioeconomic privilege.

In Part III, I critically evaluate the current use of offender characteristic factors in the United States to ascertain how that practice continues to unfairly perpetuate socioeconomic privilege, including but not limited to white privilege. I critique the federal guideline approach of ignoring socioeconomic status all together. In so doing, I argue that socioeconomic status is relevant to offenders' relative culpability to the degree that it affects their freedom of choice. I further argue that the offender who has the greatest freedom of choice should be punished most harshly under theories of retribution and utilitarianism. In current sentencing practice, however, judges tend to infer good character from facts related to socioeconomic advantage and dangerousness from facts related to socioeconomic disadvantage, which reflects a cultural belief in meritocracy. They therefore fail to account for the broad spectrum of factors that can affect whether an offender has a job, degree, or even a criminal history. As a result, the system favors privileged offenders and fails to achieve justice for the victims of those offenders' criminal conduct.

### I. WHITE PRIVILEGE AND CRITICAL RACE THEORY

The purpose of this part is to provide some general background on the notion of “whiteness” in critical race theory and then to introduce a few concepts to which I will later refer while critically evaluating the use of offender characteristic factors in sentencing in the United States. Not all that long ago, there was a scientific consensus that human beings belonged to discrete races.<sup>38</sup> The races were believed to be biologically distinct and differ from one another in physical and mental traits.<sup>39</sup>

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38. CYNTHIA LEVINE-RASKY, *WHITENESS FRACTURED* 33–38 (2016) (discussing the pseudo-scientific methods employed by race scientist to demonstrate the existence of discrete races); see, e.g., *Plessy v. Ferguson*, 163 U.S. 537, 551 (1896).

39. *Plessy*, 163 U.S. at 551–52.

Of course, it is now understood that these race definitions are social constructions, with no basis in biology.<sup>40</sup> It would be an error, however, to therefore conclude that race is not “real.”<sup>41</sup> To the contrary, social constructions are powerful in their ability to shape human understandings of the world and thus have very real consequences for the people in it.<sup>42</sup> For instance, while merely a social construction, the notion of “masculinity” has a profound influence on what it means to be male or female in our society.<sup>43</sup> Similarly, the notion of race continues to have a profound influence on what it means to be white or non-white in America.

Critical race theory (“CRT”) is a discipline in which scholars study the relationship between race and power.<sup>44</sup> Its central tenet is that the social construction of race is a mechanism through which power is distributed unevenly among members of society according to the perceived color of their skin.<sup>45</sup> Another important insight of CRT is that we cannot fully understand the relationship between race and power by studying the manner in which non-white people occupy positions of disadvantage.<sup>46</sup> This insight derives from the fact that disadvantage is a relational concept: a group is only disadvantaged vis-a-vis another group.<sup>47</sup> Therefore, it is crucial that we also study the manner in which white people occupy a position of distinct advantage in this society. The resulting subdiscipline within the field of CRT is known as whiteness studies.<sup>48</sup> Whiteness studies do not purport to draw conclusions about inherent traits of white people.<sup>49</sup> Rather, just as studies in masculinity refer to the social construction of males, studies in whiteness refer to the social construction of people who have pale complexion.<sup>50</sup> Whiteness studies examine various aspects of the construction of whiteness as an identity.<sup>51</sup> Certainly, whiteness studies explore the ways in which certain people self-identify as white and how they use that identity as a standpoint from which they view the world.<sup>52</sup> Thus, whiteness can function as a mechanism by which a person distinguishes “us” from “them” and on which basis that person justifies receiving differential treatment.<sup>53</sup> However, whiteness studies also explore the ways in which society labels people as “white,” regardless of whether those people identify as such.<sup>54</sup>

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40. LEVINE-RASKY, *supra* note 38, at 3.

41. *Id.* at 23.

42. *Id.* at 18.

43. STEVE GARNER, WHITENESS: AN INTRODUCTION 35 (2007).

44. LEVINE-RASKY, *supra* note 38 at 20; *see also* RICHARD DELGADO & JEAN STEFANCIC, CRITICAL RACE THEORY: AN INTRODUCTION (2001) (giving a thorough overview of critical race theory and its sub-disciplines).

45. GARNER, *supra* note 43, at 13–15.

46. LEVINE-RASKY, *supra* note 38, at 9–16.

47. *Id.* at 14.

48. *Id.* at 4.

49. *Id.* at 18.

50. *Id.*

51. *Id.* at 18–19.

52. *Id.* at 19.

53. *Id.*

54. *Id.* at 23–25.

When society labels people as white, it confers upon them a status of privilege.<sup>55</sup> Those people receive benefits in terms of increased social and economic opportunities.<sup>56</sup> Indeed, research has shown that, even in the twenty-first century, a white person in America is more likely than a similarly situated black or brown person to receive benefits in housing, education, and employment.<sup>57</sup> This conclusion holds true even when tightly controlling for other factors, namely, through audit studies.<sup>58</sup> In an audit study, researchers send “testers” into real social situations and document the outcomes.<sup>59</sup> The researchers carefully match the testers so that they present as equivalent in every manner except for race.<sup>60</sup> These audit studies have produced strong evidence that white people have a notable advantage in acquiring employment, housing, mortgages, insurance, and medical care, among other things.<sup>61</sup> Additionally, white people in America continue to benefit from the effects of past discrimination against non-whites. In 2011, the median household wealth for a white person was \$111,146, compared to \$7,113 for the median black household and \$8,348 for the median Latino household.<sup>62</sup> Various factors account for this huge disparity.<sup>63</sup> One factor is the accumulation of intergenerational wealth. A white household is more likely to inherit money from older generations than a black household.<sup>64</sup> A white person is also more likely to receive financial support from living family members.<sup>65</sup> This is hardly surprising given that many people’s grandparents or parents grew up in an era of Jim Crow, prior to the end of the Civil Rights Movement.

Integral to a complete understanding of whiteness is the examination of white culture. By white culture, I mean the set of cultural beliefs, norms, values, and practices that give content to the notion of whiteness. As with any discussion of culture, I refer to generalizations about broad trends in social phenomena rather than static or universal traits of groups or individuals. Critical race theorists have observed that white culture derives its values primarily from the Enlightenment and Protestant Reformation.<sup>66</sup> From the Enlightenment, white culture derived values of individuality, personal liberty, and rationality, to add to the already established values of patriarchy and

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55. *Id.*

56. *Id.* at 25.

57. Amy Traub et al., *The Racial Wealth Gap: Why Policy Matters*, DEMOS (June 21, 2016), <http://www.demos.org/publication/racial-wealth-gap-why-policy-matters/>.

58. Devah Pager & Hana Shepherd, *The Sociology of Discrimination: Racial Discrimination in Employment, Housing, Credit, and Consumer Markets*, 34 ANN. REV. SOC. 181, 185 (2008).

59. *Id.*

60. *Id.*

61. *Id.*

62. Traub, *supra* note 57, at 1.

63. *See id.*

64. LEVINE-RASKY, *supra* note 38, at 81.

65. Dennis P. Hogan et al., *The Structure of Intergenerational Exchanges in American Families*, 98 AM. J. SOC. 1428, 1453–55 (1993).

66. LEVINE-RASKY, *supra* note 38, at 27–29.

Christianity.<sup>67</sup> These contrast to some extent with other cultures' primary values such as those associated with ubuntu,<sup>68</sup> dharma,<sup>69</sup> jen-yi,<sup>70</sup> and tapu-mana.<sup>71</sup> These other values do not translate directly into English but entail notions of collective responsibility and solidarity (ubuntu), duty and mindfulness (dharma), empathy and humanity (jen), and interdependence and stewardship (tapu-mana). White culture also incorporates the ethics of capitalism, such that a person achieves respectability through the accumulation of wealth, consumption of goods, and ownership of real property.<sup>72</sup> Those ethics align with the Protestant ethic, which values foremost discipline and industriousness.<sup>73</sup> The rule of individual responsibility applies, which means that each man receives the share of resources that he has earned through his labor.<sup>74</sup> In fact, a man becomes entitled to a larger share of wealth through his increased productivity, whether achieved through industry, technology, or force.<sup>75</sup> This unequal distribution of resources is fair and just: To the degree that a man shares his wealth with others, he does so as an act of charity, not justice.<sup>76</sup>

Drawing from these values, white culture manifests a number of beliefs, including the notions of meritocracy and sovereign individuality.<sup>77</sup> A "meritocracy" is a society in which resources have been distributed among the population according to each person's individual merit.<sup>78</sup> White culture idealizes American society as a meritocracy.<sup>79</sup> It is not wholly untrue—there is certainly some correlation between hard work and success in America. However, there is hardly a simple causal relationship between the two.<sup>80</sup> In other words, if you tried to fit all Americans onto a bell curve in terms of their relative attainment of wealth, that curve would not be graded according to any measure of individual merit. A simple illustration is as follows: a public-school teacher earns substantially less money than a professional football player, but not because the teacher is less deserving. A confluence of

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67. GARNER, *supra* note 43, at 48–55; see also GEORGE M. FREDRICKSON, *THE BLACK IMAGE IN THE WHITE MIND: THE DEBATE ON AFRO-AMERICAN CHARACTER AND DESTINY, 1817-1914* at 203–05 (1971).

68. See Thaddeus Metz & Joseph B.R. Gaie, *The African Ethic of Ubuntu/Botho: Implications for Research on Morality*, 39 J. MORAL EDUC. 273 (2010).

69. See Arti Dhand, *The Dharma of Ethics, and the Ethics of Dharma*, 30 J. RELIGIOUS ETHICS 347, 356 (2002).

70. See Wong Wai-Ying, *Confucian Ethics and Virtue Ethics*, 28 J. CHINESE PHIL. 285 (2001).

71. See Manaku Henare, *Tapu, Mana, Mauri, Hau, Wairua: A Maori Philosophy of Vitalism and Cosmos*, in *INDIGENOUS TRADITIONS AND ECOLOGY: THE INTERBEING OF COSMOLOGY AND COMMUNITY* (John A. Grim ed. 2001).

72. GARNER, *supra* note 43, at 48.

73. FREDRICKSON, *supra* note 66, at 109–10.

74. *Id.* at 212; GARNER, *supra* note 43, at 17.

75. GARNER, *supra* note 43, at 40; FREDRICKSON, *supra* note 67, at 206; W.E.B. DUBOIS, *DARKWATER: VOICES FROM WITHIN THE VEIL* 29–52 (1920).

76. FREDRICKSON, *supra* note 67 at 211–12; DUBOIS, *supra* note 75, at 32.

77. LEVINE-RASKY, *supra* note 38, at 66.

78. *Id.* at 70.

79. *Id.* at 69–70.

80. GARNER, *supra* note 43, at 17.

factors influences the distribution of wealth and power in this society, including merit, access, opportunity, chance, family status, social status, legal status, physical and mental health, geographic location, and so on.<sup>81</sup>

Two problems emanate from the myth of the meritocracy. The first is that it creates the potential for people to infer that people with privileges have earned them through individual merit, or that people without such privileges must be undeserving of them. The second is that it tends to foster a sense of entitlement in people to their privilege. Indeed, qualitative studies confirm that people feel entitled to the benefits of white privilege.<sup>82</sup> Researchers have gauged people’s reactions to being confronted with the fact that they have received privileges on account of their whiteness.<sup>83</sup> The dominant reaction was defensiveness and denial.<sup>84</sup> Specifically, the research subjects in these studies denied that they had received privileges on account of anything other than their own merit.<sup>85</sup> They often insisted that the effects of racial discrimination can be isolated to a different geographic location or historical era.<sup>86</sup> They even claimed that white people are actually at a disadvantage, citing affirmative action programs.<sup>87</sup> In that sense, they failed to appreciate the myriad ways in which society has tipped the balance in their favor,<sup>88</sup> e.g., through something as simple as providing their parents with the mortgage necessary to raise them in a neighborhood with high quality public schools.<sup>89</sup> Moreover, they failed to appreciate the fact that they benefit from a system of racial discrimination, regardless of whether they intend to receive such benefits or would prefer to opt out of them.<sup>90</sup> The refusal to accept that people continue to be treated differentially according to their race is called “color-blindness.”<sup>91</sup> White people who purport to be color-blind will go as far as to accuse someone of being racist for having even implied that they have a racial identity, i.e., white, because they perceive themselves as raceless.<sup>92</sup>

Steven Farough has coined a term for the identity held by people who perceive themselves as raceless: “sovereign individuality.”<sup>93</sup> Sovereign individuality is, in and of itself, a privilege. It is the privilege to move through social space without being constantly confronted with your racial identity.<sup>94</sup> It is well documented that

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81. Sam Bowles & Herbert Gintis, *The Inheritance of Inequality*, 16 J. ECON. PERSP. 3, 5 (2002).

82. GARNER, *supra* note 43, at 36-40.

83. *Id.* at 36.

84. *Id.* at 36-38.

85. *Id.* at 38.

86. *Id.* at 39.

87. *Id.* at 38.

88. LEVINE-RASKY, *supra* note 38, at 78-82.

89. See William J. Collins & Robert A. Margo, *Race and Home Ownership: A Century-long View*, 38 EXPLORATIONS ECON. HIST. 68, 72 n. 7 (2001).

90. GARNER, *supra* note 43, at 18, 24-25.

91. LEVINE-RASKY, *supra* note 38, at 68.

92. GARNER, *supra* note 43, at 38.

93. Steven D. Farough, *The Social Geographies of White Masculinity*, 30 CRITICAL SOC. 241, 244 (2004).

94. GARNER, *supra* note 43, at 41-42.

non-white people consistently receive increased scrutiny in everyday encounters such as shopping in a store or going through security at the airport.<sup>95</sup> Two problems arise from the cultural belief in sovereign individuality. First, people with sovereign individuality tend to believe that their experience with the world is universal.<sup>96</sup> As Steve Garner aptly put it: “white is the framing position: a dominant and normative space against which difference is measured.”<sup>97</sup> Thus, the Enlightenment philosophers developed a conception of man as a free and rational actor,<sup>98</sup> which continues to influence law and policy even today.<sup>99</sup> However, even at the time, those philosophers recognized that this ideal applied only to white men who owned real property.<sup>100</sup> More importantly, that ideal is entirely inconsistent with the lived realities of most Americans. Most pertinently, black Americans’ freedom of choice is severely constrained by the compounding effects of racial discrimination on their social, economic, and political opportunities.<sup>101</sup> Second, people with sovereign individuality perceive themselves as individuals but perceive others as members of a racial group.<sup>102</sup> As a result, they can feel entitled to demand consideration of their individual circumstances, regardless of whether other people receive that same consideration.<sup>103</sup> This is evident when white people complain that affirmative action programs deny them consideration on the basis of their individual merit, while in nearly the same breath stating that immigrants are stealing all of their job prospects or Muslims are threatening their security.

This has not been a comprehensive review of the literature on whiteness; however, for purposes of this Article, two important concepts have emerged from the discussion: First, whiteness entails a cultural belief that people have earned their relative position in society through human agency and according to their individual merit – and with no regard to their race or ethnicity. Second, from a whiteness perspective, a person can draw conclusions about others on the basis of their race, especially if that person grounds such conclusions in notions of cultural difference, religious belief, or national values.<sup>104</sup> However, this does not apply to white people because “white” is not a race at all; therefore, from this perspective, white people should feel a special entitlement to the benefit of individual consideration.

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95. *Id.*

96. *Id.* at 34.

97. *Id.*

98. *Id.* at 23; LEVINE-RASKY, *supra* note 38, at 28.

99. *See, e.g.,* *Morissette v. United States*, 342 U.S. 246, 250 (1952) (“It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil.”).

100. LEVINE-RASKY, *supra* note 38, at 28.

101. GARNER, *supra* note 43, at 17-18, 25.

102. *Id.* at 34-42.

103. *Id.* at 26; LEVINE-RASKY, *supra* note 38, at 70.

104. LEVINE-RASKY, *supra* note 38, at 74.

## II. HISTORY OF THE USE OF OFFENDER CHARACTERISTIC FACTORS IN SENTENCING IN THE UNITED STATES

This part sets the stage for a later critical evaluation of the use of offender characteristic factors at sentencing. In the tradition of Michel Foucault, I will describe the history of offender characteristic factors in sentencing in the United States. Foucault used a genealogical approach to reveal how historical power relations shape contemporary society.<sup>105</sup> He described the genealogical approach as a method for discovering historical forces that continue to influence our common understanding of concepts such as punishment, even though that influence has become obscure with time:

What I am trying to do is grasp the implicit systems which determine our most familiar behavior without our knowing it. I am trying to find their origin, to show their formation, the constraint they impose upon us; I am therefore trying to place myself at a distance from them and to show how one could escape.<sup>106</sup>

This approach requires an analysis of how discourses have evolved over time and through certain practices. The aim is thus to create a sort of “genealogy” of thought.<sup>107</sup> We can then use that genealogy to identify how our current practices and institutions have descended from historical power relations.<sup>108</sup>

In this part, I will trace the genealogy of the practice of considering offender characteristic factors in sentencing. Using that genealogy, I will conclude that the practice has descended in part from discourses about racial difference. This discussion is important because it provides an account of how privilege influences sentencing notwithstanding the actual intention of judges to render fair and just sentences. It also provides the theoretical basis for using CRT to interrogate the use of offender characteristic factors at sentencing.

The United States has changed its criminal sentencing practices considerably over the course of its history.<sup>109</sup> In colonial times, judicial authorities had significant discretion to determine the nature and degree of punishment, and those authorities often considered offender characteristics in rendering a sentence.<sup>110</sup> However, the American Revolution ushered in fundamental changes to criminal justice, including the birth of prisons and an ideological commitment to sentencing

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105. David Garland, *What is a “History of the Present?” On Foucault’s Genealogies and their Critical Preconditions*, 16 PUNISHMENT & SOC’Y 365, 372 (2014).

106. John K. Simon, *A Conversation with Michel Foucault*, 38 PARTISAN REV. 192, 201 (1971).

107. Garland, *supra* note 105, at 372-74.

108. *Id.*

109. For a specific account of how the treatment of non-white people in sentencing has evolved through U.S. history, see SHAUN L. GABBIDON & HELEN TAYLOR GREENE, RACE AND CRIME 175-82 (2005).

110. THOMAS G. BLOMBERG & KAROL LUCKEN, AMERICAN PENOLOGY: A HISTORY OF CONTROL 26 (2d ed. 2010).

offenders in proportion to the nature of the offense.<sup>111</sup> But the development of prisons also brought with it a host of problems which persisted through most of the nineteenth century.<sup>112</sup> Thus, in the late nineteenth century, a reformatory movement emerged that aimed to substantially alter penal practices in the United States.<sup>113</sup> That reformatory movement promoted rehabilitation as a primary aim of punishment.<sup>114</sup>

Though the American criminal justice system has always accommodated some degree of individualized treatment of offenders,<sup>115</sup> the reformatory movement established the individualization of punishment as a dominant discourse in American sentencing practice. Two watershed moments in the movement were the National Congress on Penitentiary and Reformatory Discipline, held in Cincinnati in 1870, and the National Conference on Criminal Law and Criminology, held in Chicago in 1909.<sup>116</sup> These events show the emergence of the discourse about the individualization of punishment, first with respect to prison administration and parole and then with respect to sentencing. At both events, the reformists used the notion of “character” as the basis for the differential treatment of offenders. In the paragraphs that follow, I will describe how the discourse about character emerged in relation to reforms in prison administration and parole and then descended to discussions regarding sentencing reform. I will also describe how nineteenth-century racist thought contributed to the reformists’ understanding of the notion of character throughout that process.

#### A. *Character in Prison Administration and Parole*

Enoch Cobb Wines helped to establish a National Prison Association and arrange for its first meeting, which was called the National Congress on Penitentiary and Reformatory Discipline.<sup>117</sup> In 1869, the New York state legislature had authorized the construction of a new “penitentiary” or “industrial reformatory” at Elmira.<sup>118</sup> As the secretary of the New York Prison Association, Dr. Wines arranged for the National Congress meeting in 1870 to help inform the effort to

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111. *Id.* at 40–50.

112. *Id.* at 47, 51–70; JONATHAN SIMON, POOR DISCIPLINE: PAROLE AND THE SOCIAL CONTROL OF THE UNDERCLASS, 1890–1990 at 24–31 (James B. Jacob ed., 1993); Edward Lindsey, *Historical Sketch of the Indeterminate Sentence and Parole System*, 16 J. CRIM. L. & CRIMINOLOGY 9 (1925).

113. BLOMBERG, *supra* note 110, at 71–94.

114. *Id.*

115. See William W. Smithers, *Nature and Limits of the Pardoning Power*, 1 J. CRIM. L. & CRIMINOLOGY 549 (1910) (pardoning power); Joel Sahama, *Fixed Sentences and Judicial Discretion in Historical Perspective*, 15 WM. MITCHELL L. REV. 217 (1989) (judicial discretion); Nancy Gertner, *A Short History of American Sentencing: Too Little Law, Too Much, or Just Right*, 100 J. CRIM. L. & CRIMINOLOGY 691 (2010) (jury nullification).

116. Lindsey, *supra* note 112, at 18–21; Bernard E. Harcourt, *From the Ne'er-Do-Well to the Criminal History Category: The Refinement of the Actuarial Model in Criminal Law*, 66 LAW & CONTEMP. PROBS. 99, 104 (2003).

117. Lindsey, *supra* note 112, at 18.

118. ALEXANDER W. PISCIOTTA, BENEVOLENT REPRESSION: SOCIAL CONTROL AND THE AMERICAN REFORMATORY-PRISON MOVEMENT 19–20 (1994).

design the Elmira Reformatory.<sup>119</sup> At the meeting’s conclusion, the National Congress approved a “Declaration of Principles” that would drive sentencing policy in the United States for the next century.<sup>120</sup> Today we would call those principles, collectively, the “rehabilitative ideal.”

One of the conference attendees was Zebulon Reed Brockway, who would later become the superintendent of the Elmira Reformatory.<sup>121</sup> He advocated for a new prison system that would aim, foremost, to reform criminal offenders. He presented a paper at the conference, in which he introduced the following principle (later incorporated into the Declaration of Principles): “The true basis of classification for prisoners is *character*, not conduct. The criterion of character should be uniform throughout the whole system of institutions, and, therefore, should be applied in each case by the same officer or officers. Good conduct may be assumed, but good character *never . . .*.”<sup>122</sup> The word “character” appears time and again in the compiled volume of papers from the proceedings;<sup>123</sup> without a doubt, character as an object of reform was one of the organizing principles of the conference. In the decades that followed, the idea that offenders should be sentenced with special regard to their character became deeply entrenched in American jurisprudential thought.<sup>124</sup>

However, the word “character” means something very different today than it meant to the audience at the National Congress on Penitentiary and Reformatory Discipline. Cathy Boeckmann has argued:

The notion of character formed the core of discussions of race in the late nineteenth century. . . . In current usage *character* is a figurative term, signifying the imagined structure of an individual’s moral and ethical orientations, but in the nineteenth century it referred to a quantifiable set of inherited behaviors and tendencies that were almost always racial.<sup>125</sup>

This nineteenth century understanding of the word “character” was the product of a new school of anthropology which relied heavily on the field of phrenology.<sup>126</sup>

119. *Id.* at 20.

120. TRANSACTIONS OF THE NATIONAL CONGRESS ON PENITENTIARY AND REFORMATORY DISCIPLINE HELD AT CINCINNATI, OHIO, OCTOBER 12–18, 1870 at 541–47 (E.C. Wines ed., 1871) [hereinafter TRANSACTIONS].

121. PISCIOTTA, *supra* note 118, at 35.

122. Z.R. Brockway, *The Ideal of a True Prison System for a State*, in TRANSACTIONS OF THE NATIONAL CONGRESS ON PENITENTIARY AND REFORMATORY DISCIPLINE HELD IN CINCINNATI, OHIO, OCTOBER 12–18, 1870 38, 61 (E.C. Wines ed., 1871) (emphasis in the original).

123. See TRANSACTIONS, *supra* note 120, at 23, 31, 36, 38–39, 45, 51–53, 55–56, 58, 62–64, 70, 76, 81, 93, 162, 173–174, 195, 197, 203, 226, 228–30, 234, 237, 241, 243, 260, 283, 287–88, 294, 307, 317, 326, 337, 342, 347, 362, 369, 404, 425, 434, 436, 515, 541, 544, 571, & 580.

124. See *infra* Part III.

125. CATHY BOECKMANN, A QUESTION OF CHARACTER: SCIENTIFIC RACISM AND GENRES OF AMERICAN FICTION, 1892–1912 at 3 (2000). Though this book is about American fiction in the Progressive Era, Boeckmann’s robust analysis of the semiotics of “character” during the late nineteenth century encompasses a wide breadth of the discourse about character at that time.

126. *Id.* at 46–47.

Phrenology is the study of human craniums.<sup>127</sup> Its central dogma is that the histological and macroscopic dimensions of the brain provide us with a scientific measure of intangible human traits such as intelligence and moral character.<sup>128</sup> Thus, for a phrenologist, “character” is something that is not just incidentally related to physical traits. Rather, differences in moral character actually arise from differences in the physical body.<sup>129</sup> Samuel George Morton, the father of American physical anthropology, published *Crania Americana* in 1839. That volume is a seminal work in phrenology in the United States.<sup>130</sup> The volume included an introduction to phrenology penned by the Scottish lawyer George Combe, who wrote: “If we glance over the history of Europe, Asia, Africa, and America, we shall find distinct and permanent features of character which strongly indicate natural differences in their mental constitutions.”<sup>131</sup>

At first glance, this conception of “character” as innate and inherited may seem inconsistent with the idea that criminals could reform their character. However, to the contrary, the physical anthropologists claimed that the amenability to reform was just another dimension of racial character. Combe continued that: “The inhabitants of Europe, belonging to the Caucasian variety of mankind, have manifested, in all ages, a strong tendency toward moral and intellectual improvement.”<sup>132</sup> Morton, for his part, also wrote that each race had its own physical and moral character.<sup>133</sup> He described non-European races as presenting with reduced overall cranial capacities as well as a low brow.<sup>134</sup> Incidentally, the Italian criminologist Cesare Lombroso made similar observations about the craniums of “born” criminals, whom he deemed “atavistic being[s], a relic of a vanished race.”<sup>135</sup> Lombroso also theorized about the differential criminal tendencies of the races: “In the gipsies we have an entire race of criminals with all the passions and vices common to delinquent types: idleness, ignorance, impetuous fury, vanity, love of orgies, and ferocity.”<sup>136</sup>

After Charles Darwin published *The Origin of Species* in 1859, anthropologists began using the theory of evolution to explain the differentiation of humans into distinct races.<sup>137</sup> In *Ancient Society*, Lewis H. Morgan described human evolution as proceeding in distinct stages, namely, savagery, barbarism, and civilization.<sup>138</sup>

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127. Shepherd Ivory Franz, *New Phrenology*, 35 *SCIENCE* 321, 322 (1912).

128. *Id.* at 322-23.

129. *Id.*; see also BOECKMANN, *supra* note 125, at 46-47.

130. BOECKMANN, *supra* note 125, at 6.

131. George Combe, *Phrenological Remarks on the Relation Between the Natural Talents and Dispositions of Nations, and the Developments of their Brains*, in SAMUEL GEORGE MORTON, *CRANIA AMERICANA* 271 (1839).

132. *Id.*

133. SAMUEL GEORGE MORTON, *CRANIA AMERICANA* 1 (1839).

134. See, e.g., *id.* at 5-7.

135. GINA LOMBROSO-FERRERO, *CRIMINAL MAN ACCORDING TO THE CLASSIFICATION OF CESARE LOMBROSO* 135 (1911).

136. *Id.* at 140.

137. BOECKMANN, *supra* note 125, at 17-25.

138. LEWIS H. MORGAN, *ANCIENT SOCIETY* 11-23 (Harvard College 1964) (1877).

Progression through those stages was accomplished in part through improvements in intelligence, industry, and technology, leading to the accumulation of wealth and inheritance of land.<sup>139</sup> According to Morgan, the "Aryan family represents the central stream of human progress, because it produced the highest type of mankind, and because it has proved its intrinsic superiority by gradually assuming control of the earth."<sup>140</sup>

In the paper that Brockway presented at the National Congress in Cincinnati, he parroted some of the language from this racial discourse in anthropology, urging "pity" for the "forlorn wretch who is often the victim of ancestral vices" and further stating that:

Crime, spring, as it does, from the selfishness and imperfection of our nature, cannot entirely cease until we have a perfect society, which must be composed of a perfected race: this we can hardly hope for in our age and generation. But crime may be diminished by the progress of civilization, which, within the sphere of our influence, we may help or hinder, though in the world at large civilization is bounded by great laws, operating in harmony with those which govern the changes occurring in the material structure of the earth itself.<sup>141</sup>

Some of the other conference presenters were less subtle than Brockway in their racial overtones. An officer of the Port Blair Penal Settlement in India described the distinct characteristics of convicts from "all the nations of the east," describing one convict as "a perfect specimen of a Hindoo, with all the lying, deceitful characteristics of that race, debased by centuries of slavery."<sup>142</sup> The secretary of the Howard Association in England described how a phrenologist had concluded that habitual criminals were cranially deficient and shared physical aspects such as low brows.<sup>143</sup> He also offered his own observations of a group of Irish people that he believed had regressed to barbarism due to the effects of poverty and isolation.<sup>144</sup> In fact, several speakers referred to the use of phrenology to study criminals,<sup>145</sup> and the National Congress's proposed system for collecting statistics to aid in the assessment of criminals included "color" as an essential basis for comparison.<sup>146</sup>

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139. *Id.*

140. *Id.* at 468.

141. Brockway, *supra* note 122, at 42.

142. Fr. Ad. de Roepstorff, *Port Blair Penal Settlement in British India*, in TRANSACTIONS OF THE NATIONAL CONGRESS ON PENITENTIARY AND REFORMATORY DISCIPLINE HELD IN CINCINNATI, OHIO, OCTOBER 12-18, 1870 (E.C. Wines ed., 1871).

143. See William Tallack, *Humanity and Humanitarianism with Special Reference to the Prison Systems of Great Britain and the United States*, in TRANSACTIONS OF THE NATIONAL CONGRESS ON PENITENTIARY AND REFORMATORY DISCIPLINE HELD IN CINCINNATI, OHIO, OCTOBER 12-18, 1870 (E.C. Wines ed., 1871).

144. *Id.*

145. See, e.g., John Bowring, *The Proper Purpose of Prison Discipline*, in TRANSACTIONS OF THE NATIONAL CONGRESS ON PENITENTIARY AND REFORMATORY DISCIPLINE HELD IN CINCINNATI, OHIO, OCTOBER 12-18, 1870 (E.C. Wines ed., 1871).

146. A. J. Ourt., *Criminal Statistics*, in TRANSACTIONS OF THE NATIONAL CONGRESS ON PENITENTIARY AND REFORMATORY DISCIPLINE HELD IN CINCINNATI, OHIO, OCTOBER 12-18, 1870 (E.C. Wines ed., 1871).

The conference brought world renown to Brockway, who became superintendent of the Elmira Reformatory when it opened to inmates in 1876.<sup>147</sup> Elmira would come to be recognized as the most important institution in the history of corrections, and Brockway himself influenced penal practices all over the world.<sup>148</sup> In administering the reformatory, Brockway professed to following the teachings of Lombroso.<sup>149</sup> Lombroso, in turn, wrote with approval about Brockway and the Elmira Reformatory.<sup>150</sup> Specifically, Brockway subscribed to Lombroso's theories about the physical inferiority of criminals.<sup>151</sup> Thus, Brockway approached the reformation of criminals as an effort to improve both physical and mental characteristics: "The doctrine of the interaction of body and mind is so well established and altogether reasonable that there is no need here to guard against a fancied materialistic tendency."<sup>152</sup> With Brockway's approval, Elmira's physician Dr. Hamilton Wey conducted research into reforming the moral character of inmates through methods of physical improvement.<sup>153</sup> Dr. Wey provided some data to the statistician Frederick Hoffman, who used that data in his study, *The Race Traits and Tendencies of the American Negro*.<sup>154</sup> Hoffman argued that black people were physically inferior to white people and, therefore, mentally and morally inferior as well.<sup>155</sup> Brockway seems to have agreed with this assessment, as he made entries in his inmate ledger such as: "ordinary type of Buckskin Darkey" and "Low type. Good Enough of his race."<sup>156</sup>

### B. Character in Sentencing

The first National Conference on Criminal Law and Criminology convened in Chicago in 1909, with influential American legal scholars such as Roscoe Pound and John H. Wigmore in attendance.<sup>157</sup> Brockway was invited, but his successor at Elmira, Joseph F. Scott, attended the conference instead.<sup>158</sup>

At that first conference, the attendees discussed the application of the rehabilitative ideal to sentencing. That discussion facilitated the descension of the

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147. PISCIOTTA, *supra* note 118, at 21 & 28-29.

148. *Id.* at 110.

149. ZEBULON REED BROCKWAY, *FIFTY YEARS OF PRISON SERVICE: AN AUTOBIOGRAPHY* 215 (1912).

150. CESARE LOMBROSO, *CRIME: ITS CAUSES AND REMEDIES* § 217 (Henry P. Morton trans., Patterson Smith 1968) (1899).

151. BROCKWAY, *supra* note 149, at 215.

152. Z.R. Brockway, *The American Reformatory Prison System*, 15 AM. J. SOC. 454, 464 (1910).

153. PISCIOTTA, *supra* note 118, at 30.

154. Frederick L. Hoffman, *The Race Traits and Tendencies of the American Negro*, 11 AM. ECON. ASS'N 1, 156 (1896).

155. *Id.* at 310-16.

156. PISCIOTTA, *supra* note 118, at 20.

157. PROCEEDINGS OF THE FIRST NATIONAL CONFERENCE ON CRIMINAL LAW AND CRIMINOLOGY i-iii (Am. Inst. Crim. L. & Criminology 1910) [hereinafter PROCEEDINGS].

158. *Id.* at ii & iv.

reformatory era discourse about character in sentencing practice.<sup>159</sup> First, the conference delegates reaffirmed their support for individualized punishment and the use of parole and indeterminate sentences.<sup>160</sup> They asserted that offenders should not be released unless and until they underwent “a complete rehabilitation in point of character.”<sup>161</sup> The delegates also discussed how some judges were already individualizing punishment at sentencing.<sup>162</sup> These judges were suspending the term of imprisonment and placing the offender on probation.<sup>163</sup> Some of them had probation officers investigate the defendant’s “history, character, and circumstances” prior to sentencing.<sup>164</sup> The delegates suggested that instead of probation officers, anthropologists or other social scientists conduct the presentence investigation into offenders’ characteristics.<sup>165</sup> This suggestion indicates that delegates understood “character” by reference to anthropology, in the same way as early reformists like Brockway.

Indeed, the purpose of the National Conference was to facilitate conversations between scientists and jurists.<sup>166</sup> Several criminal anthropologists attended the National Conference, and the conference led to the English translation of Italian School treatises on criminal anthropology, namely, Ferri’s *Criminal Sociology*, Lombroso’s *Crime: Its Causes and Remedies*, and Garofalo’s *Criminology*.<sup>167</sup> Moreover, since Brockway’s time, the field of anthropology had become even more entrenched in its racist construction of character. Daniel G. Brinton, an American ethnologist, published *The Aims of Anthropology* in 1895.<sup>168</sup> He argued in favor of a branch of “applied anthropology” that would provide “a positive basis for legislation, politics, and education.”<sup>169</sup> This branch would study the different mental traits of the various human races and “find through what causes these particularities came about, the genetic laws of their appearance, and the consequences to which they have given rise.”<sup>170</sup> He called this branch “characterology.”<sup>171</sup>

The modern notion of using offender characteristic factors in sentencing thus emerged in the early twentieth century, at the same time as a discourse in anthropology about racial character.<sup>172</sup> That idea gradually became institutionalized in

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159. A discourse about character was already established in immigration law in the United States. See Kevin Lapp, *Reforming the Good Moral Character Requirement for U.S. Citizenship*, 87 IND. L.J. 1571, 1584 (2012).

160. PROCEEDINGS, *supra* note 157, at 52.

161. *Id.* at 37.

162. *Id.* at 52, 70–71.

163. *Id.*

164. *Id.* at 50.

165. *Id.*

166. James W. Garner, *Editorial Comment*, 1 J. AM. INST. CRIM. L. & CRIMINOLOGY 515, 517 (1910).

167. *Id.* at 517–518.

168. Daniel G. Brinton, *The Aims of Anthropology*, 2 SCIENCE 241 (1895).

169. *Id.* at 249–50.

170. *Id.* at 249.

171. *Id.*

172. The law provided for racial discrimination through assertions of character difference in other contexts as well. See, e.g., *Franklin v. South Carolina*, 218 U.S. 161, 168 (1910) (rejecting a challenge to the “good moral

the United States during the decades that followed. As a result of the efforts of the reformers, the United States Congress passed the Federal Parole Act in 1910.<sup>173</sup> In 1916, the United States Supreme Court issued its first opinion referring to the movement in penal reform.<sup>174</sup> The defendant in *Ex Parte United States* was the officer of a national bank and presumably privileged both socially and economically.<sup>175</sup> He was convicted in federal court in New York of several counts of embezzlement.<sup>176</sup> The district court judge imposed the minimum sentence of five years imprisonment but suspended it “during the good behavior of the defendant.”<sup>177</sup> After the prosecution moved to set aside the sentence, the judge defended it in a written order:

Modern notions respecting the treatment of law breakers abandon the theory that the imposition of the sentence is solely to punish . . . we consider the effect of the situation upon the individual as tending to reform him from or to confirm him in a criminal career, and also the relation his case bears to the community in effect of the disposition of it upon others of criminal tendencies. . . . We find that otherwise than for this crime, his disposition, character and habits have so strongly commended him to his friends, acquaintances and persons of his faith, that they are unanimous in the belief that the exposure and humiliation of his conviction are a sufficient punishment, and that he can be saved to the good of society if nothing further is done with him.<sup>178</sup>

Chief Justice Edward White, writing for the Supreme Court, concluded that this sentence violated the separation of powers doctrine because no act of Congress had provided for the suspension of the minimum sentence.<sup>179</sup> This ruling shut down what had been a common sentencing practice among the federal courts.<sup>180</sup> Despite the Court’s ruling, however, Chief Justice White clearly had sympathy for the position of the district court judge. He stated that the Supreme Court had a duty to prevent a violation of the United States Constitution “however meritorious may have been the motive giving rise to it . . . .”<sup>181</sup> He also hinted that Congress might consider passing legislation providing for probationary sentences to give greater discretion to district court judges in sentencing.<sup>182</sup> Taking its cue, the House Judiciary Committee approved such proposed legislation the following year,

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character” requirement for grand jurors as providing authorities the means to discriminate on the basis of race); *United States v. Thind*, 261 U.S. 204, 214–15 (1923) (asserting that Hindus had group characteristics that precluded them from meeting the definition of ‘white’ for purposes of US naturalization law).

173. Federal Parole Act, Pub. L. No. 61-269, 36 Stat. 864 (1910).

174. *Ex Parte United States*, 242 U.S. 27 (1916).

175. *Id.* at 37.

176. *Id.*

177. *Id.*

178. *Id.* at 38–39.

179. *Id.* at 52.

180. *Id.* at 50.

181. *Id.* at 52.

182. *Id.*

though Congress did not actually succeed in passing the Federal Probation Act until 1925.<sup>183</sup>

Thus, in 1925, the federal government had established systems of both probation and parole. At that point, however, the word “character” still did not appear in the sentencing provisions of the United States Code.<sup>184</sup> Congress had provided almost no guidance for the district court judges on how to exercise their discretion in sentencing. The Code indicated that the judge could impose probation when it appeared “to the satisfaction of the court that the ends of justice and the best interests of the public, as well as the defendant, will be subserved thereby.”<sup>185</sup> Similarly, it provided that the parole board could release a prisoner when it determined that “there [was] a reasonable probability that such applicant will live and remain at liberty without violating the laws” and that releasing the prisoner was “not incompatible with the welfare of society.”<sup>186</sup> Other than these few principles, Congress placed no constraints on the discretion of the sentencing judge.<sup>187</sup>

Nonetheless, and as evident from the historical discussion above, the notion of giving due regard to offender characteristics inheres in the very concepts of probation, parole, and rehabilitation.<sup>188</sup> In fact, American courts have relied on probation officers to provide them with presentence investigations into offenders’ character and criminal history since at least 1910. The American Institute on Criminal Law and Criminology recommended that such reports detail the offender’s previous arrests, family history, environment, employment, and present mental attitude, as well as any facts which may have induced or contributed to the offense.<sup>189</sup> The federal legislation in 1910 providing for probation in the District of Columbia required that probation officers investigate offenders and make recommendations to the court regarding whether to place an offender on probation.<sup>190</sup> Shortly after the Administrative Office of the United States Courts was established in 1939, it began publishing a standard form for presentence investigation reports.<sup>191</sup> And in 1949, when the United States Supreme Court released its opinion in *Williams v. New York*, the standard presentence investigation form included sections on family

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183. Federal Probation Act, Pub. L. No 68-596, 43 Stat. 1259 (1925); *United States v Murray*, 275 U.S. 347, 354 (1928). By 1930, every state had established a parole system, and many had provided for probation as well. SIMON, *supra* note 112, at 33.

184. See generally 18 U.S.C. §§ 691 to 727 (1926) (neglecting to mention “character”).

185. 18 U.S.C. § 724 (1926).

186. 18 U.S.C. § 716 (1926).

187. See generally 18 U.S.C. §§ 691 to 727 (1926).

188. See also ALI, MODEL PENAL CODE, TENTATIVE DRAFT NO. 4 at 4 (1954) (“The correction and rehabilitation of offenders is a social value in itself, as well as a preventative instrument. Basic considerations of justice demand . . . that differences among offenders be reflected in the just individualization of their treatment.”).

189. Wilfred Bolster, *Adult Probation, Parole and Suspended Sentence. Report of Committee C of the American Institute of Criminal Law and Criminology*, 1 J. AM. INST. CRIM. L. & CRIMINOLOGY 438, 440 (1910).

190. Act of June 25, 1910, ch. 433, Pub. L. No. 61-316, 43 Stat. 1259.

191. See, e.g., ADMIN. OFFICE OF THE U.S. COURTS, THE PRESENTENCE INVESTIGATION REPORT, PUB. NO. 101 (1943).

history, home and neighborhood, education, employment, religion, and interests and activities, among others.<sup>192</sup>

In *Williams v. New York*, the Supreme Court formally recognized the then widespread practice of sentencing offenders according to their individual character. In that case, Justice Black wrote that “[h]ighly relevant — if not essential — to [a judge’s] selection of an appropriate sentence is the possession of the fullest information possible concerning the defendant’s life and *characteristics*.”<sup>193</sup> He then elaborated that:

Undoubtedly the New York statutes emphasize a prevalent modern philosophy of penology that the punishment should fit the offender and not merely the crime. The belief no longer prevails that every offense in a like legal category calls for an identical punishment without regard to the past life and habits of a particular offender. This whole country has traveled far from the period in which the death sentence was an automatic and commonplace result of convictions—even for offenses today deemed trivial. Today’s philosophy of individualizing sentences makes sharp distinctions for example between first and repeated offenders. Indeterminate sentences the ultimate termination of which are sometimes decided by non-judicial agencies have to a large extent taken the place of the old rigidly fixed punishments. The practice of probation which relies heavily on non-judicial implementation has been accepted as a wise policy. Execution of the United States parole system rests on the discretion of an administrative parole board. Retribution is no longer the dominant objective of the criminal law. Reformation and rehabilitation of offenders have become important goals of criminal jurisprudence.<sup>194</sup>

The *Williams* opinion was cited and discussed at length in the Congressional floor debates about Title X of Public Law 91-452, which was enacted on October 15, 1970.<sup>195</sup> The relevant language is presently codified as 18 U.S.C. § 3661: “No limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence.”<sup>196</sup> Moreover, in 1976, the United States Supreme Court went as far as to actually require, as a matter of constitutional law, consideration of an offender’s characteristics in death penalty sentencing<sup>197</sup>:

A process that accords no significance to relevant facets of the character and record of the individual offender or the circumstances of the particular offense

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192. *Williams v. New York*, 337 U.S. 241, 250 n.15 (1949).

193. *Id.* at 247 (emphasis added).

194. *Id.* at 247–48 (internal citations omitted).

195. *See, e.g.*, 116 CONG. REC. 18912 (1970) (statement of Sen. McClellan).

196. 18 U.S.C. § 3661 (2012).

197. It is interesting to note that the death penalty is also the area of sentencing most plagued by racial disparity. *See* CASSIA C. SPOHN, HOW DO JUDGES DECIDE? THE SEARCH FOR FAIRNESS AND JUSTICE IN PUNISHMENT 196 (2002).

excludes from consideration in fixing the ultimate punishment of death the possibility of compassionate or mitigating factors stemming from the diverse frailties of humankind. It treats all persons convicted of a designated offense not as uniquely individual human beings, but as members of a faceless, undifferentiated mass to be subjected to the blind infliction of the penalty of death. . . . While the prevailing practice of individualizing sentencing determinations generally reflects simply enlightened policy rather than a constitutional imperative, we believe that in capital cases the fundamental respect for humanity underlying the Eighth Amendment requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death.<sup>198</sup>

From this history, we can draw several conclusions. First, both statutory and constitutional law in the United States have now enshrined the principle that judges should sentence offenders in proportion to both the nature of the offense and the character of the offender. Second, the prevailing notions of what constitutes a relevant “offender characteristic” originated during the late nineteenth and early twentieth centuries. More specifically, the reformatory movement used “character” as an organizing principle in the development of practices such as parole, and the courts adopted that same understanding of character in their sentencing practices. Third, in the late nineteenth and early twentieth centuries, the idea of “character” was deeply racialized. Overall, this suggests that racist ideas informed the discursive practice of sentencing offenders with due regard to their character. I am not alleging that it is the institutional practice of American courts to determine sentences according to personal racial animus,<sup>199</sup> nor will I allege that Judge Persky intended to reward Turner for his whiteness. To the contrary, the very point of this analysis was to establish how class status can impact sentencing notwithstanding the actual intention of judges to render fair and just sentences. Thus, in the next part I will use CRT as a means of critically evaluating the current use of “offender characteristics” in sentencing.<sup>200</sup>

### III. CRITICAL EVALUATION OF THE USE OF OFFENDER CHARACTERISTIC FACTORS IN SENTENCING IN THE UNITED STATES

This part will critically evaluate the role of offender characteristic factors in sentencing in the United States. The role of offender characteristic factors in sentencing today is defined by two countervailing forces: (1) a political commitment to promoting more consistency in sentencing and (2) an institutional resistance to

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198. *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976) (internal citation omitted).

199. However, research does suggest that racial bias continues to directly influence sentencing in at least some courtrooms in the United States, see GABBIDON & TAYLOR GREENE, *supra* note 109, at 184–90.

200. For a more in-depth discussion of how culture influences sentencing practices, see Allan Manson, *The Search for Principles of Mitigation: Integrating Cultural Demands*, in *MITIGATION AND AGGRAVATION AT SENTENCING* (Julian V. Roberts ed., 2011).

limiting judicial discretion.<sup>201</sup> The political commitment to consistency in sentencing started in the 1970s and 1980s.<sup>202</sup> During this time, the rehabilitative ideal declined as a result of criticism from across the political spectrum.<sup>203</sup> Liberals were leery of the reformatory movement because it had provided judges with substantial discretion in sentencing, leading to unwarranted sentencing disparities.<sup>204</sup> Some commentators noted that racial disparities were particularly pronounced.<sup>205</sup> Conservatives also deemed the reformatory movement a failure because it did not reduce recidivism or overall crime rates.<sup>206</sup> This widespread discontent led to a national movement toward more structured, determinate sentencing schemes that limited the role of judicial discretion.<sup>207</sup> On the federal level these efforts culminated in the passage of the Comprehensive Crime Control Act of 1984.<sup>208</sup>

That act introduced into federal law most of the sentencing principles that remain in place today. It also created a United States Sentencing Commission.<sup>209</sup> The purpose of the Commission is to “establish sentencing policies and practices” that “assure the meeting of the purposes of sentencing as set forth in section 3553 (a)(2) of title 18, United States Code” and “provide certainty and fairness in meeting the purposes of sentencing, avoiding unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct.”<sup>210</sup> Section 3553(a) provides factors that judges must consider in imposing a sentence, which include the history and characteristics of the defendant.<sup>211</sup> However, section 994(d) of title 28 requires that the Commission “assure that the guidelines and policy statements are entirely neutral as to the race, sex, national origin, creeds, and socioeconomic status of offenders.”<sup>212</sup> The statutes provide, to the degree relevant, for consideration of factors such as the defendant’s age, physical conditions, role in the offense, criminal history, and degree of dependence upon criminal activity for a livelihood.<sup>213</sup> Section 994(e) notes the “general inappropriateness” of consideration of the defendant’s education, vocational skills, previous

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201. See *United States v. Booker*, 543 US 220, 250 (2005); *Kimbrough v. United States*, 552 U.S. 85, 107 (2007); *Pepper v. United States*, 562 U.S. 476, 511 (2011).

202. Kate Stith & Steve Y. Koh, *The Politics of Sentencing Reform: The Legislative History of the Federal Sentencing Guidelines*, 28 WAKE FOREST L. REV. 223, 225 (1993).

203. *Id.* at 240.

204. *Id.* at 227.

205. See, e.g., Joseph C. Howard, *Racial Discrimination in Sentencing*, 59 JUDICATURE 121 (1975).

206. Stith & Koh, *supra* note 202, at 227.

207. *Id.* at 230–31; Richard S. Frase, *State Sentencing Guidelines: Diversity, Consensus, and Unresolved Policy Issues*, 105 COLUM. L. REV. 1190 (2005); Carissa Byrne Hessick & Douglas A. Berman, *Towards a Theory of Mitigation*, 96 B.U. L. REV. 161, 163 (2016).

208. Comprehensive Crime Control Act, Pub. L. No. 98-473, 98 Stat. 1976 (1984).

209. 28 U.S.C. § 991 (2012).

210. *Id.*

211. 18 U.S.C. § 3553(a) (2012).

212. 28 U.S.C. § 994(d) (2012).

213. *Id.*

employment record, family ties and responsibilities, and community ties – but does not prohibit consideration of those factors altogether.<sup>214</sup>

Pursuant to its mandate, the Commission has promulgated guidelines for sentencing in the federal courts. The Commission’s guidelines address the role of specific offender characteristics in Chapter 5, Part H, providing policy statements regarding the appropriate use of all the factors mentioned in section 994.<sup>215</sup> Though originally mandatory, the guidelines are now merely advisory per the United States Supreme Court’s decision in *United States v. Booker*.<sup>216</sup> Subsequent to *Booker*, the Sentencing Commission conducted a survey of all federal judges who imposed criminal sentences about what factors influenced their sentencing decisions.<sup>217</sup> The results indicated that the judges consider a wide range of factors in rendering a sentence.<sup>218</sup> I submit that those factors fall broadly into four categories:

**Table 1.**

Category	Factors
<b>Social Status</b>	Education, employment, family and community ties, upbringing
<b>Other Conduct</b>	Criminal history, aberrant behavior, prior bad acts or good deeds, post-offense rehabilitation, public or military service
<b>Collateral Consequences</b>	Family responsibilities, significant hardship, loss of professional licensure or employment
<b>Remorse</b>	Confession, cooperation with law enforcement, voluntary rehabilitation or restitution

Many state criminal codes provide broadly for consideration of the character of the offender in sentencing.<sup>219</sup> This includes all states that still retain the death penalty.<sup>220</sup>

Judges in both federal and state courts assess such offender characteristic factors using the information contained in presentence investigation reports.<sup>221</sup> Probation

214. 28 U.S.C. § 994(e) (2012).

215. U.S. SENTENCING COMM’N, GUIDELINES MANUAL § 5H (Nov. 2016) [hereinafter GUIDELINES].

216. *United States v. Booker*, 543 U.S. 220, 222 (2005).

217. U.S. SENTENCING COMM’N, RESULTS OF SURVEY OF UNITED STATES DISTRICT JUDGES JANUARY 2010 THROUGH MARCH 2010 (2010), [https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/surveys/20100608\\_Judge\\_Survey.pdf](https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/surveys/20100608_Judge_Survey.pdf).

218. *Id.* at tbl. 13.

219. *See, e.g.*, ARIZ. REV. STAT. ANN. § 13-701(D)(26); COLO. REV. STAT. § 18-1.3-203; HAW. REV. STAT. § 706-606; IND. CODE § 35-38-1-7.1 ; NEB. REV. STAT. § 29-2260 ; OHIO REV. CODE ANN. § 2929.22; W. VA. CODE § 62-12-3.

220. *See Woodson v. North Carolina*, 428 U.S. 280, 304 (1976).

221. Joan Petersilia, *Probation in the United States*, 22 CRIME & JUST. 149, 159–62 (1997).

departments generate these reports.<sup>222</sup> A probation officer will conduct the investigation and then prepare a document that contains information about the nature of the crime, characteristics of the offender, a summary of the legally permissible sentencing options, and a recommendation for a sentence.<sup>223</sup> There is a high correlation between the sentence recommended in the report and the sentence imposed.<sup>224</sup> In other words, judges defer substantially to the recommendation of the probation officer in sentencing. The current version of the federal presentence investigation report contains sections about the offense (Part A), the defendant's criminal history (Part B), offender characteristics (Part C), sentencing options (Part D), factors that may warrant departure (Part E), and factors that may warrant a sentence outside of the advisory guideline system (Part F).<sup>225</sup> Part C contains the following subheadings: personal and family data, physical condition, mental and emotional health, substance abuse, education and vocational skills, employment, and ability to pay.<sup>226</sup>

The federal approach to reducing disparities in sentencing is defined by notions of colorblindness. Proclaiming its intent to reduce sentencing disparities, Congress provided that the sentencing guidelines and policy statements remain "entirely neutral" not only to race, but also to socioeconomic status.<sup>227</sup> The latter restriction is problematic for two reasons: First, judges are considering socioeconomic status notwithstanding the guidelines, probably in part because such status is, in fact, relevant to sentencing when it affects offenders' freedom of choice. Second, as discussed in Part I above, the construction of race cannot be cleanly disentangled from the reality of socioeconomic disadvantage in the United States, which means that consideration of socioeconomic status will invariably impact racial disparities in sentencing. How it will impact those disparities, of course, depends on the logic that judges use in weighing factors related to socioeconomic status. I will now consider the proper logic to use in weighing offender characteristic factors under retributivism and utilitarianism, in turn, and compare that to the logic used in actual sentencing practice.

#### *A. Retributivism*

From a retributive perspective, offenders should be sentenced according to their moral blameworthiness.<sup>228</sup> That blameworthiness is determined according to the

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222. *Id.*

223. *Id.* at 161.

224. *Id.*

225. ADMIN. OFFICE OF THE U.S. COURTS, THE PRESENTENCE INVESTIGATION REPORT, PUB. NO. 107 Ch. 3 (2006).

226. *Id.*

227. 28 U.S.C. § 994(d) (2012).

228. RICHARD S. FRASE, JUST SENTENCING: PRINCIPLES AND PROCEDURES FOR A WORKABLE SYSTEM 8–9 (2013).

seriousness of the offense and the culpability of the offender.<sup>229</sup> Traditionally, we have assessed the culpability of offenders at least partially according to their freedom of choice, or, stated differently, according to their sovereign individuality.<sup>230</sup> Thus, an offender who murders another person after provocation is guilty of a lesser offense than an offender who murders another person after deliberation.<sup>231</sup> And, an offender who meets the legal definition of insanity is absolved of all criminal liability.<sup>232</sup>

Similarly, I submit that a person who faces socioeconomic disadvantage is often less culpable by virtue of that disadvantage.<sup>233</sup> Certainly, a thief who steals bread to feed his starving child is less culpable than a thief who steals candy to impress his friends. But disadvantage may affect the culpability of the thief who steals candy to impress his friends, too. Regardless of the particular circumstances of an offense, offenders are less culpable when their disadvantage has affected their ability to flourish and choose freely. Research indicates that being denied the opportunity to flourish fully in society can impact offenders physically, mentally, and emotionally, such that they cease to conform to the ideal of a free and rational actor.<sup>234</sup> Assessing how much offenders’ socioeconomic status affected their freedom of choice from this broader view requires inquiring into circumstances in their life outside of the immediate time frame of the offense committed. For instance, offenders’ culpability may be diminished by virtue of having grown up without family or community support; or having been denied the opportunity to learn appropriate behavioral norms, attend school and train for a meaningful career, or receive proper medical care including treatment for addiction or mental illness.<sup>235</sup> Conversely, the culpability of offenders is enhanced when they commit crimes despite having had every advantage to steer them away from criminal behavior.

Some people may protest that not every person who is disadvantaged commits crimes, but that argument misses the point. It is also true that not every person reacts violently to provocation; nonetheless, the law provides for factors that reduce the culpability of an offender – even when they do not rise to the level of an excuse or justification. Social science teaches us that criminal behavior is not the

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229. *Id.*

230. See WILLIAM BLACKSTONE, COMMENTARIES ON THE LAW OF ENGLAND, Vol. 2, Book IV, Ch. II (Collins & Hannay 1830) (1765-69).

231. *Id.*

232. *Id.*

233. See also MICHAEL TONRY, MALIGN NEGLECT — RACE, CRIME, AND PUNISHMENT IN AMERICA 155–58 (1995) (concluding “[i]f punishment is principally about blaming, it is relevant whether the offender is mentally impaired, socially disadvantaged, a reluctant participant, or moved by humane motives”).

234. See Robert J. Sampson & John H. Laub, *A Life-Course View of the Development of Crime*, 602 ANNALS AM. ACAD. POL. & SOC. SCI. 12, 40 (2005).

235. See *id.*; see also Robert Merton, *Social Structure and Anomie*, 3 AM. SOC. REV. 372 (1938) (concluding “inaccessibility of effective institutional means of attaining economic or any other type of highly valued ‘success’” can decrease one’s likelihood of conforming to societal expectations); Robert J. Sampson & Janet L. Lauritsen, *Racial and Ethnic Disparities in Crime and Criminal Justice in the United States*, 21 CRIME & JUST. 311, 337 (1997).

product of a single determinative factor but rather “the constant interaction between individuals and their environment, coupled with purposeful human agency and ‘random developmental noise.’”<sup>236</sup> When they are relevant, circumstances related to disadvantage will nearly always be mitigating, and circumstances related to advantage will nearly always be aggravating.

Yet, judges sometimes cite certain incidents of privilege as mitigating factors, such as education, employment, or family stability.<sup>237</sup> The notion of meritocracy inheres in the logic that a person with high socioeconomic status is thereby more deserving of leniency. The judge in the Turner case clearly considered Turner’s criminal conduct to be aberrant behavior.<sup>238</sup> He based that conclusion in part on the fact that Turner had significant support from his family and community who were willing attest to his character.<sup>239</sup> Moreover, the “good behavior” described in the letters largely entailed dedication to his studies and sport.<sup>240</sup> Yet for people of lower socioeconomic status in the United States, the opportunity to study at Stanford or swim in the Olympics would be considered a privilege, not evidence of good behavior or moral character. That is not to say that Turner did not work hard to accomplish these things. Rather, the point is that had Turner faced different social and economic circumstances in life, he may have been working hard at a minimum wage job – or feeling utterly defeated by his inability to find gainful employment.

Thus, in an unequal society, it is tenuous to infer good character or law abidingness relative to other offenders from things such as the offender’s educational attainment, employment record, and family stability. Another problem arises when judges infer that an offender feels remorse from things such as voluntary disclosure of the offense, cooperation with law enforcement, or a deferential attitude toward the proceedings. This inference tends to discount the real possibility that the offender’s motivation is self-interest, not remorse. Turner, for his part, claimed to feel remorse and accept responsibility for his conduct despite testifying that the victim had consented to the contact<sup>241</sup> and, to this day, denying that he committed the crime for which he has been convicted.<sup>242</sup> These measures of remorse also presuppose that the offender believes in the legitimacy and neutrality of the law, law enforcement, and the criminal justice system.<sup>243</sup> This assumption is particularly problematic given that ethnic minority populations in the United States, especially

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236. Sampson & Laub, *supra* note 234, at 40.

237. SPOHN, *supra* note 197, at 88.

238. See Levin, *supra* note 13.

239. *Id.*

240. Although, it is important to note that the letters described Turner as gentle and caring as well. See generally Letters Attached to Defendant’s Sentencing Memorandum, *People v. Turner*, Santa Clara Cnty. Super. Ct. no. B1577162, available at <http://documents.latimes.com/people-v-brock-allen-turner-99/>.

241. Levin, *supra* note 13.

242. Maya Salam, *Brock Turner is Appealing His Sexual Assault Conviction*, N.Y. TIMES (Dec. 2, 2017), <https://www.nytimes.com/2017/12/02/us/brock-turner-appeal.html>.

243. See TOM R. TYLER, WHY PEOPLE OBEY THE LAW 134 (2006).

African Americans, have a relationship of relative mistrust of law enforcement and the criminal justice process.<sup>244</sup> That mistrust arises from law enforcement practices that span the whole of American history, from slave patrols to quality-of-life policing.<sup>245</sup> And even truly remorseful offenders will probably refuse to cooperate with police if they deeply distrust law enforcement. Similarly, offenders who have been confronted with barriers to social and economic success their entire lives will probably feel angry or resentful when a prosecutor argues for a high bond on account of their unemployment, unstable housing situation, or lack of community ties.

The very process of assessing offender characteristics in the United States today reflects the white cultural value of rationality. It is a very mechanical approach to identify discrete factors and “weigh” them against one another in order to assess something as abstract, fluid, and contested as just desert. Also, for the most part, these discrete factors pertain to how offenders relate to their community, and not vice versa.<sup>246</sup> Understanding the degree to which the community has supported an offender provides an even broader view of relative culpability. For instance, a judge may consider an offender in a child neglect case less culpable by virtue of the fact that the offender had no support from family, friends, or the community in raising the child. The failure to adequately account for the reciprocal nature of the relationship between the offender and community diminishes collective responsibility for the actions of the offender and, thus, for the harm to the victim as well.<sup>247</sup> Such a narrow view lessens the victim’s claim to recompense from the community and deprives the victim of the most far-reaching justice.

Judges give significant weight to an offender’s criminal history in sentencing.<sup>248</sup> The judge in Turner’s case cited his minimal criminal history as evidence that Turner’s conduct had been aberrant behavior.<sup>249</sup> However, being a convicted criminal, like being unemployed or uneducated, is a social status that does not necessarily reflect true character. It has been well established that a very small percentage of crimes committed result in a criminal conviction.<sup>250</sup> That percentage also varies

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244. JULIAN V. ROBERTS & LORETTA J. STALANS, PUBLIC OPINION, CRIME, AND CRIMINAL JUSTICE 127–53 (John Hagan ed., 1997).

245. See generally DAVID E. BARLOW & MELISSA H. BARLOW, POLICE IN A MULTICULTURAL SOCIETY: AN AMERICAN STORY (2000).

246. See Nathan James, *Risk and Needs Assessment in the Criminal Justice System*, CONG. RES. SERV. R44087 tbl. 1 (2018), <https://fas.org/sgp/crs/misc/R44087.pdf>.

247. It is not uncommon for judges to consider family and community ties in sentencing, especially to gauge how much support the offender will receive in completing a community-based sentence, but not from the broader view of how political and social institutions have related to the offender, such as public schools, child protection agencies, housing and transportation authorities, law enforcement and private security companies, and corporations and non-profits. See *id.*

248. See SPOHN, *supra* note 197, at 83.

249. Levin, *supra* note 13.

250. See JENNIFER L. TRUMAN & RACHEL E. MORGAN, BUREAU OF JUSTICE STATISTICS, CRIMINAL VICTIMIZATION, 2015 tbl. 4 (Oct. 2016) (revised Mar. 22, 2018), <https://www.bjs.gov/content/pub/pdf/cv15.pdf> (estimating that only 46.5 percent of violent crimes and 34.6 percent of property crimes were reported to police in the United States); FED. BUREAU OF INVESTIGATION, CRIME IN THE UNITED STATES, 2015 tbl. 25, <https://ucr>.

according to the nature of the offense; for instance, rape is reported at a much lower rate than most other offenses.<sup>251</sup> Therefore, it would be particularly improper for a judge to infer that a rape constituted aberrant behavior from nothing more than the offender's lack of criminal history.

More importantly, the rarity of criminal conduct resulting in a conviction would be less problematic if each person at least had an equal chance of being apprehended, arrested, charged, and convicted of a crime. Then, even if offenders' criminal histories did not reflect the full extent of their criminal involvement, it would at least roughly approximate the extent of their criminal involvement relative to other offenders. However, we know that is not the case. For instance, black people are arrested for drug offenses at a rate three to four times higher than white people in the United States, even though the black population does not commit drug offenses at a higher rate.<sup>252</sup> In fact, research indicates that there is some degree of racial bias present at every stage of a criminal prosecution, and these biases have a cumulative effect on the rate of criminal conviction.<sup>253</sup> In 2010, around eight percent of all adults in the United States had a felony conviction, compared to thirty-three percent of African-American adult males.<sup>254</sup> Moreover, once a person receives a criminal conviction, he is more likely to be convicted again.<sup>255</sup> This is due in part to the criminogenic effects of labelling and punishment, but also to the fact that the offender will then become one of the "usual suspects" subject to increased police scrutiny.<sup>256</sup>

Thus, criminal history is an imperfect and racialized measure of an offender's criminal involvement relative to other offenders. We need not, however, abandon the consideration of criminal history altogether. Criminal history certainly touches upon prior criminal involvement even though it does not fully embody it. But sentencing statutes should not require aggravation on account of criminal history or otherwise elevate it above other offender characteristics. Criminal history should not determine the range of sentences available to the judge, as is the case in the federal sentencing scheme.<sup>257</sup> Also problematic is the federal practice of determining the weight of prior offenses largely according to the length of the sentence that the

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fbi.gov/crime-in-the-u.s./2015/crime-in-the-u.s.-2015/tables/table-25 (estimating that of those crimes reported, only 46.0 percent of violent crimes and 19.4 percent of property crimes were cleared by either arrest or exceptional means); BRIAN A. REAVES, BUREAU OF JUSTICE STATISTICS, FELONY DEFENDANTS IN LARGE URBAN COUNTIES, 2009 – STATISTICAL TABLES tbl. 21 (Dec. 2013), <https://www.bjs.gov/content/pub/pdf/fdluc09.pdf> (estimating that, of those arrested, around two-thirds of offenders charged with felonies were ultimately convicted).

251. TRUMAN & MORGAN, *supra* note 250, at tbl. 4.

252. MICHAEL TONRY, PUNISHING RACE: A CONTINUING AMERICAN DILEMMA 28 (2012).

253. SPOHN, *supra* note 197, at 165–208.

254. Sarah Shannon et al., *The Growth, Scope, and Spatial Distribution of People with Felony Records in the United States, 1948-2010*, 54 DEMOGRAPHY 1795, 1808 tbl. 2 (2017).

255. JAMES B. JACOBS, THE ETERNAL CRIMINAL RECORD 227–243 (2015).

256. *See id.* at 228; *see also* Akiva M. Liberman et. al, *Labeling Effects of First Juvenile Arrests: Secondary Deviance and Secondary Sanctioning*, 52 CRIMINOLOGY 345, 363 (2014).

257. GUIDELINES, *supra* note 215, §4A1.1.

offender received.<sup>258</sup> That approach needlessly perpetuates unfair disparities in sentencing. Instead, judges should weigh criminal history by assessing the nature and seriousness of prior offenses in terms of the harm caused and the culpable mental state of the offender. They also should have discretion to consider the wide disparities in the level of policing that occurs in different places and of different people and the effect of socioeconomic disadvantage in increasing a person’s frequency of contact with law enforcement.<sup>259</sup> They also should consider the differential rates of detection for certain categories of offenses.<sup>260</sup> For instance, judges might consider criminal history useful in determining the relative culpability of an offender convicted of motor vehicle theft given the high rate of reporting for that offense. On the other hand, judges might be discouraged from inferring aberrant behavior from the absence of criminal history for an offender convicted of an underreported crime such as rape. Judges may also consider the role of socioeconomic disadvantage in the differential rate of detection of drug offenses.<sup>261</sup>

Some might argue that judges should not in any way be held to account for sentencing disparities that result from bias occurring at other stages of a criminal prosecution,<sup>262</sup> but that argument is fallacious. When judges punish offenders more or less harshly on account of their criminal history, they directly rely on a racially discriminatory measure of moral blameworthiness. That is little better than if police officers were to disproportionately stop and question young black men about a robbery because the latter belong to a demographic with a higher rate of violent offending. Such police officers might argue that they had no control over the social and economic factors that give rise to an apparent differential rate of violent offending. Granted, the judges were at least not directly relying on race as a basis for discrimination. But both the officers and judges would be justifying their actions on grounds that they were not directly to blame for the discriminatory effect, therefore using the same tactics of defensiveness and denial that I described in Part I above. Judges have a moral responsibility to grapple with the differential rate at which disadvantaged offenders enter the criminal justice system, especially in light of the substantial socioeconomic costs of punishment for already struggling offenders and their families.<sup>263</sup>

Scholars have concluded that very little racial disparity occurs in sentencing when you control for legally relevant factors.<sup>264</sup> The problem with that conclusion

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258. *Id.*

259. Shannon et al., *supra* note 254.

260. *See supra* note 250 and accompanying text.

261. *See* FRASE, *supra* note 228, at 225; TONRY, *supra* note 252 at 23–29.

262. *See, e.g.,* SPOHN, *supra* note 197 at 171.

263. *See* Johnna Christian et al., *Social and Economic Implications of Family Connections to Prisoners*, 34 J. CRIM. JUST. 443 (2006).

264. Travis C. Pratt, *Race and Sentencing: A Meta-Analysis of Conflicting Empirical Research Results*, 26 J. CRIM. JUST. 513, 514 (1998); *see, e.g.,* Alfred Blumstein, *On the Racial Disproportionality of United States’ Prison Populations*, 73 J. CRIM. L. & CRIMINOLOGY 1259, 1267–68 (1982); Alfred Blumstein, *On the Racial Disproportionality of U.S. Prison Populations Revisited*, 64 U. Colo. L. Rev. 743, 759 (1993).

is that it assumes the validity and racial neutrality of so-called legally relevant factors. Again, this point is illustrated by the “legally relevant” factor of criminal history. In truth, under any penological theory, criminal history is merely a proxy for the actual legally relevant factor.<sup>265</sup> Richard Frase has described five desert-based theories for using criminal history as a factor at sentencing:

1. We may infer that an offender who has not committed other crimes was acting out of character, and therefore, we need not punish that offender as harshly.<sup>266</sup>
2. We may infer bad character from the fact that an offender has committed other crimes, thus increasing the need for punishment.<sup>267</sup>

Under these theories, the actual legally relevant factor is prior criminal conduct, not prior criminal convictions. Given the differential rates of arrest, prosecution, and conviction, an offender’s formal history of criminal convictions may not necessarily reflect the offender’s actual level of prior criminal involvement relative to other offenders. Also, offenders who persistently conceal their criminal conduct will inevitably have relatively fewer criminal convictions, but those offenders are more morally blameworthy. This is particularly true where offenders conceal their criminal conduct by abusing positions of power, targeting vulnerable victims, destroying evidence, intimidating or tampering with witnesses, or testifying falsely in their own defense.

3. Repeat offenders should be punished more harshly because, having already been convicted and punished in the past, they were on heightened notice that society condemns their criminal acts and committed more crime in defiance.<sup>268</sup>
4. Repeat offenders should be punished more harshly because having already been convicted and punished in the past, they were on notice that they needed to take steps to control their criminal impulses and failed to do so.<sup>269</sup>

Under these two theories, the actual legally relevant factor is notice to the offender that society condemns the criminal act. The logic is somewhat inconsistent with the general presumption in criminal law that all people know its proscriptions.<sup>270</sup> More importantly, the assumption that a conviction increases offenders’ understanding of the wrongfulness of their conduct is particularly strained when an offender has committed a crime *mala in se*, such as rape, murder, or burglary.

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265. See Richard S. Frase, *Prior-Conviction Sentencing Enhancements: Rationales and Limits Based on Retributive and Utilitarian Proportionality Principles and Social Equality Goals*, in *PREVIOUS CONVICTIONS AT SENTENCING: THEORETICAL AND APPLIED PERSPECTIVES* 117–18 (Julian V. Roberts & Andrew von Hirsch eds., 2014) (reviewing the different theoretical bases for using criminal history as a sentencing factor).

266. *Id.* at 121.

267. *Id.* at 122.

268. *Id.*

269. *Id.* at 123.

270. See *Bryan v. United States*, 524 U.S. 184, 194–95 (1998).

5. Repeat offenders are more threatening to society and harm the public’s collective sense of security.<sup>271</sup>

Under this theory, the actual legally relevant factor is harm to the public’s collective sense of security. It is difficult to defend this rationale, however, when the public at large is generally unaware of the repeat offender at issue. Overall, each of these five theories uses criminal history as a mere proxy for some other, actually legally relevant factor, and arguably a poor proxy at that. Thus, we cannot infer that sentencing practice is fair and race-neutral from studies that control for criminal history.

Moreover, all of these desert-based theories oversimplify the relationship between prior criminal involvement and moral blameworthiness. We can easily problematize the inference that a habitual offender is necessarily more morally blameworthy than a first-time offender. Of course, it is entirely possible that a habitual offender has repeatedly committed crimes on account of bad character and in willful defiance of society’s condemnation. However, it is equally plausible that a habitual offender has repeatedly committed crimes because of persistent socioeconomic strain. From a retributive perspective, it would be difficult to justify punishing more harshly a poor offender who has repeatedly stolen low-value, essential items from a corporate retail outlet than a wealthy offender who on one occasion defrauded an elderly couple of their entire life savings.

### B. Utilitarianism

Courts also consider offender characteristics in assessing the need for specific deterrence, rehabilitation, or incapacitation.<sup>272</sup> From these perspectives, it is also appropriate to distinguish between offenders who have committed crimes in part due to socioeconomic circumstances from offenders who have committed crimes with unconstrained freedom of choice. The latter should be more responsive to the threat of punishment. Jeremy Bentham noted that the theory of deterrence is most coherent with respect to free and rational actors.<sup>273</sup> Thus, when a person who is secure, sober, and mentally well actually has an opportunity to deliberate about whether to commit a crime, that person closely conforms to the ideal of a free and rational actor. When a person has reduced freedom of choice on account of some circumstance such as substance abuse, mental illness, or socioeconomic disadvantage, the best way to prevent crime is through alleviating that circumstance, not

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271. FRASE, *supra* note 265, at 123–24.

272. FRASE, *supra* note 228, at 8.

273. JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 173–74 (Clarendon Press 1876) (1780). Under economic models of crime deterrence, some judges might believe that they should punish offenders who face socioeconomic strain more harshly, because the pains of punishment will have to be greater to overcome the benefit of the crime. The flaw with that logic is that offenders under strain may well be more impervious to the consequences of a criminal act. See Bruce A. Jacobs, *Deterrence and Deterrability*, 48 CRIMINOLOGY 417, 434 (2010).

increasing the threat of punishment.<sup>274</sup> Sometimes the best way may even be to not intervene at all, understanding that intervention may only worsen the offender's plight. In a similar vein, judges may consider most dangerous the offender who has committed a serious crime despite having no condition to be treated or strain to be alleviated. They may rightfully decide to incapacitate such a person, especially after repeat offending. On the other hand, it is morally questionable to incapacitate people still susceptible to some intervention or change in circumstance that would facilitate their desistance.

The dominant present use of offender characteristics in utilitarian approaches to sentencing, however, is to inform the court's assessment of an offender's risk of reoffending.<sup>275</sup> To that end, state courts increasingly rely on actuarial assessments to assist them in their sentencing practices.<sup>276</sup> For instance, in Turner's case, the probation report included Turner's scores on the Static-99R and the Corrections Assessment Intervention System ("CAIS").<sup>277</sup> These and other evidence-based tools were developed by statisticians who calculate the factors that best predict whether an offender will be convicted of a criminal offense again in the future.<sup>278</sup> Those factors often correspond to incidents of socioeconomic disadvantage and, therefore, indirectly to race.<sup>279</sup> Thus, when an offender has minimal criminal history, high educational attainment, steady employment, and strong family and community ties, these tools will suggest that an offender poses minimal threat to public safety and would respond well to treatment in a community-based setting, or perhaps that the offender needs no intervention at all.<sup>280</sup>

However, even evidence-based assessments require interpretation, and that interpretation may rely on certain cultural assumptions. Scholars have pointed out how these assessments create the potential for decision makers to conflate risks with needs or even blame.<sup>281</sup> By means of analogy, a statistician may calculate the factors that best predict adult literacy. Most certainly, that statistician will find that the presence of socioeconomic advantage is a strong predictor of increased literacy. However, it would be illogical for policy makers to therefore conclude that we

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274. See Travis C. Pratt & Francis T. Cullen, *Assessing the Macro-Level Predictors and Theories of Crime: A Meta-Analysis*, 32 CRIME & JUST. 373, 378 (2005); see also Aaron Chalfin & Justin McCrary, *Criminal Deterrence: A Review of the Literature*, 55 J. ECON. LIT. 5, 33–37 (2017).

275. John Monahan & Jennifer L. Skeem, *Risk Assessment in Criminal Sentencing*, 12 ANN. REV. CLIN. PSYCH. 489, 494–97 (2016).

276. John Monahan & Jennifer L. Skeem, *Risk Redux: The Resurgence of Risk Assessment in Criminal Sanction*, 26 FED. SENT'G REP. 158 (2014); JAMES, *supra* note 246.

277. Probation Report, *People v. Turner*, Santa Clara Cnty. Sup. Ct. No. B1577162 (Jun. 2, 2016), available at <http://documents.latimes.com/people-v-brock-allen-turner-89/>.

278. JAMES, *supra* note 246, at 3.

279. Sonja B. Starr, *Evidence-Based Sentencing and the Scientific Rationalization of Discrimination*, 66 STAN. L. REV. 80 (2014); VERA INST. OF JUSTICE, CTR. ON SENTENCING AND CORR., REPORT TO DELAWARE JUSTICE REINVESTMENT TASK FORCE app. A (Oct. 12, 2011), available at <http://www.ma4jr.org/wp-content/uploads/2014/10/vera-institute-memo-on-risk-assessment-for-delaware-2011.pdf>.

280. JAMES, *supra* note 246, at 6.

281. Monahan & Skeem, *supra* note 275, at 501–05.

should focus literacy programs on children from families with wealth and status. It would be equally illogical to conclude that we should preemptively exclude socioeconomically disadvantaged children from receiving a formal education or pursuing professional careers. We would be appalled if our politicians justified such disparate treatment on grounds that children with a lower “risk of illiteracy” were more deserving, or on grounds that using such metrics would help us prevent illiterate people from entering fields such as medicine or law.

In Part I, I discussed the role of sovereign individuality in white culture. I described how white participants in qualitative studies were hostile toward the idea of being treated as members of a group instead of as individuals.<sup>282</sup> These study participants were indignant at the suggestion that they had received benefits on account of their whiteness.<sup>283</sup> Moreover, they complained that affirmative action effectively penalized them for the actions of other, racist people.<sup>284</sup> Along the same lines, we might expect these study participants to reject the notion that white people should be sentenced more harshly on account of their accumulated privilege. They would be presumably outraged if a judge aggravated their individual sentences according to the theory that they pose a greater risk because of their advantaged position in society. It would probably be little consolation to them if someone explained that they were not being treated differently on account of their whiteness per se, but rather indirectly, through factors such as having had a decent upbringing in a good neighborhood. To the contrary, those participants would almost certainly assert their unqualified right to be judged as individuals instead of as members of a group.

And yet, those same people are, in fact, being treated as members of group and sentenced differentially according to it. The only difference between the system in place and the one I just described is that privileged people receive the benefit of differential treatment in the American criminal justice system. Judges are permitted to deem offenders more appropriate for a community-based sentence on grounds that they scored low on an actuarial assessment.<sup>285</sup> The factors used in such assessments pertain less to the offender’s individual character and more to the offender’s status as a member of a particular statistical group.<sup>286</sup> The burden of this actuarial approach to justice falls on socioeconomically disadvantaged offenders.<sup>287</sup> The white cultural belief in rationality provides the basis for denying individual consideration to such offenders.<sup>288</sup> In white culture, a practice developed through an empirical process is, almost by definition, a fair practice.<sup>289</sup> That

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282. *See id.*

283. *Id.*

284. *Id.*

285. Monahan & Skeem, *supra* note 270.

286. *Id.*

287. *Id.*

288. *See supra* Part I.

289. *Id.*

belief discounts the mere possibility that a process that is evidence-based could be fundamentally unfair – especially when that process is ostensibly colorblind.

States have taken some measures to avoid these issues, but with limited success. In 2010, the Vera Institute conducted a national survey of probation, parole, and releasing authorities regarding their use of risk assessments.<sup>290</sup> The survey revealed that eighty-two percent of study respondents were assessing both needs and risks.<sup>291</sup> Modern actuarial assessments tend to distinguish between needs and risks according to the potential for intervention with respect to the factor at issue.<sup>292</sup> Thus, under such assessments, a “risk” is a static factor (such as criminal history and age at first offense), whereas a “need” is a dynamic factor (such as substance abuse or unemployment).<sup>293</sup> Probation departments that conducted presentence assessments indicated that those assessments were used to guide supervision levels.<sup>294</sup> California, for instance, has recently adopted a new standard of judicial administration that clearly indicates that it is improper for judges to use risk and needs assessments to determine whether to incarcerate a defendant.<sup>295</sup> Problematically, however, that standard instructs judges to consider such assessments as one factor in determining whether an offender can be supervised safely and effectively in the community.<sup>296</sup> The problem is that these two parts of the standard ultimately refer to the same decision: If a judge determines that an offender cannot be supervised safely in the community, then the judge will incarcerate the offender. The decision to incarcerate and the decision to grant a community-based sentence are two sides of the same coin. Yet this standard for judges indicates that they may properly consider actuarial assessment for the one and not the other, thus providing them with untenable, incoherent guidance for sentencing.

This problem cannot be eliminated by instructing that judges only use the results of an assessment to determine the level of supervision in the community, either. A high level of supervision increases the likelihood that offenders will be caught for violations of the conditions of their sentences, which in turn increases the chance of a revocation of supervised release.<sup>297</sup> Logically, the very same factors that render a person in need of increased supervision, e.g., unemployment and housing instability, will render it more difficult for that person to comply with terms of supervision such as staying in contact with the probation officer and submitting regular urine samples for testing. For instance, people with socioeconomic

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290. VERA, *supra* note 279, at 4.

291. *Id.*

292. *Id.* at 1–3.

293. *Id.* at 3.

294. *Id.* at 4.

295. Cal. Standards Jud. Admin. 4.35(e) (2018).

296. Cal. Standards Jud. Admin. 4.35(d)(3)(B) (2018).

297. Cecelia Klingele, *Rethinking the Use of Community Supervision*, 103 J. CRIM. L. & CRIMINOLOGY 1015, 1037–38 (2013).

disadvantage may lack resources such as reliable transportation or a working phone. Therefore, when judges determine the level supervision in the community, that decision still impacts the probability that an offender will ultimately serve time behind bars.

Certainly, the argument in favor of using actuarial assessments to determine which offenders should be incarcerated for purposes of incapacitation is less cognitively dissonant. Judges may use actuarial assessments to decide whether to imprison an offender for public safety because such assessments do, as a purely statistical matter, predict future criminal convictions. However, I identify at least three problems with this argument. First, the rate of criminal conviction is a questionable proxy for the rate of criminal involvement. Put crudely, even assuming identical offending, a young black man living in public housing projects in Harlem is going to have a longer rap sheet than a middle-aged white woman living on a farm outside Des Moines. That stark reality calls into question the validity of risk factors empirically derived from rates of subsequent conviction rather than rates of subsequent criminal conduct. Actual criminal conduct is, at present, difficult if not impossible to operationalize for purposes of research and actuarial prediction. Second, there is some ambiguity about the significance of a high or low score in assessing an offender's level of dangerousness. Specifically, a person could reasonably argue that a convicted offender with a lower score is more dangerous. The person with a higher score, by definition, falls within a pattern of conduct that can be predicted according to factors such as financial stability, family support, or emotional maturity. Because we can identify that pattern, we have the ability to actually intervene in the offender's life course. But when a person commits a crime for no apparent reason, we might infer that such a person is truly dangerous and antisocial. Finally, even assuming that a disadvantaged person is more dangerous, there is something morally repugnant about the idea of locking up disadvantaged offenders in order to protect society if society created the very circumstances rendering them dangerous in the first instance.

The amount of social and economic resources at offenders' disposal will certainly increase their rate of success in completing a community-based sentence, but that does not mean that such offenders are somehow more deserving of a community-based sentence. To conclude otherwise requires some cultural assumptions about the fair distribution of resources, similar to the assumptions that underlay the notion of meritocracy. The better approach is for judges to decide whether to grant community-based sentences according to the same principles that animate all other sentencing decisions: retribution, deterrence, incapacitation, and rehabilitation. The mere fact of socioeconomic advantage does not mean that such offenders deserve less punishment or require less deterrence, and the mere fact of socioeconomic disadvantage should not be used to infer that an offender will be unamenable to treatment or to justify imprisoning the offender. Of course, once a judge decides to grant a community-based sentence, it is important for that judge to have some information about what terms and conditions to attach to that

sentence. But the decision to grant a community-based sentence should be largely antecedent to the evaluation of criminogenic needs.

Some sentencing schemes provide for consideration of significant hardship to offenders or their families.<sup>298</sup> Under at least some theories of punishment, hardships that fall outside of the ordinary and natural consequences of criminal proceedings may affect the judge's assessment of an appropriate sentence, or simply call for mercy.<sup>299</sup> From the perspective of deterrence, for example, we need not punish as harshly a careless driver who caused an accident that resulted in the death of her beloved spouse.<sup>300</sup> The underlying utilitarian rationale is Bentham's principle of equal impact, which presumes that offenders who face significant collateral consequences from their convictions need less state-administered punishment to deter them from committing crimes.<sup>301</sup> That argument is susceptible to attack: An offender who learns that having a family to support, for instance, will shield him from the harshest punishment may actually be emboldened to commit future crimes. But more importantly, the notion of equal impact is troubling from a social justice perspective. In a fundamentally unequal society, it is difficult to even assess equality of impact. We can justifiably infer disparate impact from something as profound as the death of a spouse in the careless driving case. However, we cannot infer disparate impact from a mere loss of privileges unless comparing offenders who started from roughly equivalent positions of privilege. Even then, it is difficult to determine the degree of sentence reduction required to counterbalance the loss of privilege.

The unfairness of treating the loss of privilege as mitigating is particularly clear in the case of a college athlete. The collateral consequence to such an offender will probably entail the loss of the opportunity to attend a prestigious school and participate in competitive sports. Bearing this in mind, a judge may decide that the offender has been punished enough and impose a community-based sentence when the facts otherwise called for a prison sentence. Then, the former college athlete may attend a local community college and play sports recreationally while serving out his probationary sentence. Meanwhile, a young man who committed the same crime will languish in prison because he dropped out of high school to financially support his family through a minimum wage job. No one could credibly claim that the disparate sentencing of these two offenders resulted in an equality of impact.

Judges need to be very careful in distinguishing undue hardships from mere losses of privilege in order to avoid unfairly perpetuating socioeconomic inequalities. A collateral consequence such as losing a professional licensure should ordinarily have no bearing on the sentence imposed in court. To give an offender a

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298. See Hessick & Barman, *supra* note 207, at 200.

299. Kate Warner, *Racial and Social Background Factors*, in *MITIGATION AND AGGRAVATION AT SENTENCING* 137–39 (Julian V. Roberts ed., 2011).

300. *Id.*

301. Andrew Ashworth, *Re-evaluating the Justifications for Aggravation and Mitigation at Sentencing*, in *AGGRAVATION AND MITIGATION AT SENTENCING* 25–26 (Julian V. Roberts ed., 2011).

reduced sentence on account of such collateral consequences would be patently unfair to an offender denied such a source of mitigation because he never had a professional license to lose. In the Turner case, the judge cited the significant collateral consequences of Turner's conviction on his life as a reason for leniency.<sup>302</sup> In other words because Turner had already been suspended from Stanford and banned from participation in competitive swimming, he did not deserve the further pain of imprisonment. But this logic needlessly perpetuates privilege. There is nothing unfair about the fact that people who have more privileges in life stand to lose more when convicted of crimes. To believe otherwise would deny the fact that Turner's life as a student athlete was, truly, a privilege, as opposed to something that he deserved and to which he had become entitled.

#### CONCLUSION

The Turner case and other recent high publicity cases of sexual assault have brought renewed attention to persistent problems in the United States regarding race, class, and privilege in criminal sentencing. Some voices have demanded consequences for judges who impose sentences that appear unfair or unjust. Others have called for amendments to the law to temper the discretion provided to these judges in sentencing. In this Article, I have rejected both approaches to reform, arguing that the influence of socioeconomic privilege on sentencing is not the fault of a few impudent or imprudent judges. Rather, privilege is deeply embedded in the discourse about offender characteristic factors in sentencing in the United States. That practice has roots in the reformatory movement of the late nineteenth century, which in turn relied on the anthropological science of the day. The discourse rewards offenders who have socioeconomic privileges, inferring that they must have earned those privileges through industry and good character and, thus, that their criminal conduct must have been an aberration from their normal behavior. It construes most people as self-determining, free, and rational actors and thus fails to account for the myriad factors that may have directed the course of an offender's life.

The question of how to ensure fairness in sentencing has confronted and confounded the American criminal justice system for more than a century.<sup>303</sup> Debates have largely centered around the degree of discretion that should be afforded to judges.<sup>304</sup> That problem is fundamental to every area of applied law. Indeed, the whole common law world has for centuries grappled with the question of how to tradeoff the uniformity of prescriptive rules for the flexibility of discretionary standards.<sup>305</sup> In the late nineteenth and early twentieth centuries, American

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302. Levin, *supra* note 13.

303. *Supra* Part II.

304. *Supra* Parts II & III.

305. Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1710 (1976).

criminal justice reformers attempted to promote fairness in sentencing by significantly increasing judicial discretion.<sup>306</sup> After widespread criticism of that approach, jurisdictions across the nation changed their laws to curtail judicial discretion in sentencing.<sup>307</sup> The reformists of the 1970s and 1980s deeply distrusted judges, attributing racial disparities in sentencing to their nearly unbridled discretion.<sup>308</sup> New grid-based guidance systems required judges to follow a fairly mechanical process of determining sentences according to the offense's seriousness and the offender's criminal history.<sup>309</sup> That color-blind approach contributed to mass incarceration, especially of young African American men.<sup>310</sup> The contemporary trend of increasing a court's reliance on actuarial assessment also treats the problem of disparity as though it were primarily about containing the individual biases of judges.<sup>311</sup> To the contrary, research from the 1970s through the present day indicates relatively little direct and intentional racial discrimination in sentencing.<sup>312</sup>

To provide for fair and just sentencing, we must craft laws that will apply to the vast spectrum of criminal behavior, which reflects an infinite set of potential circumstances. It is impossible for us to prescribe, in advance, the precise sentence appropriate for each individual offender. On the other hand, it would be capricious for us to fail to provide some rules, or at least some fairly specific standards, to guide judges in sentencing. The ideal approach to sentencing necessarily involves some balance between legislative decree and judicial discretion. In a common law jurisdiction such as the United States, judges often refer to past discourses (in the form of court custom and judicial precedent) to guide their discretionary decisions, especially where those discourses have become incorporated into formal law.<sup>313</sup> In this Article, I have put forth an argument that, despite their intentions, judges perpetuate unfair bias in their sentencing practices because of their unawareness of the historical forces that have shaped their discourse about offender characteristics. That discourse emerged from a highly racist period of American history<sup>314</sup> and became institutionalized through case law (e.g., *New York v. Williams*), statutory law (e.g., 18 U.S.C. § 3661), and court practice (e.g., presentence investigations).<sup>315</sup> In that way, nineteenth-century ideas continue to influence how judges define offender characteristics, determine their relevance to sentencing, identify them as either aggravating or mitigating, and weigh them to render a sentence.

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306. *Supra* Part II.

307. *Supra* Part III.

308. *Id.*

309. *Id.*

310. TONRY, *supra* note 229, at 166–67, 190; FRASE, *supra* note 228, at 210–35.

311. *Supra* Part III.

312. Cassia Spohn, *The Effects of the Offender's Race, Ethnicity, and Sex on Federal Sentencing Outcomes in the Guidelines Era*, 76 LAW & CONTEMP. PROBS. 75, 102 (2013).

313. See, e.g., *Williams v. New York*, 337 U.S. 241, 247 (1949).

314. *Supra* Part II.

315. *Id.*

Thus, rather than once again retool the balance between legislative decree and judicial discretion, legislatures and courts in the United States need to change the dominant discourse in sentencing regarding offender characteristics. Judges currently assess offender characteristics in a way that privileges offenders with socioeconomic advantage. The most prominent factors that appear in sentencing discourse correlate to relative socioeconomic status, including criminal history, employment history, educational attainment, physical or mental health, substance abuse, prior good deeds or public service, family stability (with a focus on parents, siblings, spouse, and children), community ties or support, collateral consequences, and remorse.<sup>316</sup> These factors reflect the understanding of character held by nineteenth-century racial scientists, who described inferior character in terms of indolence, ignorance, absence of self-control, and lack of ambition, with little mention of negative attributes such as hatefulness, disloyalty, dishonesty, selfishness, greed, or corruption.<sup>317</sup> They also described bad character as inhering in the body and the mind, sometimes manifesting in mental illness or substance abuse.<sup>318</sup> Moreover, these factors also correspond with the values of white culture, namely, the rule of individual responsibility, patriarchy, and the Protestant ethic.<sup>319</sup> The factors downplay the role of broader social forces in an offender’s life; the existence of wider circles of familial support (such as grandparents, cousins, or even friends); and the achievement of non-material values such as mindfulness, emotional maturity, community solidarity, spiritual fulfillment, stewardship, or artistic expression.<sup>320</sup> They also construe good conduct as consisting of discrete acts of charity or goodwill rather than a continuous fulfillment of the duties that one owes to others.<sup>321</sup>

This focus on white cultural values is unfair and unjust insofar as it penalizes offenders not for their harmful criminal conduct, but for their failure to adopt white culture. But even putting cultural relativism aside, this focus is still unfair and unjust because it fails to properly account for the substantial socioeconomic barriers to accomplishing white cultural values for some individuals and groups in American society. American courts need to change their discourse about offender characteristics to eliminate their reliance on the incidents of socioeconomic status in assessing character. They need to create a more holistic approach to assessing offenders that fosters empathy for the offenders who deserve it, not for the offenders who have committed crimes despite having every advantage in life. Such an approach would increase justice for victims as well. When judges mitigate

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316. JAMES, *supra* note 246, at tbl. 1.

317. *Supra* Part II.

318. *Id.*

319. *Supra* Part I.

320. *Id.*

321. *Id.*

a sentence on account of socioeconomic disadvantage, they do not deny victims full account for their harm. Instead, they signal that the community needs to accept some degree of responsibility for both the offenders' behavior and the victims' harm. In that way, the victims receive more complete justice. The woman who Brock Turner assaulted, on the other hand, never received full account for the harm that she suffered. That is the injustice of privilege.