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IDEA LAB

Sentencing by the Numbers

By EMILY BAZELON

Imagine that you could stop a crime before it happened. Not by zapping a murderer seconds before he bloodied his victim, like the future cop played by Tom Cruise in "Minority Report," but by sitting calmly on the bench in judge's robes and perusing a single sheet of data. Armed with the stats, you could predict the likelihood that a convicted drug dealer or thief standing before you would be arrested again in the near future if you let him go free.

For decades, the science of predicting future criminality has been junk science -- the guesswork of psychologists who were wrong twice as often as they were right. But today, the detailed collection of crime statistics is beginning to make it possible to determine which bad guys really will commit new offenses. In 2002, the Commonwealth of Virginia began putting such data to use: the state encourages its judges to sentence nonviolent offenders the way insurance agents write policies, based on a short list of factors with a proven relationship to future risk. If a young, jobless man is convicted of shoplifting, the state is more likely to recommend prison time than when a middle-aged, employed woman commits the same crime.

Virginia's new sentencing method was born of a budget crunch. Faced with the prospect of building new prisons after passing a tough-on-crime measure in 1994, the Legislature asked the state sentencing commission to figure out which nonviolent offenders could be kept out of prison without posing a risk of committing new crimes. The commission's director, Richard Kern, and his staff members tracked 1,500 nonviolent drug, larceny and fraud offenders for three years after their release from prison. The researchers found that men were 55 percent as likely to be rearrested as women, and that offenders in their 20's were a much higher risk than those older than 40. Being unemployed made offenders more likely to commit another crime. So did being single.

Using these factors and a few others, including a defendant's adult and juvenile criminal records, Kern designed a simple 71-point scale of risk assessment as an aid for judges. If he scores 35 points or less, a defendant who would have otherwise gone to prison under Virginia sentencing guidelines is recommended for an alternative sanction like probation or house arrest. Anything above 35 means a recommendation of jail time. "Judges make risk assessments every day," Kern said. "Prosecutors do, too. Our model brings more equity to the process and ties the judgments being made to science."

Kern tested his model on prisoners released five years earlier and found that his ratings correctly predicted who would be reconvicted in three out of four cases. Of the felons who scored at or below the 35-point cutoff, 12 percent committed new crimes, compared with more than 38 percent for those who scored higher. After calculating that only a slight increase in recidivism would result, the state raised the 35-point cutoff to 38 points last July. Meanwhile, the growth of the state's prison population -- which used to be more than twice the national average -- has slowed nearly to a halt.

But if Virginia is pleased with itself, those who think punishment should reflect blameworthiness are not. They argue that by penalizing offenders differently for the same crimes, for reasons that have nothing to do with moral culpability, the state has abandoned the idea that punishment is a form of "just deserts" for wrongdoing. "If you're punishing people because of a bunch of factors that have nothing to do with blame, well, you're not in the business of doing justice anymore," said Paul Robinson, a law professor at the University of Pennsylvania. As he and like-minded legal thinkers see it, a woman in her 40's who deals drugs hasn't done anything more to earn trust or deserve a break than a male dealer in his 20's charged with the same offense. She has just gotten lucky, by falling into a group whose other members have generally proved a good public-safety bet. Meanwhile, jobless single men in their 20's start with 36 points on Virginia's risk scale, putting them on the cusp of going to prison before the crime they committed is even taken into consideration.

It's not a foregone conclusion that Virginia's method of sentencing is permissible under the Constitution, though no young male offender has brought a court challenge so far. Age and sex are what the law calls "immutable characteristics," and it's a fundamental principle of antidiscrimination law that the government has to tread carefully when it treats people differently because of qualities that are beyond their control. (Being married or holding a job are different, but not entirely so, since these statuses reflect people's opportunities as well as their preferences.)

Still, if the state has a compelling reason to discriminate based on age and sex, it sometimes can. And public safety is almost always deemed to be such a reason. The moral and legal picture would be cloudier, of course, if Virginia's sentencing recommendations were based on race. There's a statistical basis for doing that; Kern's study found that African-American felons committed new crimes at higher rates than whites. But Kern and his commission advised the state to stop short of taking race into account at sentencing, reasoning that it was merely serving as a proxy for socioeconomic disadvantage.

Virginia has tried to deflect criticism by emphasizing that judges are free to ignore the sentencing recommendations if they so please. By retaining such flexibility, Virginia has also reduced the danger that the predictions might have counterproductive consequences. This potential pitfall is what economists call a moral-hazard problem: drug dealers with low scores will realize that they're likely to avoid prison, and so have a greater incentive to sell more cocaine. (If that sounds unlikely, consider that some dealers already use child couriers to shield themselves.) If Virginia was to notice a jump in crime among middle-aged and elderly women, the state could adjust its predictions, Richard Epstein of the University of Chicago Law School points out. But allowing judges to send a little old lady to prison for a long time, if necessary, helps prevent the moral hazard in the first place.

Predicting risk can lead to harsh results. At the Legislature's request, Kern's commission tracked 579 sex offenders for an average of eight years after their release from prison. The small minority who scored above 43 on a 61-point scale were all arrested again, either for sex offenses or other crimes that harmed someone. So the sentencing commission recommended tripling the sentences for offenders in this group. For rape, a 13-year sentence would soar to 39 years.

For the sex offender who would have stayed clean despite the odds, that heavy sentence would seem unjust. But for states faced with overcrowded prisons and limited budgets, it may not be irrational.

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