LS 123 Data, Prediction, and Law

Meeting 9

**Prediction in Sentencing, Loomis, Folium Plug-Ins**

1. **Announcements: Data Investigation Project proposal due next Friday!**
   1. **Your teams should already be working on a draft**
   2. Start thinking about what you are interested in learning about; it can draw on any set of data (but should have some relationship to law or policy or the social world)
   3. key piece of the proposal checkpoint is the question—**what do you want to find ou**t; this has to be connected to the data you will use (which is in turn connected to getting it and cleaning it)
   4. having a question means that you will explore some relationship, which could be causal or could be predictive, e.g., do certain kinds of businesses promote crime? do releases of certain toxic chemicals increase mortality? (these are from [project notebooks](https://github.com/jdmarshl/LS_123_Projects))
   5. so finding a data set and providing visualizations is not sufficient, since you have not really explored a relationship (e.g., global temperatures are rising, but we need to know why)
   6. you may not be able to do something like create a regression model that is airtight because your observations are not strictly independent—that’s okay, you can acknowledge that and still move forward somehow
   7. Also, PSET 1—you should be underway in order to manage all the Pandas work, in addition to the mapping
      1. note that if you wanted to look at the .csv file in Excel or Numbers—you can’t! it has too many rows and so Excel will not open it
      2. Pandas is for manipulating these really large datasets
      3. **PSET 1** problems—since the dataset is big, you really have to run it locally using Anaconda (Datahub really has enough space just for labs), which can cause problems with dependencies
2. **Backgrounder: Wisconsin v. Loomis and the philosophy of sentencing** (just give highlights here in lecture but publish)

**I. Sentencing revolution**

1. **old model of judicial sentencing**

as Justice Abrahamson says in Loomis, punishment has a multitude of goals: retribution (“just desserts”), deterrence (both specific and general), rehabilitation (at least it used to) and incapacitation (which turned into the overriding goal in the last several decades)

even though juries make determinations of fact, judges get to decide how to punish—part of the common-law model, and typical of the civil law world too, except that mixed panels also typically sentence

* 1. **discretion in hands of judge, typically**

judges could consider any number of factors (and the whole range of goals that punishment has)

e.g. likelihood of rehabilitation, desirability of keeping an offender off the street, deterrent value of a sentence, an offender’s social support network, whether or not they went to trial on the charge… (think of Maximum Frank)

* 1. **common law emphasis on individual, leniency**

legacy of the justice tempered with mercy of the 18th century English model of criminal justice (only without so many capital crimes and without the capacity to send people to Australia)

prior to the tough on crime movement of the 1970s-80s (and into the 1990s), the focus in sentencing was on the individual

regime of indeterminate sentences: your term in prison depends on your behavior, willingness to reform

but the indeterminate sentence regime could be criticized for a number of reasons

arbitrary: radically different sentences for people convicted of similar crimes

discriminatory: white offenders got more lenient punishment because judges thought they would be less likely to reoffend, e.g.

also discriminatory because decisions about release were delegated to parole boards, which could themselves be discriminatory (for an example, see George Jackson’s Soledad Brother—Jackson was sentenced to a 1-to-life for armed robbery but was effectively kept in prison for his political views and oppositional posture;

he became a cause celebre (we will read a bit about it in a couple of weeks but you can look at Soledad Brother online) and a famous leader of both the emerging prisoners’ movement and the Black Panther Party

Jackson’s participation in prison unrest (including an indictment for the murder of a corrections officer at Soledad) and attempted escape led to a backlash in CA prison policy that continued for a couple of decades

so, indeterminate sentencing also got wrapped into the problem of prison unrest, official racism, ineffective govt. response to crime

penal populism: the public thought that criminals were getting sentences that were too lenient, and that those sentences (because they were indeterminate) were not transparent 🡪 “truth in sentencing”

1. **get tough & War on Drugs policies** 🡪 **mandatory sentencing**

with rising crime in 1970s came calls for more punitive response; this accompanied the punitive response to drug use (starting in the late 1960s in New York state but soon spreading)

crack cocaine produced an even greater punitive response in the 1980s

created a movement at the state level for “truth in sentencing” laws that eliminated indeterminate sentences (i.e. eliminate parole process) and often required serving some minimum proportion of a fixed term sentence (WI enacted its truth in sentencing law in 1998, and judges really resented the intrusion on their autonomy)

the reading by Judge Gertner focuses on the federal response—Federal Sentencing Guidelines

* 1. **punishment: deter, rehabilitate, incapacitate**

as a society there a number of goals that get wrapped up in the punishment decision, and they are not necessarily compatible

from the end of the 1950s through the mid 1970s or so the dominant goal was rehabilitation, so that offenders could resume their places as productive members of society

but there is the legacy of general deterrence passed down from Beccaria, and the specific deterrence inherent in punishment that judges in the indeterminate sentencing regime considered

and, part of the notion of criminal justice is retributive—society must ensure that the offender gets his “just desserts” for committing a crime (aside from whatever punishment would deter a person from offending or re-offending)

finally, society may want to take someone off the streets in order to ensure that he does not commit another crime--incapacitation

* 1. **mandatory sentencing tends toward incapacitate**

sentencing reform tended toward long sentences that removed people from society for an extended period

while anti-recidivism enhancements for sentences had been around for a long time (see Gideon v. Wainwright), the idea of incapacitating criminals became more prevalent

CA Three Strikes law (which really resulted from the initiative process and so is as populist as you can get) was one of the fruits of the movement toward incapacitation for violent and repeat offenders

* 1. **federal sentencing guidelines (Sentencing Commission)**

laudable goals of Sentencing Reform Act of 1984: eliminate unjust disparities, racial disparities, and inconsistency by replacing individual with expert judgment

but reform devolved into punitiveness (which I would argue was important to the Republican Party from 1968 forward: Nixon, Reagan, Bush I, even this year’s candidate)

SRA of 1984 passed after over decade of consideration in Congress, which started with improving the classification of criminal offenses and re-codification of offenses in the early 1970s

in 1975 Teddy Kennedy (the liberal’s liberal) proposed a sentencing commission to issue sentencing guidelines and reduce statutory maximum sentences

idea kicked around but was finally taken up (by Republicans too) as part of the Comprehensive Crime Control Act of 1984

so sentencing discretion at the federal level was codified as part of process that made minimum sentences harsher and made departure subject to appellate review

judges, wanting to avoid review, stuck to the guidelines

the guidelines themselves are made by an independent commission of experts but unlike other similar regulatory bodies, the Sentencing Commission is not subject to review for its rules

rulemaking, but without the sort of process afforded other kinds of rules under the Administrative Procedure Act—here the interested parties, other than the state, are ignored

so you can look at the Sentencing Commission as co-opted by the “penal populism” that was certainly present in statutes Congress passed in the 1980s

e.g. Anti Drug Abuse Act of 1986 imposed a sentencing differential of 100:1 for possession of crack as opposed to powder cocaine

why? mistaken belief that crack was more addictive than powder, that crack was uniquely dangerous, and possibly because crack (as opposed to powder) cocaine use was concentrated in the African American (as opposed to white) community

this disparity was ultimately undone by the Supreme Court in 2007 in Kimbrough v. U.S. based on United States v. Booker (which I am about to talk about) and by Congress in the Fair Sentencing Act of 2010 (well, it actually preserves a disparity in sentencing to 18:1 for possession)

meanwhile, the power of the Sentencing Commission to enforce sentencing rules was weakened by the Supreme Court in United States v. Booker in 2005

the Court ruled 5:4 that the federal sentencing guidelines violated the 6th Am. because federal judges may impose enhanced sentences based on facts never put before a jury

this made the Sentencing Guidelines advisory, but still reviewable by federal appeals courts

* 1. **States: increasing punitiveness (“three strikes”)**

anti-recidivism statutes enjoyed a renaissance, although with exceptionally harsh penalties (and there is that magic number three)

about half the states enacted three strikes laws in the 1990s

California’s three strikes law is well known, and was the result of a ballot initiative campaign that prompted the legislature and Gov. Wilson to enact essentially identical bill that was very punitive

CA voters revised three strikes in Prop 36 in 2012—third strike has to be a violent offense, and those tried under old statute could petition for reduction in term (post moral panic over crime, too)

1. **protection of individual from state** that’s arbitrary in its use of violence
   1. **Constitutional guarantees: Eighth Amend.**

protection from punishment that is cruel and unusual has included at times in the past grossly disproportionate sentences

also includes protection from prison mistreatment and very bad prison conditions

* 1. **Ewing v. California (2003)—not much protection after all?**

1. **change sentencing, change power**
   1. **prosecutor, not judge, makes decision by choosing charges**
   2. **judges can still be lenient (but appellate court & public deter it)**
   3. **discretion equals power: affect outcomes**
2. ***Loomis v. WI* – predictive model is just more info**
   1. **discussion: take a few minutes discussing following questions then we will throw it open**
      1. Is the use of risk-assessment tools to determine how intensively to supervise people outside of prison fair, or not? Why?  Provide at least two reasons.
      2. Is the use of risk-assessment tools in criminal sentencing fair or not?  Why?  Provide at least two reasons. Did you give a different answer from the previous question?  Explain.
   2. **not proper for risk assessment alone to determine sentence**

again, that is not what the models, including COMPAS, are designed to do—they are supposed to predict recidivism

BUT they are playing a part in the judge’s decision about whether to incarcerate an offender or put that person on probation

they just are not the only information the judge uses

* 1. **mandatory warnings (e.g. not for deciding sentence)**

warn the sentencing judge about limits of COMPAS score

algorithm that generates score is proprietary

they do not identify high risk individuals, only the group tendency of high-risk offenders

they may disproportionately classify members of minority groups as having higher risk of recidivism

not validated for WI offender population

not developed for sentencing but for treatment, supervision, and parole

* 1. **add information to what judges already did**

this makes the COMPAS risk assessment instrument sound good—what judges used to do by the seat of their pants now happens with some basis in science

1. **Contra-actuarialism**
   1. **objection:** prediction instruments are **contrary to logic of sentencing**
      1. **individualized, purposes beyond preventing return to system**

by definition statistical generalizations are not about individuals

they are estimates of the central tendency (i.e. the average) given certain inputs

* + 1. **how should prediction be used at sentencing?**

judges will be tempted to use risk assessment instruments because their results (accurate or not) will be reproducible

this gives a justification to decisions to deviate, especially downward, which may then lead to bias in leniency toward white, educated, employed offenders

of course, the presentencing investigation report already provided a rationale for the judge at sentencing, and this is just another piece, as the WI Sup Ct pointed out

paradox: you can’t really use this for sentencing but we know you will use it in the information on which you base your sentencing decision

* 1. **objection: prediction itself is unfair**
     1. **same prob. as before: legally permissible determinants (e.g. priors) interact with race, age, gender**

i.e. the people treated unfairly under the old regime may still be treated unfairly by how the risk assessment model treats attributes of the individual

e.g. gender—it is part of the prediction model, but it is not explicitly part of the sentencing decision (and so the WI Sup Ct in Loomis decided that the sentence was not based on invidious discrimination on account of gender)

* + 1. **use of predictors that offender cannot control**

how fair is it to use education, age, or gender as a predictor?

what about the interaction of the legal determinants with other facts about the offender like race? there’s not a correction for that in the model (I don’t think)

the offender and his lawyer are just presented with the risk assessment questionnaire, a risk score, and must offer evidence to rebut that score

* + 1. **“ratchet effect” of prediction (Bernard Harcourt)**

general problem with prediction is that it is self fulfilling (your predictive instrument is based on existing data, which means rearrest, which is biased)

e.g., if your risk score determines that you need more supervision, there will be more ways for you to fail and become a recidivist (justifying the high risk classification)

similarly, if policy focuses surveillance on a targeted population (for example, African Americans, or Latinos), then you will detect more offenders in the targeted population, and soon the targeted population accounts for a disproportionate number of people under supervision

law enforcement, wishing to be efficient in its allocation of resources, then focuses even more heavily on the targeted population, since it obtains a higher “hit rate” there

this is what Bernard Harcourt calls a ratchet effect—the initially targeted population winds up with a disproportion of criminal justice contacts and criminal records, all as a result of an initial difference in the amount of effort to detect and punish crime in the target population

1. **“humonetarianism” means prediction here to stay**
   1. **prediction** 🡪 **preventing recidivism is key goal (saves $)**
   2. **serves bureaucratic goals of efficiency, neutrality**
   3. **scientism? rationalize the process of mercy**

scientism because the prediction instruments only increase accuracy (by about 10% according to the piece in 538.com)

the instruments give the appearance of an evidence based approach, even if they are not much better than expert judgment

but when the process of deciding to punish is quantified, it seems more rational

1. **Barry-Jester et al. “Should Prison Sentences Be Based on Crimes that Haven’t** Been Committed Yet?”
   1. ARAIs are based on central tendency: about groups, not individuals
   2. Judges are typically not bound by ARAI predictions anyway
   3. There is a written record that explains the decision process (but compare Brock Turner case—there was a written record but it encoded decisions made about how serious the crime was that did not match societal beliefs about how serious the crime was)
   4. Strong interest in recidivism and incapacitation, rather than other punishment goals
   5. Use of ARAIs for bureaucratic reasons—we want to reduce the costs of supervision and so use less of it on lower risk offenders (the Philadelphia Adult Probation and Parole Dept experiment)
   6. using actuarial risk assessment might improve the decisions made by judges (and more specifically might make those decisions less punitive; usually risk assessment is used for diversion rather than prison sentences)
2. **lab**: Folium plugins
   1. today’s lab is aimed at making your mapping efforts interactive
   2. when might you want to do this? Environmental mapping, historical work (see e.g. Old Bailey Online and the linked tool “Digital Panopticon”—wouldn’t it be cool to locate people sentenced to transportation to Australia and include that in a search? Might be difficult but interesting.)
   3. presenting data like international human rights data; you may want to search for company names
   4. also, let’s take a few minutes for a coordination meeting with your project team