
Risk Reduction in Terrorism Cases: Sentencing and the Post-Conviction Environment

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Abstract

This article explores existing underpinnings in the United States criminal justice system for post-conviction risk reduction measures in terrorism cases. The purpose of these measures is to reduce the risk of future criminality by those already convicted of violent extremist offenses, thereby protecting public safety while also benefiting individuals and communities. Specifically, integrating specialized risk and needs assessments into terrorism cases at sentencing and during the corrections process constitutes one possible risk reduction measure. When administered to individuals convicted of providing material support or other terrorism-related offenses, rigorous evaluations can supply courts with information significant for sentencing and, when appropriate, structuring individualized rehabilitation approaches. In addition to assessment tools, rehabilitation and reintegration programs constitute potential risk reduction measures. Risk reduction programs would supplement and enhance, not replace, existing correctional methods including incarceration and supervised release. The District of Minnesota federal court is pioneering a program of disengagement and deradicalization for terrorism defendants, and other courts likely will develop similar approaches. However, appropriate judicial bodies have yet to adopt proactive roles in developing national policy guidance in this area. This article aims to further the discussion of reducing recidivism risk in terrorism cases by clarifying the legal and technical issues that would require resolution as prerequisites for the consideration and potential development of post-conviction programming.

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Introduction

As terrorism prosecutions evolve to counter current threats, including aggressive online recruitment and incitement to extremist violence, new interest is emerging in risk reduction measures that can be implemented following convictions. The sentencing,

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incarceration, and post-release phases of the criminal justice process all present opportunities to incorporate risk reduction measures, sometimes known as programs for disengagement and deradicalization. These approaches are not suitable for every case, and in terms of sentencing, may have the most plausible impact in prosecutions such as those based on material support for terrorism, where offenses are often non-violent and prosecutions are considered preemptive. In instances in which the underlying crime is predominantly preparatory and causes little or no actual harm, the defendant's level of continuing commitment to extremist violence in the future often acquires heightened significance at sentencing, especially when additional mitigating factors are present. In more egregious cases, defendants' crimes and culpability justify correspondingly lengthy prison terms under a retributive approach, and judges may grapple with fewer sentencing ambiguities.

In the months and years ahead, growing numbers of individuals convicted of terrorism-related offenses will complete their sentences and be released into society. Contemplating the reentry of this population affects the sentences handed down by judges at the outset, but courts face challenges in evaluating rigorously and consistently defendants' continuing propensities toward extremist violence. The federal justice system lacks infrastructure not only to assess, but also to reduce, the risk of recidivism for violent extremist offenders. This article discusses opportunities to prevent future violence after conviction, focusing on the potential role of specialized qualitative assessments at sentencing, as well as specialized rehabilitation and reintegration programs in prison and after release. Policymakers increasingly converge around the recognitions that military and law enforcement strategies are necessary but not sufficient to counter and prevent the spread of violent extremism, and that innovative, whole-of-society approaches should supplement traditional counterterrorism methods. In addition to community-based prevention and targeted interventions before individuals commit crimes of violent extremism, programs also should encompass post-conviction measures for rehabilitation and reintegration of qualifying offenders. While experts, judicial officials, and attorneys have observed the need for such programming, federal judicial bodies and agencies have not yet taken public action by

developing training, programming, or best practices. To the extent these agencies are considering the immediate need for programming and guidance, their efforts lack transparency.

Part I of this article provides a broad overview of charging, sentencing, and attendant challenges in recent terrorism cases, especially those prosecutions sounding in material support for terrorism. Part II focuses on the role of risk and needs assessments in the U.S. criminal justice system generally, and the potential contribution of such assessments in terrorism cases specifically. To provide context for the potential development of new initiatives in terrorism cases, Part II covers the existing background and usage of various types of assessments in the pre-trial, post-conviction, and sentencing contexts. Part III includes a case study of recent prosecutions in the District Court of Minnesota of individuals who sought to join the so-called Islamic State (ISIS), illustrating how structured professional judgment assessments may provide especially useful information during the sentencing phase of material support trials, and discussing how this approach could be broadened within the federal court system. Federal agencies including the U.S. Sentencing Commission, Administrative Office of the U.S. Courts, Federal Judicial Center, and Bureau of Prisons could take critical roles in promoting research and policies to support these efforts. Finally, Part IV provides a broad-brush overview of the basis for, and current status of, programs for in-prison rehabilitation and post-release reintegration tailored specifically for those convicted of terrorism offenses. Discussions in Parts II, III, and IV touch upon the respective roles of individual district court judges, and judicial entities and agencies within the justice system. Policy experts increasingly note the need for infrastructure to counter violent extremism both in civil society and at various stages of the criminal justice process. This article endeavors to further the conversation by clarifying the technical and legal foundations for such programming in the post-conviction realm.

I. Charging and Sentencing in Terrorism Cases

Surveying the Legislative Landscape

To evaluate sentencing in terrorism prosecutions, one must first determine which charges and convictions to include in the analysis.¹ In addition to innumerable definitions of terrorism existing outside the legal realm, federal law defines terrorism in multiple ways for a range of purposes.² In every case that factually appears linked to political or extremist violence, prosecutors decide whether to pursue federal or state charges, or both, and under which specific laws to proceed.³ Statutes expressly linked to terrorism provide the most appropriate prosecutorial tools in certain instances, while generally applicable criminal statutes – such as those pertaining to murder, firearms, conspiracy, racketeering, immigration fraud, false statements, or other criminal offenses – are preferred by prosecutors in others.⁴ Even when defendants are convicted of crimes other than terrorism, judges at sentencing may still apply a terrorism enhancement under the United States Sentencing Guidelines (discussed *infra*), which stiffens penalties for crimes with a terrorism nexus.⁵

¹ See Ari Shapiro, *Just How Many Terrorists has the U.S. Convicted?*, NPR (Feb. 11, 2010), <http://www.npr.org/templates/story/story.php?storyId=123571858> (accessed: December 25, 2017) (citing David Burnham of Syracuse University’s Transactional Records Access Clearinghouse for the proposition that studies of terrorism convictions rely on subjective decisions about which cases to include and “[d]epending on how you count... you get different answers.”)

² Nicholas J. Perry, *The Numerous Federal Legal Definitions of Terrorism: The Problem of Too Many Grails*, JOURNAL OF LEGISLATION, Vol. 30: Iss. 2, Article 3, 249 (May 1, 2004), <http://scholarship.law.nd.edu/cgi/viewcontent.cgi?article=1127&context=jleg>. (accessed: December 25, 2017)

³ See, e.g., Susan Hennessey, *The Good Reasons to Not Charge All Terrorists With Terrorism*, LAWFARE (Dec. 5, 2015), <https://www.lawfareblog.com/good-reasons-not-charge-all-terrorists-terrorism> (accessed: December 25, 2017); Michal Buchhandler-Raphael, *What’s Terrorism Got to Do With It?*, FLA. ST. U. L. REV., 811 (2012), <http://ir.law.fsu.edu/cgi/viewcontent.cgi?article=1020&context=lr>. (accessed: December 25, 2017)

⁴ See, e.g., Richard B. Zabel and James J. Benjamin, Jr., *In Pursuit of Justice: Prosecuting Terrorism Cases in the Federal Courts*, HUMAN RIGHTS FIRST 6 (May 2008), <https://www.humanrightsfirst.org/wp-content/uploads/pdf/080521-USLS-pursuit-justice.pdf> (accessed: December 25, 2017); *Terrorist Trial Report Card: September 11, 2001-September 11, 2011*, CENTER ON LAW AND SECURITY, NYU SCHOOL OF LAW, <http://www.lawandsecurity.org/wp-content/uploads/2011/09/TTRC-Ten-Year-Issue.pdf>. (accessed: December 25, 2017)

⁵ See U.S. SENTENCING GUIDELINES MANUAL § 3A1.4 (2015); Christina Parajon Skinner, *Punishing Crimes of Terror in Article III Courts*, YALE LAW & POL. REVIEW, Vol. 31: Iss. 2, Article 3, 334-35 (2012).

To provide a general framework for considering sentencing in federal terrorism cases, the following overview first highlights a selection of prohibitions that relate overtly to terrorism. Congress has passed key pieces of anti-terrorism legislation over the course of recent decades, including among others the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), following the Oklahoma City bombings, and the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (USA Patriot Act), passed after the 9/11 attacks. Chapter 113B of the federal criminal code, entitled “Terrorism,” codifies many of the anti-terrorism provisions in United States law.⁶ For example, the terrorism chapter includes the material support laws, key prosecutorial devices in recent terrorism cases. After considering the material support laws and other provisions in the terrorism chapter of the criminal code, the discussion below highlights some of the other statutes that prosecutors rely upon frequently in cases related to violent extremism, including general criminal law provisions.⁷ The section concludes by outlining the factors courts generally address in sentencing terrorism defendants.

The Terrorism Chapter of the Federal Criminal Code

The federal Criminal Code (Title 18 of the United States Code) contains some of the numerous definitions of terrorism in U.S. law.⁸ Within the terrorism chapter, 18 U.S.C. § 2331 defines the terms “international terrorism” and “domestic terrorism.”⁹ Without

⁶ 18 U.S.C. Ch. 113B: Terrorism, <http://uscode.house.gov/view.xhtml?path=/prelim@title18/part1/chapter113B&edition=prelim>. (accessed: December 25, 2017)

⁷ While a discussion of all terrorism-related federal laws in the U.S. exceeds the scope of this article, the discussion below highlights a selection of key provisions.

⁸ See Perry, *supra* note 2, at 256.

⁹ Specifically, 18 U.S.C. § 2331 defines “international terrorism” as activities that: (A) involve violent acts or acts dangerous to human life that are a violation of the criminal law of the U.S. or of any state, or that would be a criminal violation if committed within the jurisdiction of the U.S. or any state; (B) appear to be intended (i) to intimidate or coerce a civilian population; (ii) to influence the policy of a government by intimidation or coercion; or (iii) to affect the conduct of a government by mass destruction, assassination, or kidnapping; and (C) occur primarily *outside* the territorial jurisdiction of the U.S., or transcend national boundaries in the means by which they are accomplished, the persons they appear intended to intimidate or coerce, or the locale in which their perpetrators operate or seek asylum. The statute defines “domestic

designating conduct that meets these definitions as chargeable offenses *per se*,¹⁰ federal law references the definitions in several other statutory provisions. For example, federal laws reference the Section 2331 definitions in: expanding warrant authority in terrorism investigations, rewarding the furnishing of information on terrorism, and removing liability protections for volunteers and teachers who engage in international terrorism while in the scope of volunteering or teaching.¹¹ For conduct to amount to either international or domestic terrorism under Section 2331, it must incorporate an element of political intent. Specifically, the activities at issue must appear to be intended: (i) to intimidate or coerce a civilian population; (ii) to influence the policy of a government by intimidation or coercion; or (iii) to affect the conduct of a government by mass destruction, assassination, or kidnapping.

In the same chapter, Congress established extraterritorial jurisdiction when U.S. nationals are targets or victims of terrorism abroad.¹² Section 2332 makes it a crime for a person overseas to kill, or attempt or conspire to kill, a U.S. national, or to engage in physical violence with the intent or result of causing serious bodily injury to a U.S. national.¹³ Section 2332 also mandates a political motivation to substantiate the required terrorism nexus. In order for the U.S. government to pursue the case, the Attorney General, or his or her highest ranking subordinate with responsibility for criminal prosecutions, must certify in writing his

terrorism” as activities that: (A) involve acts dangerous to human life that are a violation of the criminal laws of the U.S. or of any state; (B) appear to be intended (i) to intimidate or coerce a civilian population; (ii) to influence the policy of a government by intimidation or coercion; or (iii) to affect the conduct of a government by mass destruction, assassination, or kidnapping; and (C) occur primarily *within* the territorial jurisdiction of the U.S.

¹⁰ While these definitions do not constitute standalone offenses, they have been incorporated into a variety of other statutory contexts affording broad liability-related implications. See Hennessey, *supra* note 3; Perry, *supra* note 2, at 257.

¹¹ Perry, *supra* note 2, at 257; see also, *How the USA PATRIOT Act Redefines “Domestic Terrorism,”* ACLU, <https://www.aclu.org/other/how-usa-patriot-act-redefines-domestic-terrorism>. (accessed: December 25, 2017)

¹² See 18 U.S.C. § 2332; Hennessey, *supra* note 3.

¹³ 18 U.S.C. § 2332; Offices of the United States Attorneys, *Terrorist Acts Abroad Against U.S. Nationals (18 U.S.C. 2332)*, CRIMINAL RESOURCE MANUAL, <https://www.justice.gov/usam/criminal-resource-manual-12-terrorist-acts-abroad-against-us-nationals-18-usc-2332>. (accessed: December 25, 2017)

or her judgment that that the offense “was intended to coerce, intimidate, or retaliate against a government or civilian population.”¹⁴

The terrorism chapter also defines the term, “federal crime of terrorism,” which holds particular significance at sentencing.¹⁵ The sentencing judge’s determination of whether an individual committed a federal crime of terrorism, based upon a preponderance of the evidence standard, determines whether the judge will apply the terrorism enhancement under the U.S. Sentencing Guidelines (*see* Part I, *infra*), potentially lengthening an offender’s sentence substantially.¹⁶ The definition also impacts the scope of the Attorney General’s investigative authority, in that he or she “shall have primary investigative responsibility for all Federal crimes of terrorism.”¹⁷ To constitute a federal crime of terrorism, conduct must violate at least one of a list of statutory provisions, and must be “calculated to influence or affect the conduct of government by intimidation or coercion, or to retaliate against government conduct.”¹⁸ The enumerated predicate offenses relate to acts such as the destruction of aircraft or aircraft facilities, violence at international airports, biological weapons, nuclear materials, weapons of mass destruction, and a long list of others.¹⁹ These enumerated crimes provide insight into what types of acts, when coupled with political intent, amount to terrorism from the perspective of the U.S. government.

In contrast, other offenses encompassed within the federal terrorism laws do not require a political motivation.²⁰ For example, Section 2332a criminalizes the act of using, or attempting, conspiring, or threatening to use, a weapon of mass destruction against a U.S. national while abroad, or by any person in the U.S. under specified circumstances. And

¹⁴ 18 U.S.C. § 2332(d).

¹⁵ *See* 18 U.S.C. § 2332b(g)(5).

¹⁶ *See* U.S. SENTENCING GUIDELINES MANUAL § 3A1.4; Perry, *supra* note 2, at 258; George D. Brown, *Punishing Terrorists: Congress, the Sentencing Commission, the Guidelines, and the Courts*, CORNELL JOURNAL OF LAW AND PUBLIC POLICY, Vol.23:517, 534-35 (2014), <http://www.lawschool.cornell.edu/research/JLPP/upload/Brown-final.pdf> (accessed: December 25, 2017), 534-35; Wadie E. Said, *Sentencing Terrorist Crimes*, OHIO STATE LAW JOURNAL, Vol. 75:3, 477 (2014), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2448361. (accessed: December 25, 2017)

¹⁷ 18 U.S.C. § 2332b(f).

¹⁸ 18 U.S.C. § 2332b(g)(5)(A).

¹⁹ 18 U.S.C. § 2332b(g)(5).

²⁰ *See* Perry, *supra* note 2, at 255.

Section 2332b criminalizes acts of terrorism transcending national boundaries. Individuals involved in conduct transcending national boundaries violate this provision if, among other things, they kill, kidnap, maim, or seriously assault any person within the U.S., or create a substantial risk of serious bodily injury by destroying property or structures within the U.S. Federal law criminalizes as terrorism several other acts, not discussed in detail here, without requiring political motivation. Some of those acts include: financial transactions with countries supporting international terrorism (2332d), bombings of places of public use (2332f), certain acts related to missile systems designed to destroy aircraft (2332g) and radiological dispersal devices (2332h).

The Material Support Provisions

Also located within the terrorism chapter of the criminal code, the material support laws form a strategic centerpiece of the United States Government's approach to prosecuting terrorists.²¹ Two key sections, 18 U.S.S. §§ 2339A and 2339B, criminalize the provision of "material support or resources" for terrorists and acts of terrorism. Congress has defined material support or resources for the purpose of both statutes to include, among other things: property, services, money, lodging, training, expert advice or assistance, safehouses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel, and transportation.²² The penalties for violating Sections 2339A and 2339B are, respectively, a maximum of 15 or 20 years imprisonment for each

²¹ See, e.g., Andrew Peterson, *Addressing Tomorrow's Terrorists*, JOURNAL OF NAT'L SECURITY LAW & POLICY, Vol. 2:297, 298 (2008), <http://jnsllp.com/wp-content/uploads/2011/01/peterson-finalpageproofs-12-2-08.pdf> (accessed: December 25, 2017), (material support concept became the "centerpiece of the legal war on terrorism"); Kelly A. Berkell, *Off-Ramp Opportunities in Material Support Cases*, HARVARD NAT'L SECURITY JOURNAL, Vol.8, 21-23 (2017), <http://harvardnsj.org/wp-content/uploads/2017/02/1.-Berkell.pdf>. (accessed: December 25, 2017)

²² See 18 U.S.C. § 2339A(b)(1).

count, “and, if the death of any person results,” then a maximum of life imprisonment. Individuals who violate these sections also may incur monetary fines of up to \$250,000.²³

Section 2339A sets forth criminal penalties for anyone who provides material support or resources intended for the preparation or carrying out of any crime enumerated therein. The list of underlying crimes, in turn, incorporates by reference all of the “federal crimes of terrorism” listed in Section 2332b.²⁴ Section 2339B, another frequently charged material support provision,²⁵ criminalizes the provision of material support to any Foreign Terrorist Organization (FTO) as designated by the Secretary of State.²⁶ The U.S. Supreme Court has held that even non-violent conduct intended to further humanitarian goals – such as training group members on the use of international law to resolve disputes peacefully – can violate the material support laws if the actions assist an FTO.²⁷ Foreign terrorist organizations “are so tainted by their criminal conduct that any contribution to such an organization facilitates that conduct.”²⁸ Joining or attempting to physically join and fight alongside a terrorist group, such as traveling to join ISIS in the conflict zone, constitutes the provision (or attempted provision) of personnel, and has been a frequently arising type of material support violation in recent years.²⁹ By May 2017, prosecutors had charged material support violations of Section 2339B

²³ 18 U.S.C. §§ 2339A, 2339B, 3571(b); *see also* Charles Doyle, *Terrorist Material Support: An Overview of §18 U.S.C. 2339A and § 2339B*, 9, 19-20 (Dec. 8, 2016), <https://fas.org/sgp/crs/natsec/R41333.pdf>. (accessed: December 25, 2017)

²⁴ Doyle, *supra* note 23, at 6; Charles Doyle, *Material Support of Terrorists and Foreign Terrorist Organizations: Sunset Amendments in Brief*, CRS REPORT FOR CONGRESS (March 17, 2006), CRS-4, CRS-5, <https://fas.org/sgp/crs/terror/RS22222.pdf>. (accessed: December 25, 2017)

²⁵ *See, e.g., Terrorist Trial Report Card, supra* note 4, at 13; Sameer Ahmed, *Is History Repeating Itself? Sentencing Young American Muslims in the War on Terror*, YALE LAW JOURNAL, Vol. 126, No. 5 (March 2017) <http://www.yalelawjournal.org/feature/is-history-repeating-itself-sentencing-young-american-muslims-in-the-war-on-terror> (“The material support statutes [18 U.S.C. §§ 2339A and 2339B] are two of the more widely used tools in the War on Terror”).

²⁶ 8 U.S.C. § 1189(a).

²⁷ *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705 (2010).

²⁸ *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705 (2010); Berkell, *supra* note 21, at 24.

²⁹ Attempts by Americans to physically join ISIS appear to have peaked in 2015; thereafter, this type of material support offense declined in conjunction with ISIS’ loss of territory. *See Director Comey Remarks During May 11 ‘Pen and Pad’ Briefing with Reporters*, FBI NAT’L PRESS OFFICE (May 11, 2016), <https://www.fbi.gov/news/pressrel/press-releases/director-comey-remarks-during-may-11-2018pen-and-pad2019-briefing-with-reporters> (accessed: December 25, 2017) (stating rate of American recruits traveling to fight with ISIS declined from about six to ten per month in the first half of 2015, to about one per month since August 2015); Paul Sonne, *Flow of Fighters to Iraq, Syria to Join Islamic State Has Slowed, U.S. Says*, WALL

in over 90 ISIS-related cases alone, far exceeding reliance on any other statute in ISIS-related cases.³⁰

Another provision, Section 2339, criminalizes the act of harboring or concealing any person whom the offender knows or reasonably believes to be a terrorist.³¹ The final two statutes in the terrorism Chapter, 18 U.S.C. §§ 2339C and 2339D, respectively disallow fundraising for terrorism and receiving military-type training from a designated FTO. These sections are related to the material support provisions described above, but are charged less frequently.³²

In the years after the 9/11 attacks, the material support laws increased dramatically in prominence, evolving from infrequently charged violations into core strategic tools. Prosecutors often apply these laws preemptively, as part of law enforcement's increased orientation toward identifying terrorists early and preventing attacks before they occur.³³ The Department of Justice has "shifted its focus from the prosecution of crimes already committed to the prevention of future terrorist acts."³⁴ The material support prohibitions encompass not

ST. J. (Apr. 26, 2016), <https://www.wsj.com/articles/flow-of-fighters-to-iraq-syria-to-join-islamic-state-has-slowed-u-s-says-1461701387> (accessed: December 25, 2017) (citing information from Air Force Maj. Gen. Peter Gersten that rate of foreign fighters traveling to join ISIS slowed from around 2,000 per month to 200 per month); see also Michael Isikoff, *Steep Decline in U.S. Recruits to ISIS, FBI Chief James Comey Says*, YAHOO NEWS (May 11, 2016), <https://www.yahoo.com/news/steep-decline-in-us-recruits-to-isis-fbi-chief-212138680.html> (accessed: December 25, 2017).

³⁰ *Statistical Analysis: ISIS Cases in the United States, 3/1/2014-5/8/2017*, CENTER ON NATIONAL SECURITY AT FORDHAM LAW,

<https://static1.squarespace.com/static/55dc76f7e4b013c872183fea/t/591095c89de4bb0a23961069/1494259145920/ISIS+Case+Update+5-8-2017.pdf>. (accessed: December 25, 2017)

³¹ 18 U.S.C. § 2339.

³² In addition to the fundraising prohibition in Section 2339C, a number of other statutes operate in the realm of terrorist financing. The International Emergency Powers Act's, for example, disallows the provision of funds, services, or support to a Specially Designated Global Terrorist under Executive Order 13224 (50 U.S.C. § 1701-1776).

³³ See, e.g., Zabel and Benjamin, *supra* note 4, at 17; Berkell, *supra* note 21, at 21, note 106.

³⁴ Peterson, *supra* note 21, at 302; see also, Norman Abrams, *The Material Support Terrorism Offenses: Perspectives Derived from the (Early) Model Penal Code*, JOURNAL OF NAT'L SECURITY LAW & POL., Vol.1:5, 7, http://jnslp.com/wp-content/uploads/2010/08/02_ABRAMS_MASTER.pdf (accessed: December 25, 2017) (the government often applies the material support laws in a preemptive manner, "as a basis for early intervention, a kind of criminal early-warning and preventive-enforcement device designed to nip the risk of terrorist activity in the bud"); Testimony of John Ashcroft before the Senate Committee on the Judiciary (Sept. 25, 2001),

<https://www.justice.gov/archive/ag/testimony/2001/0925AttorneyGeneralJohnAshcroftTestimonybeforetheSenat>

only substantive violations, but also attempts and conspiracies to provide material support, thus enhancing their preemptive power.³⁵ Even where the intended support is never actually provided, the penalties available for attempts and conspiracies are equal to those for substantive offenses (except that penalties increase if the death of any person results).

Crimes prosecuted under the material support statutes span a broad range of severity in light of the inclusion of attempts and conspiracies along with substantive violations, as well as significant variations in the nature of support provided in different cases. At the low end of the spectrum, infractions may include non-violent conduct that results in little or no benefit to any terrorist organization or act.³⁶ For example, individual efforts to raise small amounts of money to contribute to an FTO, whether successful or not, would constitute material support violations.³⁷ On the opposite end of the spectrum, material support violations may involve more direct links to violence, and more extensive cooperation with violent extremist individuals or groups. In 2015, Haroon Aswat pled guilty to material support charges stemming from his participation in a plot to establish a terrorist training camp for Al Qaeda on rural property in Bly, Oregon.³⁸ In another egregious example, Ali Saleh Kahlah al-Marri, a

[eCommitteetheJudiciary.htm](#) (accessed: December 25, 2017) (“We cannot wait for terrorists to strike to begin investigations and make arrests.... We must prevent first, prosecute second”).

³⁵ See Charles Doyle, *Federal Conspiracy Law: A Brief Overview*, CONGRESSIONAL RESEARCH SERVICE, 11, note 87 (Jan. 20, 2016) <https://fas.org/sgp/crs/misc/R41223.pdf>. (accessed: December 25, 2017)

³⁶ See George D. Brown, *Notes on a Terrorism Trial*, 4 HARV. NAT. SEC. J., 1, 3 (2013) (“the problem is that the defendants found at one end of this spectrum will not have done all that much”), <http://harvardnsj.org/wp-content/uploads/2013/01/Vol-4-Brown-FINAL.pdf> (accessed: December 25, 2017); Berkell, *supra* note 21, at 21-22.

³⁷ See *Terrorist Trial Report Card*, *supra* note 4, at 20 (referencing the act of raising \$300 for Al Shabab as a material support violation); Indictment at 4, *U.S. v. Hodzic, et al*, 4:15-cr-00049 (E.D. Mo. Feb. 5, 2015), <https://cchs.gwu.edu/sites/cchs.gwu.edu/files/downloads/Ramic%20Indictment.pdf> (accessed: December 25, 2017) (alleging conspiracy to provide material support and resources including currency and monetary instruments and property); Seamus Hughes and Bennett Clifford, *First He became an American – Then He Joined ISIS*, THE ATLANTIC, (May 25, 2017), <https://www.theatlantic.com/amp/article/527622/> (accessed: December 25, 2017) (referencing cases in which community networks provided material support); U.S. Department of Justice, *Fourteen Charged with Providing Material Support to Somalia-Based Terrorist Organization Al-Shabaab* (Aug. 5, 2010), <https://www.justice.gov/opa/pr/fourteen-charged-providing-material-support-somalia-based-terrorist-organization-al-shabaab> (accessed: December 25, 2017) (announcing arrest of Hawo Mohamed Hassan, a 63 year-old Minnesota woman, and Amina Ali, then aged 33, for among other things, raising money for Al Shabaab through door-to-door solicitations in Somali communities in the U.S.

³⁸ U.S. Department of Justice, *Terrorist Sentenced to 20 Years in Prison for Providing Material Support to Al Qaeda* (Oct. 16, 2015), <https://www.justice.gov/opa/pr/terrorist-sentenced-20-years-prison-providing-material-support-al-qaeda>. (accessed: December 25, 2017)

“sleeper” agent for Al Qaeda, pled guilty to one count of conspiracy to provide material support to Al Qaeda.³⁹ Al-Marri had attended terrorist training camps, researched the use of chemical weapons for maximum impact, taken direct instructions from Khalid Sheikh Mohammed, and traveled to central Illinois the day before the 9/11 attacks to plan and prepare for future acts of terrorism within the United States.⁴⁰

When offenders have plotted to provide material support to ISIS by joining the terror group in the conflict zone, but failed to make it there, authorities have responded with varying degrees of aggressiveness. Depending upon whether they perceive the conduct to be at the low or high end of the material support spectrum, law enforcement’s response has ranged from dropping the case entirely (*i.e.*, deciding not to prosecute), to prosecution resulting in a prison sentence as long as thirty-five years, with many sentences falling in between. In 2014, three teenage girls from Colorado who reportedly attempted to join ISIS in Syria were halted by German authorities in Frankfurt and sent back to Denver. The FBI detained the girls briefly, and then released them to their families without charges.⁴¹ Similarly, another Colorado teen was stopped at Denver International Airport in 2014 while attempting travel to join ISIS in Syria. Nineteen-year old Shannon Conley was charged, pleaded guilty to a material support charge, and was sentenced to four years in prison, three years of supervision, and 100 hours of community service.⁴² In a more recent case, prosecutors charged nine young men in Minnesota with conspiring to join ISIS, although they failed to do so. Six conspirators pled guilty; the remaining three went to trial. After all three were convicted at trial, 22-year old Guled Omar was sentenced to 35 years in prison, while Mohamed Farah and Abdirahman Daud, also 22, received 30-year sentences. These cases are discussed in detail in Part IV,

³⁹ U.S. Department of Justice, *Ali Al-Marri Pleads Guilty to Conspiracy to Provide Material Support to Al-Qaeda* (April 30, 2009), <https://www.justice.gov/opa/pr/ali-al-marri-pleads-guilty-conspiracy-provide-material-support-al-qaeda>. (accessed: December 25, 2017)

⁴⁰ *See id.*; David Andrew Weinberg, *Former Al Qaeda Operative Freed, Sent Home to Qatar*, LONG WAR JOURNAL (Jan. 20, 2015), http://www.longwarjournal.org/archives/2015/01/former_al_qaeda_oper.php. (accessed: December 25, 2017)

⁴¹ Michael Daly, *How ISIS’s Colorado Girls Were Caught*, DAILY BEAST (Oct. 22, 2014), <http://www.thedailybeast.com/how-isis-colorado-girls-were-caught>. (accessed: December 25, 2017)

⁴² Kirk Mitchell, *Arvada Teen Jihadist Wannabe Sentenced to Four Years in Prison*, DENVER POST (Jan. 23 2015), <http://www.denverpost.com/2015/01/23/arvada-teen-jihadist-wannabe-sentenced-to-four-years-in-prison/>. (accessed: December 25, 2017)

infra. For current purposes, it is sufficient to note that the penalties for attempting to join ISIS in Syria have ranged from non-existent (non-prosecution), to moderate prison sentences, to lengthy, decades-long prison sentences.

The different results in outwardly similar cases of attempting to travel to join ISIS appear related to the presence or absence of mitigating factors (such as youth, cooperation with authorities, and others), and the sentencing judge's view of whether the offender is likely to disengage from violent extremism. District court judges have struggled to ascertain the extent of individuals' commitments to violent extremist ideologies or groups. Notwithstanding general statutory guidance on sentencing considerations, judges benefit from little or no specific, official guidance on these highly fact-specific judgments about continuing commitments to violent extremism.⁴³ Part II, *infra*, addresses how risk and needs assessments could assist judges in the sentencing process, by bringing to light additional information outside the scope of a general presentence investigation report.

Judges cannot predict the future, nor does U.S. criminal law permit convictions or sentences for hypothetical future crimes. Yet the material support laws are often applied preventively, to preempt the commission of more violent crimes in the future. Judges and experts explain that assessing the offender's commitment to violent extremism already plays a critical role in sentencing; and this is consistent with the utilitarian or consequentialist theory of sentencing. Risk reduction measures therefore would not change the fundamental calculus that judges employ in sentencing, but would serve to make their analysis as systematic and evidence-based as possible. Most material support convictions do not result in life imprisonment. Offenders will continue to be released into society, bolstering the case for risk reduction measures during the corrections process.

⁴³ See Joanna Baltes *et al.*, *Convicted Terrorists: Sentencing Considerations and Their Policy Implications*, J. NAT'L SEC. L. & POL., 352-53, 55-57 (2016), http://jnslp.com/wp-content/uploads/2016/04/Sentencing_Considerations_and_Their_Implications_on_Foreign_Policy_2.pdf (accessed: December 25, 2017) (remarks by Hon. Gerald Bruce Lee and Karen Greenberg); Berkell, *supra* note 21, at 47.

Charging Trends in Terrorism Cases

The Transactional Records Access Clearinghouse (TRAC) at Syracuse University reported on the lead charges in “terrorism-international matters” filed in U.S. district courts during the first nine months of FY 2016.⁴⁴ Material support and related charges, including concealing or harboring terrorists, topped the list with the most counts filed. Other charges that TRAC ranked among the most frequent were: violations of the International Emergency Economic Powers Act (50 U.S.C. § 1705), control of arms exports and imports (22 U.S.C. § 2778), conspiracy to kill/kidnap/maim a person or damage public property outside of the U.S. (18 U.S.C. § 956), conveying false information and hoaxes concerning specified subjects (18 U.S.C. § 1038), engaging in interstate and foreign travel or transportation in aid of racketeering enterprises (18 U.S.C. § 1952), and engaging in prohibited acts relating to controlled substances (21 U.S.C. § 960).⁴⁵

In 2011, the Center on Law and Security at NYU School of Law (CLS) compiled a Terrorist Trial Report Card reviewing terrorism prosecutions over the previous ten-year period.⁴⁶ The report listed the twenty-five most frequent charges in terrorism cases. CLS found that the statute most frequently charged was 18 U.S.C. § 371, general criminal conspiracy. Following that were the two primary material support statutes, 2339A and 2339B, which were in turn followed by 18 U.S.C. § 1001, criminalizing certain false statements. Prosecutors in terrorism cases have also brought charges for money laundering, immigration violations, and other unlawful conduct. According to data published more recently by The Intercept, fifty percent of federal terrorism defendants since the 9/11 attacks have been charged with material support violations (although the report does not specify

⁴⁴ *One in Five International Terrorism Prosecutions in Eastern Virginia*, TRAC REPORTS (Aug. 8, 2016), <http://trac.syr.edu/tracreports/crim/431/> (accessed: December 25, 2017); see also, *Transactional Records Access Clearinghouse (About Us)*, TRAC, <http://trac.syr.edu/aboutTRACgeneral.html>. Terrorism charges are sometimes filed under state law. This article focuses on the federal context, while state court prosecutions fall outside of its scope.

⁴⁵ See *id.*

⁴⁶ *Terrorist Trial Report Card: September 11, 2001 – September 11, 2011*, *supra* note 4.

under which statutes), rendering material support charges the most common type by far filed in all federal terrorism cases.⁴⁷

As of June 2017, prosecutors in the United States had charged 128 individuals with ISIS-related offenses.⁴⁸ Accordingly, some recent reports have focused on charges pursued specifically in ISIS-related cases. The Center on National Security at Fordham law found that as of June 30, 2016, material support charges far outranked any other type of charges in ISIS cases. These were followed by charges for conspiracy to kill overseas (18 U.S.C. § 956). Other crimes, not specific to the terrorism context but charged with relative frequency in those cases, included weapons charges (18 U.S.C. §§ 922 and 924), false statements (18 U.S.C. § 1001), and general conspiracy (18 U.S.C. § 371).⁴⁹

Some have advocated for the more frequent use of treason charges in terrorism cases.⁵⁰ The crime of treason does constitute another possible charge in certain terrorism cases, but perhaps because of the difficulty of asserting it (*i.e.*, proving treason requires testimony from two witnesses to the defendant's performance of an "overt act," or a confession in open court), prosecutors have relied upon it infrequently to date.⁵¹

⁴⁷ See Trevor Aaronson and Margot Williams, *Trial and Terror*, THE INTERCEPT (data updated July 13, 2017), <https://trial-and-terror.theintercept.com/> (accessed: October 9, 2017) (addressing cases classified as international terrorism).

⁴⁸ *GW Extremism Tracker: ISIS in America*, GW PROGRAM ON EXTREMISM, <https://extremism.gwu.edu/isis-america> (accessed: December 25, 2017); see also Adam Goldman, Jia Lynn Yang, and John Muyskens, *The Islamic State's Suspected Inroads into America*, WASHINGTON POST (July 6, 2017), <https://www.washingtonpost.com/graphics/national/isis-suspects/> (accessed: December 25, 2017) (listing 111 individuals charged).

⁴⁹ *Case by Case: ISIS Prosecutions in the United States* 13 (March 1, 2014 – June 30, 2016), CENTER ON NATIONAL SECURITY AT FORDHAM LAW, <https://static1.squarespace.com/static/55dc76f7e4b013c872183fea/t/577c5b43197aea832bd486c0/1467767622315/ISIS+Report+-+Case+by+Case+-+July2016.pdf>. (accessed: December 25, 2017)

⁵⁰ See Amitai Etzioni, *Charge American Terrorists with Treason*, THE ATLANTIC (May 24, 2013), <https://www.theatlantic.com/national/archive/2013/05/charge-american-terrorists-with-treason/276199/> (accessed: December 25, 2017); Lauren Prunty (ed. Megan McKee), *Terrorism as Treason: US Citizens and Domestic Terror*, JURIST: STUDENT COMMENTARY (Sept. 11, 2011), <http://www.jurist.org/dataline/2011/09/lauren-prunty-domestic-terrorism-treason.php>. (accessed: December 25, 2017)

⁵¹ U.S. Const., Article III, Sec. 3, <https://www.law.cornell.edu/constitution/articleiii> (accessed: December 25, 2017) ("No person shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in open court"); see Zabel and Benjamin, *supra* note 4, at 6; Post Staff Report, *The Trouble with Prosecuting Treason*, NEW YORK POST (May 5, 2010), <http://nypost.com/2010/05/05/the-trouble-with-prosecuting-treason/>. (accessed: December 25, 2017)

Sentencing Considerations for Terrorism-Related Convictions

Following every conviction, judges consider several factors to determine an appropriate sentence. In addition to penalties specified in the charging statute, such as minimum or maximum terms, courts consider seven factors set forth in the Sentencing Reform Act of 1984 and codified at 18 U.S.C. § 3553. These mandatory considerations include: (1) the nature and circumstances of the offense and the history and characteristics of the defendant; (2) the need for the sentence to be sufficient, but not greater than necessary, to reflect the four primary purposes of sentencing, *i.e.*, retribution, deterrence, incapacitation, and rehabilitation; (3) the kinds of sentences available; (4) the sentencing range established by the sentencing guidelines and the types of sentences available under the guidelines; (5) any pertinent policy statement issued by the Sentencing Commission in effect at the time of sentencing; (6) the need to avoid unwarranted sentencing disparities among similarly situated defendants; and (7) the need to provide restitution to any victims of the offense.⁵²

Calculating the range established by the Sentencing Guidelines – the fourth required consideration under 18 U.S.C. § 3553 – is itself a complex and multi-step process. The Guidelines range is not binding, but any district court judge who departs from it runs the risk of reversal.⁵³ To calculate the Guidelines range, one must first determine the base offense level. Some offense types are associated with “specific offense characteristics” that can increase or decrease the base offense level. For example, if an offender brandishes a weapon during a robbery, the base offense level of 20 for robbery increases to 25, and if the firearm was discharged during the robbery, the level rises to 27.⁵⁴

⁵² *Federal Sentencing: The Basics*, UNITED STATES SENTENCING COMMISSION 2 (2015), https://www.usc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/miscellaneous/201510_fed-sentencing-basics.pdf (accessed: December 25, 2017); *see also*, 18 U.S.C. § 3553; Evidentiary Hearing Transcript, *United States v. Abdullahi Mohamud Yusuf*, 0:15-cr-00049-MJD-FLN, Document 661, 8:24-25, 9:1-2 (Sept. 26, 2016); Berkell, *supra* note 21, at 47.

⁵³ *United States v. Booker*, 543 U.S. 220, 245 (2005).

⁵⁴ *An Overview of the Federal Sentencing Guidelines*, UNITED STATES SENTENCING COMMISSION 1, https://www.usc.gov/sites/default/files/pdf/about/overview/Overview_Federal_Sentencing_Guidelines.pdf (accessed: December 25, 2017)

The court then considers any additional adjustments based on general aggravating and mitigating factors, which are common across offense types. For example, if the offender obstructed justice, the offense level increases by two.⁵⁵ On the other hand, if the judge determines that the offender accepted responsibility for the crime by pleading guilty or otherwise, the offender is eligible for a two-level decrease. Further, if a defendant accepts responsibility and declares an intention to plead guilty in a timely manner, and the offense level is greater than 15, then the government may request an additional one-level reduction.⁵⁶

In an adjustment specific to terrorism-related cases, the judge determines whether to apply a terrorism enhancement in Section 3A1.4 of the Guidelines. If employed, the enhancement increases the both the base offense level and the offender's criminal history category, resulting in a substantial increase in the sentence. In determining whether the enhancement applies, the judge employs a preponderance of the evidence standard to determine whether the offense "is a felony that involved, or was intended to promote, a federal crime of terrorism."⁵⁷ In turn, 18 U.S.C. § 2332b(g)(5) defines a federal crime of terrorism as one that: (A) is calculated to influence or affect the conduct of government by intimidation or coercion, or to retaliate against government conduct; and (B) violates any one of a long list of specified statutes. When applied, the enhancement increases the offense level by 12; if the result is less than 32, then the offense level is increased to 32. The enhancement also imposes a Criminal History Category of VI, regardless of the offender's actual criminal history or lack thereof.

In addition to determining a final offense level, the judge also determines the offender's criminal history category. This measurement is determined by calculating criminal history points under the provisions of Chapter Four of the Sentencing Guidelines. Consulting

⁵⁵ *Overview of the Federal Sentencing Guidelines*, *supra* note 54, at 2.

⁵⁶ *Overview of the Federal Sentencing Guidelines*, *supra* note 54, at 2.

⁵⁷ See U.S. U.S. SENTENCING GUIDELINES MANUAL § 3A1.4(a), *supra* note 5; Brown, *supra* note 16, at 535; James P. McLoughlin Jr., *Deconstructing United States Sentencing Guidelines Section 3A1.4: Sentencing Failure in Cases of Financial Support for Foreign Terrorist Organizations*, 28 LAW & INEQ. 51 (2010), 58, 80. Some have argued, however, that the enhancement has effectively become mandatory because appellate courts tend to treat it as the norm in all terrorism cases. See Brown, *supra* note 16, at 534-35.

the Sentencing Table, one can determine a final Guidelines sentencing range by finding the box on the grid where the offense level and criminal history category intersect.

After the Guidelines range is determined, the court may consider grounds for a departure or variance from the applicable range.⁵⁸ One common type of departure occurs when an offender provides substantial assistance to authorities in another investigation or prosecution. In that situation, the government may make a motion pursuant to §5K1.1 of the Sentencing Guidelines for a downward departure. Part K of Chapter 5 of the Sentencing Guidelines outlines additional reasons for upward and downward departures from the Guidelines range.

In formulating a sentence, the court generally benefits from a presentence report (PSR) that calculates the relevant Guidelines range, as well as any bases for departure from that range. A probation officer prepares the report based upon his or her presentence interview of the offender and an independent investigation. Prior to the sentencing hearing, the probation officer submits the PSR and confidential sentencing recommendation to the court. The defense and prosecution attorneys also receive copies of the PSR.⁵⁹

The Status of Terrorism Prosecutions in the United States

Statistics for federal terrorism cases prosecuted since September 11, 2001, are not entirely consistent in light of the necessity of making subjective judgments about which cases to include, and the ever-evolving nature of the data as cases arise and progress. The broad picture indicates that somewhere in the range of 800 people have been prosecuted for terrorism offenses,⁶⁰ and federal courts have convicted more than 620 individuals on terrorism-related charges.⁶¹ Recent sources indicate that between 352⁶² and 400⁶³ individuals

⁵⁸ *Federal Sentencing: The Basics*, *supra* note 51, at 16.

⁵⁹ *Federal Sentencing: The Basics*, *supra* note 51, at 6.

⁶⁰ Aaronson and Williams, *supra* note 47.

⁶¹ *Trying Terror Suspects in Federal Courts*, Fact Sheet, HUMAN RIGHTS FIRST (May 2017), <https://www.humanrightsfirst.org/sites/default/files/Trying-Terror-Suspects-In-Federal-Court.pdf>. (accessed: December 25, 2017)

charged or convicted for terrorism-related offenses currently are in prison in the United States, and more generally that incarcerated individuals include “380 linked to international terrorism and 83 tied to domestic terrorism.”⁶⁴ Releases of convicted offenders are set to continue apace over the coming years, with figures based on 2015 data indicating that 50 “homegrown violent jihadists” were to be released between January 2017 and the end of 2026.⁶⁵ Yet another expert reported in March 2017 that “over 100 terrorist prisoners are due to be released over the next few years.”⁶⁶

Focusing on the narrower universe of terrorism cases with an ISIS connection, as of November 2017, 147 individuals had been charged in the U.S. with ISIS-related offenses since 2014, when such arrests began.⁶⁷ The average age of these individuals at charging is 28.⁶⁸ Eighty-eight of the individuals have pleaded or been found guilty, and the average sentence length is 13.5 years.⁶⁹ As of June 2016, 46 individuals had been convicted in ISIS-related prosecutions, their average age was 26 (while the most common age among them was 20) and the average prison sentence was 9.2 years.⁷⁰ The relative youth of many of these defendants, coupled with their average sentence lengths, make clear that many defendants in terrorism cases will be released from prison before attaining middle age.

⁶² Aaronson and Williams, *supra* note 47.

⁶³ *Trying Terror Suspects in Federal Courts*, *supra* note 61.

⁶⁴ Deb Riechmann, *Should Springing of US Terrorism Convicts Alarm Americans?* ASSOCIATED PRESS (Aug. 6, 2017), <https://apnews.com/0d08df6f540f4dc291314396534fcf31/Should-springing-of-US-terrorism-convicts-alarm-Americans?> (accessed: December 25, 2017)

⁶⁵ See Riechmann, *supra* note 64; see also, Statement of Jerome P. Bjelopera, *Terror Inmates: Countering Violent Extremism in Prison and Beyond*, CONGRESSIONAL RESEARCH SERVICE, Figure 1 (Oct. 28, 2015 Hearing), <http://docs.house.gov/meetings/HM/HM05/20151028/104102/HHRG-114-HM05-Wstate-BjeloperaJ-20151028.pdf>. (accessed: December 25, 2017)

⁶⁶ Eric Rosand, *We Need to Prepare for the Inevitable: When Terrorists Leave Prison*, TIME (March 28, 2017), <http://time.com/4715307/terrorists-get-out-of-prison/>. (accessed: December 25, 2017)

⁶⁷ *GW Extremism Tracker: ISIS in America*, PROGRAM ON EXTREMISM, GEORGE WASHINGTON UNIVERSITY (November 2017 Snapshot), <https://extremism.gwu.edu/isis-america>. (accessed: December 25, 2017)

⁶⁸ *GW Extremism Tracker: ISIS in America*, *supra* note 67.

⁶⁹ *GW Extremism Tracker: ISIS in America*, *supra* note 67.

⁷⁰ *Case by Case: ISIS Prosecution in the United States*, CENTER ON NATIONAL SECURITY AT FORDHAM LAW (March 1, 2014-June 30, 2016), <https://static1.squarespace.com/static/55dc76f7e4b013c872183fea/t/577c5b43197aea832bd486c0/146776762231/ISIS+Report++Case+by+Case++July2016.pdf>. (accessed: December 25, 2017)

II. The Use of Risk and Needs Assessments in Sentencing for Terrorism Offenses

Risk and Needs Assessments in Federal Courts

Reviewing the current roles of risk and needs assessments in the criminal justice system provides a useful backdrop against which to consider the potential role for new, specialized evaluations in terrorism cases. The federal justice system has relied upon forms of predictive analysis for decades.⁷¹ Policy rationales supporting the use of risk and needs assessments include safeguarding the public, and allocating correctional resources for maximum beneficial impact. Risk and needs assessments may inform decisions and recommendations by judicial officials, probation officers, and others, at various stages of the criminal process. Before trial, assessments factor into determinations about the requirement and conditions of pretrial detention or supervision, including decisions about bail. At sentencing, assessments can help courts evaluate the risk of recidivism as one factor affecting the length and type of sentence imposed; this sentencing application is considered more controversial, but is relied upon or recommended in some states.⁷² In the post-sentencing

⁷¹ Jonathan J. Wroblewski Letter to the Honorable Patti B. Saris, 3 (July 29, 2014), <http://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/20140729/DOJ.pdf>. (accessed: December 25, 2017)

⁷² See Jordan M. Hyatt and Steven L. Chanenson, *The Use of Risk Assessment at Sentencing: Implications for Research and Policy*, VILLANOVA LAW/PUBLIC POLICY RESEARCH PAPER NO. 2017-1040 (Working Paper Series 193), 4-6 (Dec. 2016), <http://digitalcommons.law.villanova.edu/cgi/viewcontent.cgi?article=1201&context=wps> (accessed: December 25, 2017) (noting that Virginia was the first jurisdiction to systematically adopt at-sentencing risk assessment statewide, and that “[n]o single description can fully capture the diversity of approaches to at-sentencing risk assessment”); Nathan James, *Risk and Needs Assessment in the Criminal Justice System*, CONGRESSIONAL RESEARCH SERVICE 14 (Oct. 13, 2015), <https://fas.org/sgp/crs/misc/R44087.pdf> (accessed: December 25, 2017) (referencing research suggesting that best prospective use for assessments in sentencing would be to screen out low-risk offenders); see also, John Monahan and Jennifer L. Skeem, *Risk Assessment in Criminal Sentencing*, ANNUAL REV. OF CLINICAL PSYCHOLOGY, 489, 496-497 (2016), <http://risk-resilience.berkeley.edu/sites/default/files/journal-articles/files/annurev-clinpsy-021815-092945.pdf> (accessed: December 25, 2017); *Algorithms in the Criminal Justice System*, ELECTRONIC PRIVACY INFORMATION CENTER, <https://epic.org/algorithmic-transparency/crim-justice/> (accessed: December 25, 2017); Anna Maria Barry-Jester, Ben Casselman, and Dana Goldstein, *Should Prison Sentences Be based On Crimes That Haven't Been Committed Yet?* FIVETHIRTYEIGHT (Aug. 4, 2015), <https://fivethirtyeight.com/features/prison-reform-risk-assessment/>.

phase, assessments can affect eligibility for rehabilitation programming, the structure of that programming, and decisions about supervised release.⁷³

Assessment tools may focus on risk factors, which increase an individual's likelihood of offending, and/or protective factors, which can reduce this likelihood and provide pathways out of criminal behavior.⁷⁴ While risk assessments predict and describe an individual's likelihood of committing future crimes, needs assessments identify the individual's criminogenic factors or characteristics that can be addressed to reduce the likelihood of recidivism through treatment and services.⁷⁵ The risk-needs-responsivity (RNR) model has become a widely accepted paradigm in the United States,⁷⁶ and incorporates the principles of: assessing risk and matching supervision and treatment levels to risk levels, addressing dynamic criminogenic needs, and providing treatment that is responsive to the offender's abilities and learning style.⁷⁷

Assessments take different forms, including structured and unstructured approaches. Structured or actuarial risk assessment tools utilize research from the social sciences to help measure the likelihood of recidivism, employing statistical probabilities based on factors unique to each individual.⁷⁸ Some risk factors are static and unchanging (*e.g.*, age at the time of the offense, employment history, and prior criminal record) while other factors are dynamic and changeable (*e.g.*, attitudes and associations). More advanced instruments typically

⁷³ See, *e.g.*, James, *supra* note 72, at 4.

⁷⁴ See *Risk Assessment Instruments Validated and Implemented In Correctional Settings in the United States: An Empirical Guide* 6, <https://csgjusticecenter.org/wp-content/uploads/2014/07/Risk-Instruments-Guide.pdf> (accessed: December 25, 2017) (drawn from Sarah L. Desmarais and Jay P. Singh, *Risk Assessment Instruments Validated and Implemented in Correctional Settings in the United States* (New York: Council of State Governments Justice Center, 2013), <https://csgjusticecenter.org/wp-content/uploads/2014/07/Risk-Assessment-Instruments-Validated-and-Implemented-in-Correctional-Settings-in-the-United-States.pdf>) (accessed: December 25, 2017) <https://csgjusticecenter.org/wp-content/uploads/2014/07/Risk-Instruments-Guide.pdf> (accessed: December 25, 2017), 6.

⁷⁵ See, *e.g.*, *Risk/Needs Assessments for Youths*, OJJDP LITERATURE REVIEW 1 (Jan. 2015), <https://www.ojjdp.gov/mpg/litreviews/RiskandNeeds.pdf>. (accessed: December 25, 2017)

⁷⁶ James, *supra* note 72, at Summary.

⁷⁷ See *id.* at 5-6; Pamela Casey, Roger Warren, Jennifer Elek, *Using Offender Risk and Needs Assessment Information at Sentencing: Guidance for Courts from a National Working Group*, NATIONAL CENTER FOR STATE COURTS 4-6 (2011), <http://www.ncsc.org/~media/Microsites/Files/CSI/RNA%20Guide%20Final.ashx>. (accessed: December 25, 2017)

⁷⁸ See, *e.g.*, Barry-Jester, *et al.*, *supra* note 72.

incorporate both static and dynamic factors. Structured tools involve plugging variables into an algorithm that produces a conclusion about the offender's risk level.⁷⁹ In contrast, unstructured assessments rely heavily on clinical methods, affording maximum deference to the evaluator's professional judgment. The structured professional judgment approach falls in between those two poles, allowing evaluators to consider specific risk factors from the structured tool's calculus while simultaneously employing their own professional judgment.⁸⁰

Recent years have witnessed a growing interest in using risk assessments at various stages of the criminal justice process. In some ways, the increased use of these tools represents a return to past sentencing philosophies. The U.S. Department of Justice, Criminal Division, has noted that a rehabilitative model of sentencing and corrections, based on predicting future behavior, "dominated sentencing and corrections policy in the U.S. until the late 20th Century."⁸¹ In the 1970s and 80s, however, reformers' emphasis shifted to truth-in-sentencing, an effort to diminish unwarranted sentencing disparities and their discriminatory impacts, and ensure that sentences were based primarily on the crimes committed.⁸² The Sentencing Reform Act of 1984 established the U.S. Sentencing Commission, which in turn promulgated the federal Sentencing Guidelines in 1987.⁸³ Congress also passed laws imposing mandatory minimum sentences for certain crimes, including the Armed Career Criminal Act of 1984 and the Anti-Drug Abuse Act of 1986, and the number of mandatory

⁷⁹ See, e.g., *Federal Probation Sharpens Tools for Detecting Violent Offenders*, U.S. COURTS (Feb. 9, 2017), <http://www.uscourts.gov/news/2017/02/09/federal-probation-sharpens-tools-detecting-violent-offenders> (accessed: December 25, 2017); Julia Angwin, et al., *Machine Bias*, PRO PUBLICA (May 23, 2016), <https://www.propublica.org/article/machine-bias-risk-assessments-in-criminal-sentencing>. (accessed: December 25, 2017)

⁸⁰ See *Federal Probation Sharpens Tools for Detecting Violent Offenders*, *supra* note 79; Desmarais, *supra* note 74, at 6.

⁸¹ Wroblewski Letter, *supra* note 71, at 3.

⁸² *Id.* at 4.

⁸³ See Paul J. Hofer, et al., *Fifteen Years of Guidelines Sentencing*, UNITED STATES SENTENCING COMMISSION iv (Nov. 2004), https://www.usc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/miscellaneous/15-year-study/15_year_study_full.pdf (accessed: December 25, 2017) (guidelines could not be fully implemented until after the Supreme Court's ruling in *Mistretta v. U.S.*, 488 U.S. 361 (1989)).

minimum laws continued to increase thereafter.⁸⁴ The Sentencing Guidelines were adopted to emphasize fairness, consistency, punishment, incapacitation, and deterrence in sentencing.⁸⁵ However, implementation of the Sentencing Guidelines was followed by an unprecedented upsurge in the U.S. prison population, while racial disparities in sentencing persisted and even increased.⁸⁶ The total number of inmates under the Bureau of Prisons' jurisdiction increased from roughly 25,000 in 1980 to over 205,000 in 2015.⁸⁷

In 2005, the Supreme Court decided *U.S. v. Booker*, finding that mandatory application of the Sentencing Guidelines violated the Sixth Amendment right to a trial by jury. The Court excised the statutory provisions that made the Guidelines mandatory, and rendered the Guidelines advisory instead.⁸⁸ As the tide shifts away from the sentencing reform movement of the 1980s and its emphasis on incarceration over rehabilitation, practitioners and policymakers are seeking a more outcome-directed model.⁸⁹ The resurgent

⁸⁴ See Evan Bernick and Paul J. Larkin, Jr., *Reconsidering Mandatory Minimum Sentences: The Arguments for and Against Potential Reforms*, THE HERITAGE FOUNDATION 2 (Feb. 10, 2014), <http://www.heritage.org/crime-and-justice/report/reconsidering-mandatory-minimum-sentences-the-arguments-and-against> (accessed: December 25, 2017); see also, *Quick Facts: Mandatory Minimum Penalties*, U.S. SENTENCING COMMISSION, http://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Quick_Facts_Mand_Mins_FY14.pdf. (accessed: December 25, 2017)

⁸⁵ *The Impact of United States v. Booker on Federal Sentencing*, Fact Sheet, DEPARTMENT OF JUSTICE (March 15, 2006), https://www.justice.gov/archive/opa/docs/United_States_v_Booker_Fact_Sheet.pdf (accessed: December 25, 2017); see also, Hofer, *supra* note 83, at iv.

⁸⁶ See Bernick *supra* note 84, at 1; Hofer, *supra* note 83, at 115-17. Although racial disparities in sentencing have been well-documented and persistent, the relationship of those disparities with the Sentencing Guidelines is less clear. One study by the U.S. Sentencing Commission found that racial disparities increased after the Supreme Court's *Booker* decision rendered the Guidelines only advisory, but other sources dispute this. See Sonja B. Starr and M. Marit Rehavi, *Mandatory Sentencing and Racial Disparity, Assessing the Role of Prosecutors and the Effects of Booker*, YALE LAW JOURNAL 2 (2013), <http://repository.law.umich.edu/cgi/viewcontent.cgi?article=2497&context=articles> ("Contrary to other studies (and in particular, the dramatic recent claims of the U.S. Sentencing Commission), we find no evidence that racial disparity has increased since *Booker*, much less because of *Booker*").

⁸⁷ Nathan James, *The Federal Prison Population Buildup: Options for Congress*, CONGRESSIONAL RESEARCH SERVICE 1 (May 20, 2016), <https://fas.org/sgp/crs/misc/R42937.pdf>. (accessed: December 25, 2017)

⁸⁸ See *Booker*, 543 U.S. 220; *Final Report on the Impact of United States v. Booker on Federal Sentencing*, UNITED STATES SENTENCING COMMISSION iv (March 2006), http://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/submissions/200603-booker/Booker_Report.pdf. (accessed: December 25, 2017)

⁸⁹ See Eric Holder, Remarks at the National Association of Criminal Defense Lawyers 57th Annual Meeting and 13th State Criminal Justice Network Conference (Aug. 1, 2014), <https://www.justice.gov/opa/speech/attorney-general-eric-holder-speaks-national-association-criminal-defense-lawyers-57th>. (accessed: December 25, 2017)

interest in risk assessment in the corrections process in recent years derives in part from a growing demand to reduce prison populations and utilize budgetary resources more efficiently. Advocates perceive reliance on risk assessments in sentencing as one step toward unwinding mass incarceration in the U.S. without simultaneously jeopardizing the historically low national crime rate.⁹⁰

The growing reliance on risk assessments also reflects a trend emphasizing data-driven analytics and evidence-based policies across professions.⁹¹ Former Attorney General Eric Holder noted in a 2014 speech:

Over the past decade, we've seen an explosion in the practice of using aggregate data to observe trends and anticipate outcomes. In fields ranging from professional sports, to marketing, to medicine; from genomics to agriculture; from banking to criminal justice, this increased reliance on empirical data has the potential to transform entire industries – and, in the process, countless lives – depending on how this data is harnessed and put to use.... It's increasingly clear that, in the context of directing law enforcement resources and improving reentry programs, intensive analysis and data-driven solutions can help us achieve significant successes while reducing costs.⁹²

Notwithstanding the trend toward evidence-based assessments, critics have raised significant concerns. When assessments are based on static and unchangeable factors in an individual's background, they may result in sentences that exacerbate racial disparities in criminal justice.⁹³ Additional concerns relate to fundamental fairness, and the goal of ensuring that sentencing decisions are based on the crimes and culpability of the individual offender, rather

⁹⁰ See Monahan and Skeem, *supra* note 72, at 491.

⁹¹ See Holder, *supra* note 89; Wroblewski, *supra* note 71, at 2.

⁹² See Holder, *supra* note 89.

⁹³ See Angwin, *supra* note 79.

than hypothetical future crimes and aggregate group statistics.⁹⁴ As policymakers continue to study the benefits and drawbacks of reliance upon risk assessment instruments, they may reach different conclusions for various contexts and criminal offense types. In the aggregate, terrorism offenders exhibit significant differences from other criminal offenders, and the factors considered predictive of the likelihood of recidivating are also different in the context of violent extremism.⁹⁵ As a policy matter, terrorist incidents contrast with other crimes in their ability, at times, to profoundly impact society, and to exert far-reaching national security ramifications. Accordingly, policymakers should specifically study the potential advantages and pitfalls of risk and needs assessments in the particular context of terrorism cases.

Pre-Trial Assessments

Pretrial risk assessment instruments have been developed and tested in various jurisdictions since at least the early 1960s,⁹⁶ but actuarial risk assessments are relatively new to the federal pretrial services system.⁹⁷ In the pretrial context, risk assessments address the likelihood that defendants will fail to appear in court, will present a danger to the community, or will be rearrested. Assessing these factors helps judicial officers (*i.e.*, judges, magistrates, commissioners, and hearing officers) determine whether individuals who have been arrested should be placed in detention or released into the community while awaiting trial. If the judicial officer decides to release the defendant, he or she also determines the conditions (if

⁹⁴ See, e.g., Dawinder S. Sidhu, *Moneyball Sentencing*, 56 Boston College Law Review 671, 675 (2015), http://digitalrepository.unm.edu/cgi/viewcontent.cgi?article=1305&context=law_facultyscholarship. (accessed: December 25, 2017)

⁹⁵ See D. Elaine Pressman and John Flockton, *Violent Extremist Risk Assessment*, in PRISONS, TERRORISM AND EXTREMISM 124-25 (Andrew Silke ed., Routledge 2014) (noting that risk indicators used in the Violent Extremism Risk Assessment protocol (Version 2) (VERA-2), “differ fundamentally from the risk indicators used for non-ideologically motivated violent offenders”).

⁹⁶ See Cynthia A. Mamalian, *State of the Science of Pretrial Risk Assessment*, PRETRIAL JUSTICE INSTITUTE 7 (March 2011), https://www.bja.gov/publications/pji_pretrialriskassessment.pdf. (accessed: December 25, 2017)

⁹⁷ Timothy P. Cadigan, James L. Johnson, and Christopher T. Lowenkamp, *The Re-Validation of the Federal Pretrial Services Risk Assessment (PTRA)*, FEDERAL PROBATION 4 (September 2012) http://www.ussc.gov/sites/default/files/pdf/training/annual-national-training-seminar/2014/PTRA_2012.pdf. (accessed: December 25, 2017)

any) for doing so.⁹⁸ Conditions of release known as alternatives to detention include substance abuse testing and treatment, third-party custody, halfway house placement, location monitoring, and mental health treatment,⁹⁹ but these conditions are not exhaustive.¹⁰⁰ The federal system, as well as the District of Columbia and at least twenty-two states, authorize the use of pretrial preventive detention in some circumstances.¹⁰¹

Pretrial risk assessments provide critical information to judicial officers as they make decisions concerning criminal defendants awaiting trial. These officers are tasked with ensuring the defendant's attendance at court proceedings and protecting the community, victims, and witnesses from possible further crimes, while imposing the least restrictive conditions under which it is practicable to hold the defendant.¹⁰² Judicial policy favors holding defendants before trial under the least restrictive conditions practicable in part because of the presumption of innocence inherent in American criminal law.¹⁰³ Providing an additional, pragmatic justification for minimizing restrictions beyond those necessary for public safety, research demonstrates that "unnecessary alternatives to detention placed on low-risk federal defendants can and do hurt defendant outcomes by increasing their failure rates."¹⁰⁴

The Pretrial Services Risk Assessment (PTRA) is an actuarial instrument for the federal system that provides a consistent and valid method of predicting risk of failure to

⁹⁸ See Mamalian, *supra* note 96, at 4.

⁹⁹ Cadigan, *supra* note 97, at 4.

¹⁰⁰ Timothy P. Cadigan and Christopher T. Lowenkamp, *Implementing Risk Assessment in the Federal Pretrial Services System*, FEDERAL PROBATION 30 (Sept. 2011), <https://www.pretrial.org/download/risk-assessment/Implementing%20Risk%20Assessment%20in%20the%20Federal%20Pretrial%20Services%20System%20-%20Cadigan%20et%20al%202011.pdf> (accessed: December 25, 2017) ("Typically, defendants who are released on supervision in the federal system are given a 'laundry list' of conditions").

¹⁰¹ *Moving Beyond Money: A Primer on Bail Reform*, CRIMINAL JUSTICE POLICY PROGRAM AT HARVARD LAW SCHOOL 25, footnote 210 (Oct. 2016) (referencing state statutes), <http://cjpp.law.harvard.edu/assets/FINAL-Primer-on-Bail-Reform.pdf>. (accessed: December 25, 2017)

¹⁰² See Mamalian, *supra* note 96, at 13; *ABA Standards for Criminal Justice: Pretrial Release*, AMERICAN BAR ASSOCIATION, Part I (General Principles) (3d ed. 2007), https://www.americanbar.org/publications/criminal_justice_section_archive/crimjust_standards_pretrialrelease_toc.html (accessed: December 25, 2017); *Moving Beyond Money*, *supra* note 101, at 18 ("Pretrial decision-making is always, at bottom, a process of risk assessment").

¹⁰³ See Mamalian, *supra* note 96, at 13.

¹⁰⁴ Cadigan, *supra* note 97, at 5 (discussing research by VanNostrand and Keebler); see also, Mamalian, *supra* note 96, at 10 (referencing 2009 VanNostrand and Keebler study).

appear, new criminal arrest, and technical violations that lead to revocation while on pretrial release.¹⁰⁵ As of September 2011, the tool had been implemented nationally in 93 federal districts.¹⁰⁶ The PTRAs also can be used to identify higher risk defendants for enhanced services, and to conserve resources by reducing services to low risk defendants.¹⁰⁷ According to a 2011 report by the Bureau of Justice Assistance, the six most common validated pretrial risk factors identified in studies over the preceding decade included: prior failure to appear in court, prior convictions, the present charge constituting a felony, being unemployed, history of drug abuse, and having a pending case.¹⁰⁸ Yet predictive items identified in pretrial services risk assessment research change over time, and should be re-validated on an ongoing basis to ensure their integrity and effectiveness.¹⁰⁹ In a September 2012 article concerning the revalidation of the PTRAs, experts identified a need for the addition of dynamic factors, in order to provide officers with a tool to monitor and reassess risk in a standardized way to ensure that supervision and services are having the intended impacts.¹¹⁰

Post-Conviction Assessments

A primary purpose of post-conviction risk assessments is to reduce recidivism by implementing evidence-based practices.¹¹¹ A 2015 study by the Administrative Office, Probation and Pretrial Services Office, suggested that increases in these efforts over recent years has proven beneficial, and the study documented a reduction in recidivism rates. A report on this study in the Federal Probation Journal found that “despite the increase in risk of the federal post-conviction supervision population and several years of austere budgets,

¹⁰⁵ See Cadigan, *supra* note 97, at 5; Cadigan, *supra* note 100, at 32.

¹⁰⁶ Cadigan, *supra* note 97, at 5; *see also*, Cadigan, *supra* note 100, at 33 (noting that national implementation was almost completed by August 2011).

¹⁰⁷ Cadigan, *supra* note 97, at 12

¹⁰⁸ Mamalian, *supra* note 96, at 9; *see also* Marie Van Nostrand and Gena Keebler, *Pretrial Risk Assessment in the Federal Court*, 73 FED. PROBATION 3 (2009) (discussing predictors of pretrial risk).

¹⁰⁹ See Cadigan, *supra* note 97, at 3-4.

¹¹⁰ See *id.* at 12.

¹¹¹ See *An Overview of the Federal Post Conviction Risk Assessment*, ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, OFFICE OF PROBATION AND PRETRIAL SERVICES 1 (Sept. 2011), http://www.uscourts.gov/sites/default/files/pcra_sep_2011_0.pdf. (accessed: December 25, 2017)

probation officers are improving their abilities to manage risk and provide rehabilitative interventions.” The report concluded that investments in evidence-based supervision practices and reinforcement of risk-need-responsivity principles may be “beginning to reap dividends in terms of community safety.”¹¹²

The federal Post Conviction Risk Assessment (PCRA) is a scientifically-based instrument developed by the Administrative Office for the purpose of improving the effectiveness and efficiency of post-conviction supervision.¹¹³ The history of the PCRA’s development sheds light on its utility for assessing offender risk and identifying challenges offenders face while under supervision.¹¹⁴ Criminal justice agencies began using actuarial risk assessment instruments for post-conviction supervision as early as 1923.¹¹⁵ By the 1970s, federal probation officers used various statistical prediction tools to assist case managers in determining how much supervisory time and effort to devote to working with certain categories of offenders.¹¹⁶ In 1982, the Federal Judicial Center (FJC) identified numerous probation or parole prediction instruments in the federal probation system, and evaluated the validity of four of them.¹¹⁷ The FJC recommended the national implementation of one particular tool to assist officers in classifying probation caseloads.¹¹⁸ The Administrative Office tested, modified, and adopted this tool for system-wide use, renaming it the Risk Prediction Scale 80. While the RPS-80 was in use for probation supervision, the U.S. Parole Commission’s Salient Factor Score (SFS) was in use for parole supervision. However, the Judicial Conference Committee on Criminal Law became concerned that the instruments were losing predictive accuracy.

¹¹² Laura M. Baber, *Inroads to Reducing Federal Recidivism*, FED. PROBATION 8 (Dec. 2015), http://www.uscourts.gov/sites/default/files/federal_probation_journal_dec_2015_0.pdf. (accessed: December 25, 2017)

¹¹³ *An Overview of the Federal Post Conviction Risk Assessment*, *supra* note 111, at 1.

¹¹⁴ *See generally*, Jeremy Luallen, Sharmini Radakrishnan, William Rhodes, *The Predictive Validity of the Post-Conviction Risk Assessment Among Federal Offenders*, CRIMINAL JUSTICE AND BEHAVIOR, 43: 9 (Sept. 2016), <http://journals.sagepub.com/doi/abs/10.1177/0093854816650481> (accessed: December 25, 2017).

¹¹⁵ *An Overview of the Federal Post Conviction Risk Assessment*, *supra* note 111, at 4.

¹¹⁶ *See ibid.*

¹¹⁷ *See ibid.*

¹¹⁸ *See id.* at 5.

Upon the Committee's request in 1991, the FJC developed the Risk Prediction Index (RPI), to increase predictive accuracy. This model was approved in 1997, and required to be implemented for all offenders at the beginning of supervision. The RPI takes into account information about: the individual's age at the start of supervision, prior arrests, use of a weapon in the instant offense, employment status, history of substance abuse, and whether the person ever absconded from supervision, obtained a college degree, and/or was living with a spouse and/or children at the start of supervision.¹¹⁹ A later review by IBM Business Consulting Services pointed to shortcomings in the RPI model, in that it did not adhere to the principles of risk, need, and responsivity. The factors accounted for in the RPI model are static, and it does not enable officers to regularly assess dynamic factors that are associated with the risk of recidivism (*i.e.*, antisocial attitudes and associates).

The Administrative Office hired an expert, Christopher Lowenkamp, in 2009 to create an instrument with data specific to the federal probation system that adheres to the principles of risk, need, and responsivity.¹²⁰ Lowenkamp and colleagues constructed and validated the federal Post-Conviction Risk Assessment.¹²¹ Researchers subsequently found that continuing to administer the PCRA during federal supervision can provide additional information about changes in the likelihood of recidivism.¹²² Researchers also have found that while the PCRA performs well for some offenses including drug, violent, and property offenses, it is not as reliable in predicting less common offenses.¹²³

The justice system has developed a system-wide infrastructure to standardize and increase the effectiveness of the PCRA. Probation officers must attend in-person training and pass online certification tests before they can administer the assessment instrument. In 2011, the Administrative Office reported that it was in the process of training all officers in the

¹¹⁹ *See id.* at 6.

¹²⁰ *See id.* at 8.

¹²¹ Christopher T. Lowenkamp, *et al.*, *The Federal Post Conviction Risk Assessment (PCRA): A Construction and Validation Study*, PSYCHOLOGICAL SERVICES, 10(1) (Feb. 2013), <https://www.ncbi.nlm.nih.gov/pubmed/23148771>. (accessed: December 25, 2017)

¹²² *See* Thomas H. Cohen, Christopher T. Lowenkamp, and Scott W. VanBenschote, *Does Change in Risk Matter?* CRIMINOLOGY & PUBLIC POLICY 15:263-296 (Jan. 2016).

¹²³ *See* Luallen, note 114 *supra*.

federal probation system who supervise individuals convicted of a crime, with a 16-hour course that covers: (1) principles of offender risk, needs, and responsivity; (2) PCRA scoring rules; (3) time to practice the PCRA on test cases; and (4) an examination of the relationship between the PCRA and the case plan.¹²⁴ Staff from the Administrative Office teach the sessions with help from local district probation officers who are certified in administering the PCRA. Officers must then complete an online certification process, and must recertify annually through a computer-based test.

This model of training probation officers to administer the PCRA represents an existing infrastructure that perhaps could be leveraged, on a more limited scale, for specialized efforts to assess violent extremist offenders, whether for sentencing purposes or for post-conviction supervision. The District Court of Minnesota hired independent expert Daniel Koehler of the German Institute for Radicalization and Deradicalization Studies to train its probation officers in administering disengagement and deradicalization evaluations (as discussed below).¹²⁵ Yet the trained officers will eventually leave their positions, and Minnesota is the only one of 94 federal districts to have implemented this program. A more centralized and sustainable effort is warranted nationally.

Assessments at Sentencing

Considerations about an individual's likelihood of reoffending have long factored into judges' sentencing decisions, at least informally.¹²⁶ One observer described sentencing as a "backward- and forward-looking enterprise," which is "informed by an individual's past conduct as well as by the criminal justice system's prediction of the individual's future

¹²⁴ *An Overview of the Federal Post Conviction Risk Assessment*, *supra* note 111, at 14.

¹²⁵ Mr. Koehler is also the co-founder and editor of the instant publication.

¹²⁶ *See* Monahan and Skeem, *supra* note 72, at 490 ("Since shortly after the Civil War, many American states have relied on some inchoate notion of risk assessment in criminal sentencing"); Barry-Jester, Casselman, and Goldstein, *supra* note 72 ("Risk assessments have existed in various forms for a century, but over the past two decades, they have spread through the American justice system, driven by advances in social science").

criminal conduct.”¹²⁷ Indeed, the principles underlying risk assessment are, to an extent, implicit in the federal sentencing calculation under 18 U.S.C. § 3553, in particular the need for the sentence to “protect the public from further crimes of the defendant.” Nonetheless, the use of risk assessment instruments to inform front-end sentencing in the federal system is less established than the use of such instruments in the pretrial and post-sentencing settings.

In contrast to the federal system, some states have incorporated risk assessments into sentencing guidelines, designating them as one factor that judges may consider in determining appropriate sentences.¹²⁸ For example, sentencing commissions in Virginia and Utah have developed systems whereby assessments factor into front-end sentencing; and following extensive study in Pennsylvania, that state’s sentencing commission is required by statute to adopt an actuarial risk assessment instrument to help determine appropriate sentences.¹²⁹ The American Law Institute, in a draft of its Model Penal Code, directs sentencing commissions to develop actuarial instruments to estimate offenders’ risk and treatment needs, and encourages the use of these instruments to inform sentencing decisions.¹³⁰

Individual views about whether risk assessment instruments should play a role in front-end sentencing are informed by perceptions of the core purposes of sentencing itself.¹³¹ The U.S. Sentencing Commission identifies the four principal purposes of sentencing as: just punishment, deterrence, incapacitation, and rehabilitation.¹³² One approach focuses primarily on the retributive or deontological qualities of sentencing, emphasizing just punishment in

¹²⁷ Dawinder S. Sidhu, *Moneyball Sentencing*, 56 BOSTON COLLEGE LAW REVIEW 671, 671 (2015), http://digitalrepository.unm.edu/cgi/viewcontent.cgi?article=1305&context=law_facultyscholarship. (accessed: December 25, 2017)

¹²⁸ See Monahan and Skeem, *supra* note 72, at 495.

¹²⁹ See *id.* at 494-96; Mark H. Bergstrom, *Sentence Risk Assessment Instrument Update*, PENNSYLVANIA COMMISSION ON SENTENCING (December 2017), <http://downloads.pbi.org/courses/9885/Bergstrom.pdf>. (accessed: December 25, 2017)

¹³⁰ See Sidhu, *supra* note 127, at 674; Sonja B. Starr, *Evidence-Based Sentencing and the Scientific Rationalization of Discrimination*, 66 STANFORD L. REV. 803, 815 (April 2014).

¹³¹ See Andrew D. Leipold, *Recidivism, Incapacitation, and Criminal Sentencing Policy*, 3 U. OF ST. THOMAS LAW JOURNAL 536, 543 (2006), <http://ir.stthomas.edu/cgi/viewcontent.cgi?article=1097&context=ustlj> (accessed: December 25, 2017) (“[t]he search for a limiting principle to imprisonment reveals that incapacitation and recidivism are two sides of the same coin”).

¹³² *An Overview of the United States Sentencing Commission*, United States Sentencing Commission, http://isb.ussc.gov/files/USSC_Overview.pdf (accessed: December 25, 2017); see also, 18 U.S.C. § 3553(a)(2).

proportion to the offender's culpability. Assessing the risk of future crime is not relevant to sentencing decisions based "solely on backward-looking perceptions of blameworthiness."¹³³ A contrasting approach, referred to as consequentialist or utilitarian, focuses on preventing future crime by the offender and other would-be offenders. The sentence is structured to incapacitate (and in some cases, rehabilitate) the individual, protecting the public from his or her future crimes and deterring others from criminal acts.¹³⁴ This utilitarian approach implicitly relies upon risk assessment and reduction strategies.¹³⁵ Finally, the limiting retributivism approach represents a hybrid of the prior two approaches. Risk assessment is relevant under a limiting retributivism approach, but has a limited impact: even if classified as high risk, an offender cannot be sentenced to more time than he or she deserves for the crime committed.¹³⁶

Risk assessment has encountered resistance in the area of front-end sentencing.¹³⁷ The federal Sentencing Reform and Corrections Act of 2015, a bipartisan bill introduced in the U.S. Senate in October 2015, would have directed the Attorney General to develop and validate a postsentencing assessment of inmates' risks and needs, but did not establish a role for risk assessment in front-end sentencing.¹³⁸ Likewise, in describing the Federal Post Conviction Risk Assessment in 2011, the Office of Probation and Pretrial Services stated that the Administrative Office had "not fully examined the use of risk assessment tools for other purposes, such as sentencing."¹³⁹ One concern is that risk assessment tools could both reinforce and exacerbate existing racial and socioeconomic disparities, particularly to the extent that assessments are based on static factors in the offender's background and factors

¹³³ See Monahan and Skeem, *supra* note 72, at 492.

¹³⁴ See *id.* at 491-92.

¹³⁵ See *id.* at 492-93.

¹³⁶ See *id.* at 493.

¹³⁷ See, e.g., Monahan and Skeem, *supra* note 72, at 495 ("the most controversial applications" for risk assessments "involve front-end sentences that judges impose").

¹³⁸ See Monahan and Skeem, *supra* note 72, at 496; S. 2123 – 114th Congress (2015-2016): *Sentencing Reform and Corrections Act of 2015*, <https://www.congress.gov/bill/114th-congress/senate-bill/2123>. (accessed: December 25, 2017)

¹³⁹ *An Overview of the Federal Post Conviction Risk Assessment*, *supra* note 111, at 1.

that correlate with race.¹⁴⁰ Further, basing outcomes on aggregated data may violate fundamental norms of fairness.¹⁴¹ Risk categorizations that result from these systems are based, at least partially, on previous independent decisions and conduct by other people, whose actions are beyond the offender's control.

During a 2014 speech in Pennsylvania, then Attorney General Eric Holder discussed the increasing use of aggregate data tools in many fields, and spoke favorably of assessments in criminal justice. In particular, Holder noted the utility of evidence-based strategies to improve corrections and reduce recidivism, including by “better matching services with needs; by providing early warnings whenever supervised individuals stray from their reentry plans; by incorporating faster responses from probation officers to get people back on track; and by yielding feedback and results in real-time.”¹⁴² However, Holder expressed reservations about using risk assessments in front-end sentencing. Instead, he stated, “[c]riminal sentences must be based on the facts, the law, the actual crimes committed, the circumstances surrounding each individual case, and the defendant's history of criminal conduct. They should *not* be based on unchangeable factors that a person cannot control, or on the possibility of a future crime that has not taken place.”¹⁴³

The argument that sentences should not be based on “the possibility of a future crime that has not taken place” is in tension (although not direct conflict) with the legislative mandate that judges must base sentences on the need “to protect the public from further crimes of the defendant.”¹⁴⁴ This tension has been amplified in terrorism cases, especially in many of the recent prosecutions based on charges of material support for terrorism. The material support statutes are widely interpreted as serving a preemptive purpose, at least in part. Former Attorney General Eric Holder emphasized the importance of material support

¹⁴⁰ See *Moving Beyond Money*, *supra* note 101, at 22.

¹⁴¹ See *id.* at 22-23.

¹⁴² See Eric Holder, Remarks at the National Association of Criminal Defense Lawyers 57th Annual Meeting, *supra* note 89.

¹⁴³ *Id.* (emphasis in original).

¹⁴⁴ See *id.*; 18 U.S.C. 3553(a)(2)(C).

laws as measures to police the threat of terrorism and “criminalize the preparatory acts committed by those with terrorist plans.”¹⁴⁵

In *U.S. v. Shelton Thomas Bell*, the defendant was charged with counts of attempt and conspiracy to provide material support to terrorists, both under 18 U.S.C. 2339A. In his Sentencing Order in *Bell*, U.S. District Judge Timothy Corrigan noted:

...unlike other crimes, where, in a close case, the Court might give the benefit of the doubt to a seemingly remorseful defendant, terrorism-related crimes are different. Terrorism endangers the lives and property of the public at large, seeks to weaken or destroy societal institutions, and tries to spread as much fear and panic as possible... *the need to protect the public from further crimes of this defendant remains an important consideration.*¹⁴⁶

Similarly, Judge Gerald Bruce Lee of U.S. District Court for the Eastern District of Virginia noted in a panel discussion about terrorism sentencing that judges consider “forecasting” an important component of sentencing decisions, explaining this thought process as follows:

What will the future be when this person comes back home? Is he or she going to pose a risk or a danger to the public? ... Reading about it is not the same as sitting there and seeing it and trying to decide, well, if this person is fifty years old, are they likely to come out and try to shoot up the Holocaust Museum? Are they likely to try to blow up [the] Metro?¹⁴⁷

¹⁴⁵ Robert Chesney, *Exporting the Preventive Prosecution Model: AG Holder on Countering the Syrian Foreign Fighter Threat*, LAWFARE (July 8, 2014), <https://www.lawfareblog.com/exporting-preemptive-prosecution-model-ag-holder-countering-syrian-foreign-fighter-threat> (accessed: December 25, 2017) (reproducing remarks by Eric Holder in Oslo).

¹⁴⁶ Sentencing Order, *U.S. v. Shelton Thomas Bell*, 3:13-cr-00141-TJC-JRK (M.D. Fl. Jan. 14, 2015), Document 91, 39, https://www.investigativeproject.org/documents/case_docs/2602.pdf (accessed: December 25, 2017) (emphasis added).

¹⁴⁷ See Baltés, note 43 *supra*, at 353.

Judge Lee later added that, in terrorism cases, “the risk of recidivism and protection of the public are very, very powerful considerations, and that depends on the evidence, that’s evidence-based, and that’s fact-driven.”¹⁴⁸

Judges have made clear that, when imposing sentences for terrorism offenses such as material support crimes, they devote substantial effort – and assign substantial weight – to determinations about the defendant’s likelihood of committing future violent acts. Facilitating a process where judges could benefit from existing expertise on violent extremism risk assessments would provide greater structure to the sentencing process and make outcomes more evidence-based. Like the recommendations in presentence reports, the assessment results would not be binding upon courts or mandate particular sentences, but would factor into the judges’ consideration of the § 3553 factors. Material support offenses cover a wide range of conduct and culpability. The sentencing range is correspondingly wide, with no mandatory minimum, and a maximum prison sentence of 20 years per count (or life imprisonment, if a death resulted from the offense). Against this backdrop, federal agencies should conduct data-driven study and consider establishing policies to include risk and needs assessments in terrorism cases at sentencing and other stages of the correctional process, so that judges will have the fullest possible toolkit to address the cases before them.

Some of the risk assessment instruments in use for sentencing at the state level are commercial products, and some have been developed for particular jurisdictions. One study identified 19 validated risk assessment instruments being used (or recently used) in correctional settings in the U.S.¹⁴⁹ However, these instruments were not designed to assess the likelihood of specific offenses¹⁵⁰; further, as Professor Andrew Silke observed, “[t]here is generally good recognition that standard risk assessment tools do not work well with terrorists and extremists.”¹⁵¹ Factors considered significant for assessing terrorism risk generally cluster around the following: ideology (despite popular perceptions, this is not necessarily the

¹⁴⁸ *Id.* at 370.

¹⁴⁹ Desmarais and Singh, *supra* note 74, at 9.

¹⁵⁰ *See ibid.*

¹⁵¹ *See* Andrew Silke, *Terrorists, Extremists and Prison: An Introduction to the Critical Issues*, in PRISONS, TERRORISM AND EXTREMISM 9 (Andrew Silke ed., Routledge 2014).

most significant factor), capability, affiliations, political and social environment, disengagement factors, behavior in custody, and emotional factors.¹⁵² In recent years, new risk assessment measures have been developed specifically for the context of violent extremism, including the Violent Extremist Risk Assessment (VERA-2 and VERA-2R, originally developed in 2009) and the Extremism Risk Guidance (ERG 22+, launched in 2011). The VERA-2 is in use for terrorist prisoners in Australia, while the ERG 22+ is in use for terrorist prisoners in England and Wales.¹⁵³ The VERA-2 and ERG 22+ are similar in the factors they consider. The VERA-2 assesses individuals based on 31 factors, including six protective factors. The ERG 22+ assesses offenders on 22 factors, and is designed so that other factors may be considered as well if they have a demonstrated relevance to a particular case.¹⁵⁴ A small-scale study supported the use of VERA-2 for risk assessment, while the ERG instrument's authors have called the factors "working hypotheses," as the link with recidivism has not yet been proven.¹⁵⁵ The models are likely to evolve as more data and substantive evaluations become available.¹⁵⁶ The International Centre for Counter-Terrorism at the Hague (ICCT) is also developing a comprehensive risk assessment tool.

Federal judicial agencies should study these instruments and determine whether an instrument customized for the U.S. federal judicial system would be beneficial. Another option is to rely on a structured professional judgment model, such as the consultations that leading expert Daniel Koehler, and the German Institute for Radicalization and Deradicalization Studies (GIRDS), provided to the District Court of Minnesota in 2016. In addition to administering evaluations, Koehler trained officers from the district's Office of Pretrial and Probation Services to administer the assessments themselves. The Minnesota ISIS trials and the emerging issues they highlight for terrorism jurisprudence on a national scale are explored further in Parts III and IV.

¹⁵² See Andrew Silke, *Risk Assessment of Terrorist and Extremist Prisoners*, in PRISONS, TERRORISM AND EXTREMISM 113 (Andrew Silke ed., Routledge 2014).

¹⁵³ *Id.* at 117. See also Evidentiary Hearing Transcript, *supra* note 52, at 50:1-11 (referencing ERG-22+ and Canadian evaluation methodologies).

¹⁵⁴ See Silke, *supra* note 152, at 118.

¹⁵⁵ See *ibid.* (internal reference omitted).

¹⁵⁶ See *ibid.*

III. Forging New Pathways in Terrorism Cases

An Overview of the Minnesota ISIS Cases

In April 2015, Andrew Luger, then U.S. Attorney for Minnesota, announced the arrests of six young men from Minnesota's Somali-American community for trying to join ISIS in Syria, following a ten-month investigation.¹⁵⁷ The investigation focused on a network of individuals who aspired to follow in the footsteps of Abdi Nur, a common friend to the group who had successfully reached Syria and fought with ISIS, and who currently is believed dead.¹⁵⁸ Three other associates of the group had been charged previously. One of the previously charged individuals, Abdullahi Yusuf, was an 18-year old high school student when he first drew authorities' attention; Yusuf provided suspicious answers to a passport specialist while applying for an expedited passport.¹⁵⁹ Following his eventual arrest in November 2014, Yusuf pleaded guilty and was released to a halfway house as part of an experimental approach to disengagement and deradicalization. Ultimately, of the nine defendants remaining in the United States, six pleaded guilty to material support charges. The other three defendants (Guled Ali Omar, Abdirahman Yasin Daud, and Mohamed Abdihamid Farah) were convicted at trial of both material support offenses and conspiracy to commit murder overseas.¹⁶⁰

¹⁵⁷ See, e.g., Scott Shane, *6 Minnesotans Held in Plot to Join ISIS*, NEW YORK TIMES (April 20, 2015), https://www.nytimes.com/2015/04/21/us/6-somali-americans-arrested-in-isis-recruiting-case.html?_r=0 (accessed: December 25, 2017). The men arrested and their ages at the time of arrest were: Zacharia Yusuf Abdurahman, 19; Adnan Farah, 19; Hanad Mustafe Musse, 19; Guled Ali Omar, 20; Abdirahman Yasin Daud, 21; and Mohamed Abdihamid Farah, 21 (Adnan Farah's brother). Other friends charged in the same conspiracy included Abdullahi Yusuf, Abdirizak Warsame, and Hamza Naj Ahmed; and Abdi Nur was charged in absentia with joining ISIS in Syria. See Counter Extremism Project website, *Abdiwali Nur: Overview*, <https://www.counterextremism.com/extremists/abdiwali-nur>. (accessed: December 25, 2017)

¹⁵⁸ Counter Extremism Project, <https://www.counterextremism.com/extremists/abdiwali-nur>.

¹⁵⁹ See Andrew Grossman, Ben Kesling, and Tamara Audi, *U.S. Charges Six Minnesota Men with Trying to Join ISIS*, WALL STREET JOURNAL (April 20, 2015), <https://www.wsj.com/articles/terrorism-probe-yields-six-arrests-u-s-authorities-say-1429518994>. (accessed: December 25, 2017)

¹⁶⁰ See Steve Karnowski, *German Expert Details Efforts to De-Radicalize 6 Somali Defendants*, ASSOCIATED PRESS (Sept. 20, 2016), <http://www.twincities.com/2016/09/20/german-expert-details-efforts-to-de-radicalize-6-somali-defendants/>. (accessed: December 25, 2017)

In March of 2016, as prosecutions for conspiracy to join ISIS proceeded against the nine defendants, Judge Michael Davis of the federal District of Minnesota launched the district court's new Terrorism Disengagement and Deradicalization Program (TDDP). U.S. Attorney Andrew Luger supported the initiative, calling it "one important step to address terror recruiting."¹⁶¹ The program's objectives are: (1) to provide information to the Court that is otherwise not available to it as a basis for sentencing defendants convicted of a terrorism offenses; (2) to provide purposeful pre-trial and post-incarceration supervision that ensures public safety by monitoring defendants to verify that they have not reverted to any involvement with terroristic activities; and (3) to further the process of disengagement and deradicalization from extremist ideology while rehabilitating offenders to become successful, law-abiding citizens.¹⁶² Upon the TDDP's inception, the court enlisted Daniel Koehler of GIRDS to provide evaluations on specific cases, to train staff, and to provide ongoing consultations and services.

During a hearing related to these evaluations in the ISIS litigation, Judge Davis recounted that the need for this program materialized years ago, when the court was adjudicating al-Shabaab cases. Judge Davis noted that the court lacked sufficient information for sentencing defendants, in that a necessary component was missing.¹⁶³ Subsequently, Judge Davis turned to the TDDP program in the 2016 cases of the accused ISIS conspirators, pioneering the use of specialized risk and needs assessments for offenders convicted on terrorism charges.¹⁶⁴ Initially, Judge Davis ordered that four defendants who had pleaded guilty by early March 2016 submit to presentence examinations and studies "to evaluate risk assessment and recommended intervention needs for de-radicalization of defendants involved in terrorism related cases." The court ordered the U.S. Probation and Pretrial Services Office

¹⁶¹ Amy Forliti, *Federal Court in Minnesota Creates Deradicalization Program*, ASSOCIATED PRESS (March 3, 2016), <https://apnews.com/c48c6df80d8c4ed2b18decfec62fb9af/judge-study-willrecommend-deradicalization-plans-4-men>. (accessed: December 25, 2017)

¹⁶² U.S. DIST. CT., DISTRICT OF MINN., *Terrorism Disengagement and Deradicalization Program*, two-page document supplied to the author by Judge Michael J. Davis's Judicial Assistant.

¹⁶³ See Evidentiary Hearing Transcript, *supra* note 52, at 11:7-15, 21-22.

¹⁶⁴ See *id.* at 27:8-17 (Koehler provided a more limited evaluation, at the request of a parent, for the defense attorneys in a California case prior to his work in the Minnesota ISIS cases).

for the District of Minnesota to coordinate the study, and to contract with Koehler to prepare a written report with findings and recommendations that would be helpful to the Court at sentencing.¹⁶⁵ The court's orders specified that Koehler should base his risk assessment on recognized, structured professional judgment assessment tools.

Daniel Koehler completed the assessment reports for the four defendants as originally ordered, as well as for two additional defendants who pled guilty subsequently. In addition, Koehler trained a select group of officers from the Probation and Pretrial Services Office to coordinate programs for disengagement and deradicalization, assess their impact, and build strong community partnerships to facilitate success.¹⁶⁶ The assessment reports were attached as addenda to the preliminary presentence investigation reports and distributed to defendants' attorneys.¹⁶⁷ Defendants had the opportunity to object to the evaluations, but none did so.¹⁶⁸ In fact, two of the defendants who were convicted at trial, Abdirahman Daud and Guled Omar, later requested the opportunity to be assessed by Koehler as well. The court denied these motions, finding that Koehler's training of court personnel obviated the need for Koehler personally to conduct the evaluations.

At an evidentiary hearing in late September 2016, Daniel Koehler testified at length about his assessment methodology. Each report answered three main questions. First, Koehler considered what factors contributed to each defendant's radicalization, leading him to aspire to join ISIS. Second, Koehler provided a "risk or radicalization stage assessment," considering the individual's existing degree of radicalization and risk of recidivism. Third, Koehler provided recommendations for mentoring and counseling programs to help each

¹⁶⁵ See, e.g., Order, *United States v. Yusuf* (D. Minn. Mar. 2, 2016) (Crim. No. 15-46); Order, *United States v. Abdurahman* (D. Minn. Mar. 2, 2016) (Crim. No. 15-49 (05)); see also, Order, *U.S. v. Ahmed* (Oct. 5, 2016) (Crim. No. 15-49) <http://www.leagle.com/decision/In%20FDCO%2020161006F21/U.S.%20v.%20Ahmed>. (accessed: December 25, 2017)

¹⁶⁶ See Daniel Koehler, *The NYC Bombing Highlights Our Urgent Need for Deradicalization Programs*, THE WORLD POST (Sept. 22, 2016), https://www.huffingtonpost.com/entry/nyc-bombing-deradicalization-programs_us_57e00bfee4b04a1497b5a1d5 (accessed: December 25, 2017); Evidentiary Hearing Transcript, *supra* note 52, at 11:7-11.

¹⁶⁷ See Evidentiary Hearing Transcript, *supra* note 52, at 7:23-25.

¹⁶⁸ See Evidentiary Hearing Transcript, *supra* note 52, at 7:16-23.

individual disengage and deradicalize.¹⁶⁹ For each defendant, Koehler's report included a risk assessment level; as to the first four assessed, Abdullahi Yusuf was assessed as medium to low risk, Zacharia Abdurahman and Hamza Ahmed were medium to high risk, and Abdirizak Warsame was high risk.¹⁷⁰

Koehler arrived at those conclusions utilizing a qualitative approach which began with substantial information gathering.¹⁷¹ He conducted qualitative narrative and semi-structured interviews with the defendants themselves, their families, and other persons of interest who interacted with the defendants, such as religious leaders. He reviewed documents provided by the court, as well as open source information including media reports. For each individual evaluated, Koehler endeavored to ascertain what driving factors (*i.e.*, theological, ideological, or other factors) motivated them to embrace violent extremism. Further, he assessed where the individuals stood at the time of assessment with respect to rejecting the violent ideology and/or distancing themselves from the conspiracy, and whether they exhibited cognitive openings whereby a counselor, mentor, or coordinator could identify a route to facilitate their exit from violent extremism.¹⁷²

Daniel Koehler's methodology relies upon structured professional judgment, rather than a purely actuarial or purely clinical method. Indeed, the court's orders for the assessments specify that Koehler should use "recognized, structured professional judgment assessment tools."¹⁷³ Koehler does not administer actuarial assessment protocols like the VERA-2 or ERG-22, but incorporates elements from those tools into his evaluations.¹⁷⁴ During his testimony, Koehler explained that the structured assessment protocols rely upon a mathematical formula to produce a numerical risk assessment output, but provide insufficient

¹⁶⁹ See Evidentiary Hearing Transcript, *supra* note 52, at 46:24-47:12.

¹⁷⁰ See *Radicalization Expert Testifies About Minnesota Terror Suspects' Review*, KSTP/ABC EYEWITNESS NEWS, <http://www.wdaz.com/news/4119771-radicalization-expert-testifies-about-minnesota-terror-suspects-review> (accessed: December 25, 2017).

¹⁷¹ See Evidentiary Hearing Transcript, *supra* note 52, at 47:13-15.

¹⁷² See Evidentiary Hearing Transcript, *supra* note 52, at 48:14-24.

¹⁷³ See Order, *United States v. Warsame* (D. Minn. Mar. 2, 2016) (Crim. No. 16-37), <https://extremism.gwu.edu/sites/extremism.gwu.edu/files/Warsame%20Order%2C%203-2-16.pdf>. (accessed: December 25, 2017)

¹⁷⁴ See Evidentiary Hearing Transcript, *supra* note 52, at 49:1-20, 52:24-53:4.

information for why and how an individual moved toward violent extremism. A numerical estimate of the likelihood of committing a violent act does not provide counselors with necessary information about how to help the person exit from violent extremism, nor an understanding of the best approach for disengagement and deradicalization of that individual.¹⁷⁵ The actuarial assessment instruments, in other words, do not sufficiently incorporate the needs and responsivity principles of a risk-needs-responsivity model.¹⁷⁶

Judge Davis indicated implicit agreement with Koehler's qualitative, structured professional judgment approach, noting that the district alternatively could have contracted with an expert from Canada to administer the ERG-22, a structured assessment protocol. But citing the decision in the *Shelton Thomas Bell* case, Judge Davis described the role of judges in terrorism cases as "trying to find out who an individual defendant is, and that's what you do in helping them, if you can, dealing with the issues of de-radicalization."¹⁷⁷

The judge indicated that the evaluation report likely would serve as one factor in his sentencing determinations, but would not take on overwhelming significance relative to other considerations.¹⁷⁸ To arrive at sentencing determinations, Judge Davis calculated the advisory range under the Sentencing Guidelines, including the terrorism enhancement, as well as any applicable downward departures such as motions under §5K1.1 of the Sentencing Guidelines for providing substantial assistance to the government. The judge also considered the required factors under 18 U.S.C. § 3553, and took into account sentencing decisions in comparable terrorism cases.

In a pattern used in criminal prosecutions outside the terrorism context, the court also appeared to base sentencing decisions partially upon defendants' degree acceptance of responsibility and cooperation with law enforcement. Some of the defendants, including Abdullahi Yusuf and Abdirizak Warsame, pleaded guilty and cooperated, even agreeing to

¹⁷⁵ See *ibid.*

¹⁷⁶ See discussion, *supra*, part II.

¹⁷⁷ See Evidentiary Hearing Transcript, *supra* note 52, at 50:12-17.

¹⁷⁸ See Evidentiary Hearing Transcript, *supra* note 52, at 282:23-283:8 (Judge Davis indicated, "This is just a small portion of how I'm going to – the factors I'm going to be using for sentencing... This is not that large of a factor, if it is a factor at all, in my sentencing").

testify against their co-conspirators. Yusuf was sentenced to time served, a period of up to 365 days in a residential reentry center (or halfway house) with electronic monitoring, and 20 years of supervised release.¹⁷⁹ Judge Davis also handed down a relatively light sentence (for an ISIS-related case) to Mr. Warsame, who received two and a half years in prison followed by 20 years supervised release. In a second category, four defendants – Hanad Musse, Zacharia Abdurahman, Adnan Farah, and Hamza Ahmed – pleaded guilty but did not cooperate with the government.¹⁸⁰ Musse, Abdurahman, and Farah were each sentenced to 10 years imprisonment, and 20 years of supervised release.¹⁸¹ Hamza Ahmed received a 15-year sentence. In the final category, three defendants – Mohamed Farah, Abdirahman Daud, and Guled Omar – pleaded not guilty and were convicted at trial. These defendants, who were also charged with additional offenses, received the longest sentences of 30 years imprisonment each, along with lifetime supervised release for Farah and Daud and 35 years for Guled Omar. Karen Greenberg, Director of the Center on National Security at Fordham University School of Law, noted that these sentencing gradations reflected added nuance in terrorism jurisprudence that brought the cases more in line with other criminal prosecutions.¹⁸²

Judge Davis stated in Abdullahi Yusuf’s sentencing hearing that, “any act of terrorism represents a particularly grave threat because of the dangerousness of the crime and the difficulty of deterring and rehabilitating the criminal. And thus, terrorists and their supporters should be incapacitated for a long period of time.”¹⁸³ And yet, Davis imposed a varied range

¹⁷⁹ Sentencing Hearing Transcript, *United States v. Yusuf*, 0:15-cr-00046-MJD, Document 104, 39: 15-18, 43:5-9 (Nov. 23, 2016).

¹⁸⁰ See Sentencing Hearing Transcript, *United States v. Musse*, 0:15-cr-00049-MJD-FLN, Document 764 (Nov. 15, 2016), at 15, 16-21, 17-25; Tracy Connor, *Sentences in Minnesota ISIS Case Run from Time Served to 35 Years*, NBC NEWS (Nov. 16, 2016), <https://www.nbcnews.com/news/us-news/sentences-minnesota-isis-case-run-time-served-35-years-n685011>. (accessed: December 25, 2017)

¹⁸¹ See *id.*

¹⁸² See Connor, *supra* note 180.

¹⁸³ Sentencing Hearing Transcript, *United States v. Yusuf*, *supra* note 179, at 38:25-39:7; see also, *United States v. Meskini*, 319 F.3d 88, 92 (2d Cir. 2003) (“Congress and the Sentencing Commission had a rational basis for concluding that an act of terrorism represents a particularly grave threat because of the dangerousness of the crime and the difficulty of deterring and rehabilitating the criminal, and thus that terrorists and their supporters should be incapacitated for a longer period of time”).

of sentences spanning from time served at the low end, to 35 years imprisonment at the high end. Many fact-based considerations, as outlined above, allowed Judge Davis to reach these sentencing gradations, but among the most novel and noteworthy factors were the assessments that Daniel Koehler administered. Mr. Koehler acknowledged that “[t]here’s no 100 percent guarantee that these intervention methods actually work.” However, he noted, “it’s better than working blindfolded without any kind of assessment or structure or protocol.”¹⁸⁴ Judge Davis likewise noted that, in establishing the program for disengagement and deradicalization, the district was “being proactive in trying to protect and serve the community.”¹⁸⁵

The Way Forward: Broadening the Minnesota Approach

Judge Michael Davis has advanced the state of terrorism jurisprudence in the United States by identifying and articulating the needs for: (1) methods for courts to obtain supplemental, expert information to assist in the process of sentencing terrorism defendants; and (2) programs for rehabilitation and reintegration of violent extremist offenders in the federal judicial and corrections systems. While the District of Minnesota is proactively addressing these needs within its own jurisdiction, federal terrorism investigations have been initiated in all 50 states. All districts should be prepared to handle the post-conviction environment in terrorism cases with approaches that reflect state of the art expertise and duly considered policy choices.

Researching and potentially implementing post-conviction policies and procedures for terrorism prevention within the federal justice system requires a substantial commitment from federal policymakers. A comprehensive, data-driven study of rehabilitation and reintegration programs globally is a crucial first step. Judicial agencies could draw upon previous work that surveys existing programs and categorizes them by typology and methodology¹⁸⁶, while

¹⁸⁴ See Forliti, *supra* note 161

¹⁸⁵ See *id.*

¹⁸⁶ See, e.g., DANIEL KOEHLER, UNDERSTANDING DERADICALIZATION: METHODS, TOOLS AND PROGRAMS FOR COUNTERING VIOLENT EXTREMISM (Routledge 2017).

convening expert working groups to assist in framing the analysis in the manner most expedient for the U.S. justice system.

Officials should then channel their findings into several policy determinations. The threshold determination is whether to implement uniform, post-conviction procedures for risk reduction in the sentencing, incarceration, or post-release realms of terrorism cases. The Minnesota TDDP initiative described in Part III, *supra*, aims to encompass all three contexts.¹⁸⁷ Practitioners often view programming in these realms as interrelated; for example, reintegration after prison is a core component of the well-known Saudi approach to rehabilitation.¹⁸⁸ Yet developing policy approaches in each arena will face different logistical hurdles. In particular, the level and availability of needed funding and other resources impacts preferred approaches across different institutions. For example, in Minnesota, the District Court has implemented sentencing evaluations as one component of its broad new initiative, but it is unclear whether the Federal Bureau of Prisons will arrange for the new program to work with inmates.¹⁸⁹ Further, recruiting counselors and mentors for involvement in terrorism cases has proven challenging for the Probation and Pretrial Services Office for the District of Minnesota.¹⁹⁰

Federal policymakers also should identify the goals, preferred methodology, and metrics for success for any new risk reduction processes or programming. For post-conviction programs focused on preventing recidivism, officials should consider whether empirical evidence supports goals encompassing disengagement (cessation of violent actions and affiliations) or deradicalization (renunciation of belief in violent ideology).¹⁹¹ This

¹⁸⁷ See, e.g., Brandan I. Koerner, *Can You Turn a Terrorist Back Into a Citizen?* WIRED (Jan. 24, 2017), <https://www.wired.com/2017/01/can-you-turn-terrorist-back-into-citizen/>. (accessed: December 25, 2017)

¹⁸⁸ See, e.g., Laura Mallonee, *Step Inside a Saudi Rehab Prison for Jihadists*, WIRED (March 31, 2017) (“The government even helps prisoners find wives, buy cars, and land a job”), <https://www.wired.com/2017/03/david-degner-jihad-rehab/> (accessed: December 25, 2017).

¹⁸⁹ See Koerner, *supra* note 187.

¹⁹⁰ See *id.*

¹⁹¹ See, e.g., Mary Beth Altier, Emma Leonard Boyle, Neil D. Shortland & John G. Horgan, *Why They Leave: An Analysis of Terrorist Disengagement Events from Eight-seven Autobiographical Accounts*, 26 SECURITY STUDIES (Iss. 2, March 2, 2017), <http://www.tandfonline.com/doi/abs/10.1080/09636412.2017.1280307>. (accessed: December 25, 2017)

question implicates not only empirical but also constitutional considerations.¹⁹² When considering pre-sentencing risk evaluations specifically, officials should study the existing risk assessment protocols, available data, and precedent in U.S. courts to determine whether: (1) the development of a new, structured or actuarial risk and needs assessment protocol is warranted, customized for violent extremist offenders in the U.S. court system; (2) an existing protocol developed for violent extremist offenders, such as the ERG-22+ or VERA-2, should be adopted; or (3) a structured professional judgment model, such as that employed by Daniel Koehler in the District of Minnesota, should be incorporated.

Those agencies which conceivably could effect valuable contributions to advancing post-conviction risk reduction strategies for violent extremist offenders include the United States Sentencing Commission, the Administrative Office for the U.S. Courts, the Bureau of Prisons, and the Federal Judicial Center. These agencies could leverage existing infrastructure and expertise to research issues relating to sentencing, rehabilitation, and reintegration for violent extremist offenders. Even if every federal district theoretically could secure resources to hire experts like Daniel Koehler to help design programs and train probation officers as the need arises, those officers will eventually retire and others will replace them. Additionally, unwarranted disparities would arise across districts. A more sustainable and consistent model would be one based upon central policy decisions supported by purposeful research and decision-making.

The U.S. Sentencing Commission is an independent agency in the judicial branch, which describes its principal purposes as follows:

- (1) to establish sentencing policies and practices for the federal courts, including guidelines to be consulted regarding the appropriate form and severity of punishment for offenders convicted of federal crimes; (2) to advise and assist Congress and the executive branch in the development of effective

¹⁹² See, e.g., Berkell, *supra* note 21, at 6, 18 (“Critics express concern that CVE guidelines may violate constitutional norms by rendering suspect political and religious expression protected under the First Amendment”) (internal citations omitted), 29.

and efficient crime policy; and (3) to collect, analyze, research, and distribute a broad array of information on federal crime and sentencing issues....¹⁹³

The Sentencing Commission is well-positioned to study and report on the sentencing of terrorist offenders, and the potential for risk assessment instruments to aid in this process.

In addition to risk assessment instruments, another possible option to minimize disparities and use evidence to guide the sentencing process, would be a statutory amendment that would build more gradations into the material support laws themselves. In addition to incorporating formal assessment results into sentencing decisions, Congress could consider adding greater nuance into the penalties enumerated in the underlying statutes. The material support statutes already permit the imposition of longer sentences in instances in which the death of any person results from the offense; other sentencing gradations could be codified as well. The Sentencing Commission could consider this option, of using factors that would affect the outcome of a risk and needs assessment instead to shape sentencing outcomes more directly through the criminal code. However, because such provisions would tend to reduce judicial discretion in handling unique cases and fact patterns, risk assessments that leave judicial discretion intact while providing moderately structured information may provide preferable tools to inform sentencing decisions for violent extremist offenders.

In 2015, the Chief of the National Program Development Division at the Administrative Office of the U.S. Courts, Probation and Pretrial Services Office, wrote that the federal justice system has “articulated the system’s goals in national policies, promoted a common understanding of those goals, operationalized measures that speak directly to those goals, and built an infrastructure that promotes systematic measurement of results.”¹⁹⁴ In light of the overlap of terrorism prosecutions with national security policy, the Administrative Office could articulate the goals and policies of the federal justice system with respect to those individuals accused and convicted of terrorism-related offenses, including policies with

¹⁹³ United States Sentencing Commission website, www.ussc.gov/about-page (accessed: December 25, 2017), Mission.

¹⁹⁴ See Baber, *supra* note 112, at 4 (internal citation omitted).

respect to the implementation of formal risk reduction programs. In connection with the sentencing environment, the Sentencing Commission and Administrative Office could jointly study the possible development of an actuarial tool, and/or the issuance of policies supporting a structured professional judgment approach such as the one employed by Daniel Koehler. Finally, the Administrative Office could train probation officers regarding the administration of any approved assessment instrument, perhaps in a scaled down version of training provided in connection with the Post Conviction Risk Assessment (see discussion in Part II, *supra*).

The Federal Judicial Center (FJC) is the research and education agency of the U.S. government's judicial branch. The FJC conducts research and issues reports on judiciary activities, including case management and court administration. With the Administrative Office, the FJC maintains a public database of federal cases. Additionally, the FJC educates federal judges and judiciary staff on law, case management, leadership, ethics, and court administration.¹⁹⁵ The FJC, working in conjunction with the Administrative Office and other agencies, could play a valuable role in educating judges and judiciary staff in state-of-the-art national and international approaches to countering and preventing violent extremism, so that court personnel are fully aware of the range of options and best practices, if and when terrorist-related offenses are prosecuted in their districts.

Finally, the Bureau of Prisons (BOP) is the federal agency responsible for the custody and care of federal inmates. It is the BOP's responsibility to "ensure the security of federal prisons and provide inmates with programs and services that model mainstream values."¹⁹⁶ While integrating research and expertise from other agencies, the BOP would be the lead implementer of any federal programs for disengagement and deradicalization of inmates in the federal prison system. A critical determination concerning in-prison programs is how to model coordination with independent service providers and outside contractors to achieve maximum efficiency and beneficial impact.¹⁹⁷

¹⁹⁵ See Federal Judicial Center website, <https://www.fjc.gov/>. (accessed: December 25, 2017)

¹⁹⁶ See Federal Bureau of Prisons website, <https://www.bop.gov/about/agency/>. (accessed: December 25, 2017)

¹⁹⁷ See Tony C. Parker, *Establishing a Deradicalization/Disengagement Model for America's Correctional Facilities: Recommendations for Countering Prison Radicalization*, CALHOUN: INSTITUTIONAL ARCHIVE OF THE

IV. Prison and Reentry Programs

A detailed exploration of the status of, and potential for, in-prison rehabilitation and reintegration programs across federal districts (or in state penitentiaries) is beyond the scope of this article. However, the absence of such programming for violent extremist offenders in the federal justice system is worth noting here. The Bureau of Prisons currently administers no substantial, publicly known programs for disengagement and deradicalization of prisoners convicted of violent extremist crimes.¹⁹⁸

Judges in recent terrorism prosecutions have noted the absence of such programming. For example, in sentencing defendant Shelton Thomas Bell to 20 years in prison after he pleaded guilty to attempt and conspiracy to provide material support to terrorists, District Judge Timothy Corrigan commented on the possibility of Bell's rehabilitation. While expert testimony suggested there was "little reason to believe" the threat posed by defendant "could ever be extinguished short of permanent incapacitation," Judge Corrigan felt Bell's apparent remorse provided "some hope that counseling component to [the defendant's] incarceration could have a positive effect."¹⁹⁹ The court observed that the defendant could be "counseled while in prison, and *in the years to come, one would expect more comprehensive methods for rehabilitating would-be terrorists will be developed.*"²⁰⁰

Testimony in the ISIS cases described in Part III, *supra*, and comments there by Judge Davis, also shed light on the lack of specialized programming available in the federal prison system. Kevin Lowry, Chief Probation and Pretrial Services Officer for the District of

NAVAL POSTGRADUATE SCHOOL, 77 (March 2013) ("U.S. Corrections should invest in an intensive effort to recruit properly vetted and trained volunteers, chaplains, and psychological professionals that would be utilized in an established counseling program...."), https://calhoun.nps.edu/bitstream/handle/10945/32881/13Mar_Parker_Tony.pdf?sequence=1. (accessed: December 25, 2017)

¹⁹⁸ See Sentencing Order, U.S. v. Shelton Thomas Bell, *supra* note 146, at 27; Doualy Xaykaothao, *Judge Allows ISIS Conspirator to Remain Out of Prison*, MPR NEWS (May 9, 2017), <https://www.mprnews.org/story/2017/05/09/judge-allows-isis-conspirator-yusuf-to-remain-out-of-prison> (accessed: December 25, 2017) (quoting Judge Michael Davis).

¹⁹⁹ See Sentencing Order, U.S. v. Shelton Thomas Bell, *supra* note 146, at 29.

²⁰⁰ See *id.* at 39-40 (emphasis added).

Minnesota, testified that the district has 35 to 40 different contract and treatment service providers. When Mr. Lowry and Judge Davis canvassed the country, Lowry testified that:

[we] did not find any other criminal justice agencies, counties, states or nongovernmental agencies that had this type of [disengagement and deradicalization] programming, so we looked to nine different programs internationally ... we are in the infancy of building a program, so we have a number of treatment providers that were trained and we're putting online and number of other treatment activities that we've put together.²⁰¹

Mr. Lowry further testified that if Abdullahi Yusuf (one of the nine defendants in the recent ISIS-related conspiracy) was sentenced to a prison term, Yusuf would be assessed and designated through a central office in Texas. Thereafter, Yusuf probably would be sent to a high risk institution somewhere in the county based on his conviction for a terrorist offense, likely far removed from the Minneapolis community. Mr. Lowry testified that any general programming that the U.S. Bureau of Prisons has available for terrorism offenders does not meet the same standards as the “evaluative or assessment process or treatment modalities” that Minnesota is developing. In a subsequent hearing after Mr. Yusuf violated the terms of his supervised release by watching a CNN documentary in May 2017, Judge Davis once again noted the absence of any violent extremist rehabilitation programming in prison, stating, “I don't have a [terrorist rehabilitation] program. So we are working together to make you well. But if there is a misstep, my only alternative is to send you to prison.”²⁰²

Despite the absence of programming in the United States, numerous programs for in-prison rehabilitation and reintegration of violent extremist offenders exist globally. In accordance with Kevin Lowry's above-referenced testimony, any efforts by U.S. corrections officials to develop such programming should commence with a review of existing programs at the international level. For example, Saudi Arabia in particular has garnered extensive

²⁰¹ See Sentencing Hearing Transcript, *United States v. Yusuf*, *supra* note 179, at 33.

²⁰² See Xaykaothao, *supra* note 198.

international attention for its well-funded and relatively long-running deradicalization initiative.²⁰³ While certain aspects of the Saudi program – such as its religious reeducation component – would not be culturally viable nor constitutionally permissible in the United States, other elements of the program warrant further evaluation. These latter elements include enlisting family support, and robust post-release reintegration and follow-up efforts.²⁰⁴ Together with the Administrative Office for the U.S. Courts and the Office of Probation and Pretrial Services (perhaps including representatives from individual district offices of probation and pretrial services), the Bureau of Prisons should study possible options for in-prison programming and report on those most viable within the jurisdiction of the U.S. federal prison system.

Andrew Silke has written that:

Our understanding of terrorists and extremists in prison is surprisingly limited. Given the scale of writing and research on terrorism over recent decades...it is surprising then to see how little has focused on prison issues. This is particularly unexpected because eventually most terrorists will end up in prison. What happens within the prison walls, however, has been largely overlooked for a very long time.²⁰⁵

The U.S. population of imprisoned terrorist offenders constitutes only a tiny fraction of the general prison population in the U.S. Notwithstanding its relatively small size, the future of this population is linked with high stakes for individuals, communities, and national security policy. Accordingly, research into the evidence base for development of programs within the correctional system for rehabilitation and reintegration of violent extremist offenders would constitute a worthwhile investment.

²⁰³ See Berkell, *supra* note 21, at 29; Mallonee, *supra* note 188.

²⁰⁴ See *id.* at 30-31.

²⁰⁵ See Silke, *supra* note 151, at 5.

Conclusion

Opportunities to prevent terrorism by countering violent extremism arise across many different segments of society, including in the post-conviction areas of the criminal justice system. The federal government should supplement laws that punish terrorist acts in the short term with policies that counter and prevent violent extremism in the long term. These efforts may include developing and implementing evidence-based, systematic measures to assess and reduce the risk that convicted terrorist offenders will reoffend. Specialized risk and needs assessments, as well as rehabilitation and reintegration programming, constitute possible measures. Yet the relevant federal agencies have not released findings or publicly advanced policies on the pressing issues that increasingly confront judicial and corrections officials in sentencing and supervising those convicted of terrorist offenses. While the number of offenders in terrorism cases is miniscule as compared with the population of criminal offenders overall in the United States, terrorist crimes have broad implications for society and national security policy, thus supporting the development of policy and evidence-based practices.

Federal district judges may continue to forge their own pathways in sentencing terrorism defendants and assessing defendants' potential for rehabilitation, and districts may develop community-based programs to assist with reintegration on an *ad hoc* basis. However, federal agencies have developed strong infrastructure that could be applied to these issues, and could facilitate meaningful advancements and uniformity in the area of terrorism jurisprudence. The adoption of risk assessment policies for violent extremist offenders at the sentencing stage and beyond, to monitor and assess offenders' ongoing risks of recidivism, would insert additional information and rigor to the sentencing and corrections processes. Evidence-based programs to rehabilitate terrorist offenders and counter further radicalization in prison also could help to reduce risks of recidivism after releases from prison. In the current environment, in which many perpetrators of terrorist attacks have previously appeared on law enforcement's radar, it is logical for judicial officials to consider and endeavor to reduce the continuing commitment of these individuals to engage in violent extremist acts.

Such initiatives are not exclusive of more traditional approaches to sentencing and incarceration, but would supplement existing methods.

As trends in crime evolve, the legislature and judicial officials develop more proactive and sophisticated methods of addressing them. Because the majority of terrorist offenders eventually will be released back into society, and because of the high stakes of terrorist offenses, judicial resources are warranted to duly consider reducing the risks of recidivism. Much as the justice system devotes resources to other specialized rehabilitation programs such as those for substance abuse and gang violence, federal resources should be directed toward researching and establishing policies on initiatives to diminish opportunities for violent extremism in the post-conviction setting.

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Mission

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