FIFTH AMENDMENT LIMITATIONS ON CRIMINAL ALGORITHMIC DECISION-MAKING

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As we increasingly turn to algorithms to guide our criminal justice decision-making processes, more and more questions are being raised. How much can we rely on algorithms? How accurate are they? Are they biased? Does their use implicate Equal Protection or Due Process concerns? Much scholarship and research has developed in response to these questions. However, there is a lack of scholarship on the implications of the assessment interview process itself—particularly with respect to the Fifth Amendment. This analytical gap is critical given that many algorithms rely heavily on defendant testimony for input data. Many of the benefits of algorithms such as efficiency and accuracy diminish significantly if the input data is collected from potentially unreliable sources. Further, these Fifth Amendment concerns are also implicated by other technologies, such as facial recognition software.

This paper will introduce the concept of risk assessment algorithms in the criminal justice system and summarize the many arguments offered for and against the use of these tools. It will also explore the implications of the risk assessment interview process. In particular, it will argue that the solicitation of defendant data for risk assessment purposes is subject to Fifth Amendment privilege, and often even Miranda safeguards. Defendants can and, in some cases, should, invoke their right to abstain from the risk assessment process. This paper will analyze how algorithms and assessments should respond to selective invocation of silence during the risk assessment interview. Finally, it will offer suggestions for Miranda-like warnings tailored to the risk assessment process.

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I.
INTRODUCTION TO RISK ASSESSMENT AT SENTENCING

There are two primary rationales for criminal punishment—retribution and utilitarianism.[1] Retribution ties the individual's punishment to the severity of her wrongdoing;[2] utilitarianism focuses on forward-

1. *See* Michael Tonry, *Purposes and Functions of Sentencing*, 34 CRIME & JUST. 1, 16 (2006).
2. *Id.*

looking goals, such as deterrence, incapacitation, and rehabilitation.[3] In recent years there has been a shift in the U.S. justice system to emphasize utilitarianism, particularly rehabilitation, in criminal punishment.[4] This utilitarian framework strives to correlate criminal justice decisions with the prevention of crime.[5] An ideal system incorporating this philosophy would subject a person who has been successfully rehabilitated, or who will not reoffend, to lesser punishment.[6]

But how do criminal justice systems identify which offenders are rehabilitated and unlikely to reoffend? An intuitive answer, and what policymakers and judges have historically done,[7] is to look at the defendant's characteristics. Has she offended before?[8] Does she appear remorseful?[9] In fact, the link between defendant characteristics and criminal justice outcomes has been a subject of interest for nearly a century.[10] Studies dating back to the 1920s have identified an array of

3. *Id.* at 17.

4. *Id.* at 16–17 ("Interest in rehabilitation has revived in the early twenty-first century (as evidenced by drug and similar courts offering individualized, treatment-based dispositions, a plethora of new treatment programs in institutions and in the community, and the 'prisoner reentry' movement), and interest in restorative and community justice and in therapeutic jurisprudence has burgeoned.").

5. *Id.* at 11 ("People concerned primarily with the word 'criminal' would say that the overriding purpose of sentencing is the prevention of crime and accordingly that the overriding functional goal is to minimize the incidence of crime and its consequences.").

6. This approach is not only utilitarian in that it holds it is unnecessary to impose a longer sentence on an individual who is unlikely to reoffend; it is also utilitarian because keeping lower-risk individuals incarcerated with higher-risk individuals can detract from the rehabilitation process. A.B.A. CRIMINAL JUSTICE SECTION, STATE POLICY IMPLEMENTATION PROJECT 19, http://www.americanbar.org/content/dam/aba/administrative/criminal_justice/spip_handouts.authcheckdam.pdf.

7. Carissa Byrne Hessick & F. Andrew Hessick, *Recognizing Constitutional Rights at Sentencing*, 99 CAL. L. REV. 47, 74 ("[H]istorically, courts have considered future dangerousness [and] lack of remorse . . . in imposing sentence . . . .").

8. *Id.* at 72.

9. *Id.* at 65 ("Most states provide for increased sentences for those defendants who fail to express remorse for their crimes.").

10. *See, e.g.*, Robert M. Allen, *A Review of Parole Prediction Literature*, 32 J. CRIM. L. & CRIMINOLOGY 548, 548 (1942); *see also* ANDREW A. BRUCE ET AL., THE COMMITTEE ON THE STUDY OF THE WORKINGS OF THE INTERMEDIATE-SENTENCE LAW AND OF PAROLE IN THE STATE OF ILLINOIS, THE WORKINGS OF THE INDETERMINATE-SENTENCE LAW AND THE PAROLE SYSTEM IN ILLINOIS: A REPORT TO THE HONORABLE HINTON G. CLABAUGH, CHAIRMAN, PAROLE BOARD OF ILLINOIS 221 (1928); Richard C. Cabot, *Foreword* to SHELDON GLUECK & ELEANOR T. GLUECK, 500 CRIMINAL CAREERS xii (1930); GEORGE B. VOLD, PREDICTION METHODS AND PAROLE: A STUDY OF FACTORS INVOLVED IN THE VIOLATION OR NON-VIOLATION OF PAROLE IN A GROUP OF MINNESOTA ADULT MALES 10 (1931); Clark Tibbits, *Success and Failure on Parole Can Be Predicted: A Study of the Records of 3,000 Youths Paroles from the Illinois State Reformatory*, 22 AM. INST. CRIM. L. & CRIMINOLOGY 11, 11 (1931).

factors—criminal record, marital status, occupation, etc.—that correlate to a defendant's likelihood of re-arrest, and presumably, reoffense.[11] Newer studies have identified even more factors that correlate with criminal re-arrest and have used these to craft so-called criminal risk assessment (CRA) algorithms.[12]

These algorithms produce classifications which are intended to be indicators of risk—typically of general recidivism or violent recidivism. They are calculated using statistical methods on a set of defendant-provided or -associated data. The information used as inputs to these algorithms is often solicited during custodial questioning of the defendant. Examples of input assessment information vary by jurisdiction and can include a large range of information such as criminal history, age, parental history, gauged reaction to questions, and more.[13] This paper will focus on sentencing, but note that these techniques and methods are employed for parole, probation, bail determination, etc.[14]

A. Application of Risk Assessment to Sentencing

Following a defendant's conviction, judges typically determine what sentence to impose.[15] Judges base sentences on an array of factors, including those detailed in what is often called a Presentence Investigation (PSI) report. The format and contents of these reports vary across jurisdictions, but they normally include information about the relevant crime or crimes, the defendant's criminal history, and any extenuating or mitigating circumstances concerning the crime or the defendant.[16] Many of these factors intuitively and statistically correlate with reoffense and are thus relevant to a judge's sentencing determination. In recent years, many states have began requiring that, in

11. Allen, *supra* note 10, at 548, 550, 553.

12. Other names for these tools include: risk and needs assessments ("RNAs"), criminal justice algorithms, and evidence-based methods.

13. For examples of input assessment inputs, see UNIV. OF CINCINNATI, INDIANA RISK ASSESSMENT SYSTEM (2010) [hereinafter INDIANA RISK ASSESSMENT SYSTEM], and UNIV. OF CINCINNATI & TEX. DEP'T OF CRIMINAL JUSTICE, TEXAS RISK ASSESSMENT SYSTEM COMMUNITY SUPERVISION INTERVIEW GUIDE—FELONY 2, 6 (2014).

14. See INDIANA RISK ASSESSMENT SYSTEM, *supra* note 13, at 2–9 (detailing Indiana's various CRA applications including community supervision, prison intake, and prison reentry).

15. In some jurisdictions juries impose penalties for capital cases. *See, e.g.*, Estelle v. Smith, 451 U.S. 454, 457–58 (1981) ("At the penalty phase, if the jury affirmatively answers three questions on which the State has the burden of proof beyond a reasonable doubt, the judge must impose the death sentence.").

16. *See, e.g.*, STATE OF IND., PRESENTENCE INVESTIGATION REPORT (on file with author).

addition to the historical PSI information, risk assessment scores be included in the PSI report.[17] Additionally, many states now require that judges consider these scores in their sentencing determinations.[18]

B. Benefits of Risk Assessment in Sentencing

The use of risk assessment in the criminal justice system has sparked considerable interest and has had a mixed reception.[19] Advocates for the use of these systems point to at least three major benefits—accuracy, consistency, and diversion.

Risk assessment algorithms are grounded in data science. In an ideal scenario, their predictive accuracy is known and is the result of studies of large samples of defendants and the utilization of accepted statistical methods.[20] Like algorithms, judges process defendant data (often provided by PSI reports) and output sentencing decisions. However, unlike *ideal* risk assessment algorithms, their methodology has not been shown to have high predictive accuracy.[21] Although it has

17. *See, e.g.*, TEX. GOV'T CODE ANN. § 501.092(b)(1) (West 2017) (requiring a reentry and reintegration plan to "incorporate the use of the risk and needs assessment instrument" mandated by § 501.0921).

18. *See, e.g.*, KY. REV. STAT. ANN. § 532.007(3)(a) (West 2016) (requiring sentencing judges to consider "the results of the defendant's risk and needs assessment included in the presentence investigation").

19. *Compare* Julia Angwin et al., *Machine Bias*, PROPUBLICA (May 23, 2016), https://www.propublica.org/article/machine-bias-risk-assessments-in-criminal-sentencing (arguing that a popular risk assessment system is racially biased), *with* Issie Lapowsky, *How Algorithms Could Help Keep People out of Jail*, WIRED (Nov. 6, 2016, 6:55 AM), https://www.wired.com/2016/11/law-enforcement-mental-health-algorithms (arguing that risk assessment algorithms facilitate beneficial criminal justice reform).

20. *See, e.g.*, EDWARD LATESSA ET AL., CREATION AND VALIDATION OF THE OHIO RISK ASSESSMENT SYSTEM: FINAL REPORT 10–18 (2009) (explaining, at a high level, the methods used and indicating a sample size of 1837 defendants).

21. What suffices as high predictive accuracy in the CRA context is unclear from the literature. Is there a certain threshold (for example, ninety percent) that we consider to be sufficiently accurate? Do we focus on only the properly classified population or do we care about the distribution of false positives and the magnitude of their consequences? I propose that all of these factors should be considered in a determination of what qualifies as "high predictive accuracy." In populations that have a low likelihood of reoffense, this may mean algorithms are sufficiently accurate even where their accuracy rate appears low. For example, ProPublica harshly criticized a popular CRA for being sixty-one percent accurate, or only "somewhat more accurate than a coin flip," in its ability to classify defendants who are likely to reoffend. Angwin et al., *supra* note 19. However, on that particular set of data, using a coin flip to assign risk scores would have resulted in an accuracy rate of only forty-five percent. *See* Jeff Larson et al., *How We Analyzed the COMPAS Recidivism Algorithm*, PROPUBLICA (May 23, 2016), https://www.propublica.org/article/how-we-analyzed-the-compas-recidivism-algorithm. ProPublica found that 3317 defendants were classified as "high-risk" and 2035 of those defendants later reoffended, resulting in an "accuracy rate" of

not been well established that CRAs are more accurate than judicial decision-making, it is not hard to see why a well-designed algorithm may outperform a judge. Generally, it is well accepted that when it comes to risk assessment, human judgment is inferior to statistical models.[22] While some factors, such as an extensive criminal history, are commonly known to increase the risk of reoffense,[23] other factors are less obvious.[24] Furthermore, even if a judge can accurately identify which factors make a defendant more or less likely to reoffend, it is nearly impossible for her to gauge how to weight each factor and how factors interact with one another. For these reasons, most models will likely have superior predictive accuracy than the average judge. Additionally, knowledge of the tool's level of accuracy is useful in and of itself because it leads to more informed decision-making.

Risk assessment algorithms are also consistent across judges and defendants. Judges are human and necessarily have biases or individual policy preferences.[25] For example, some judges may "go easy" on juvenile defendants,[26] while other judges are notoriously "tough on

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sixty-one percent (2035/3317). *Id.* If instead a random coin flip had been used to designate "high-risk," fifty percent of the *total* number of defendants—or 3607—would have been classified as "high-risk." Because a coin flip is random, the percentage of these defendants that would have later reoffended would mirror the percentage of the total defendant study population (3251/7214), or forty-five percent. This means that the CRA accurately identified an additional sixteen percent of the population—an improvement in classifying reoffenders of nearly thirty-six percent. Although sixty-one percent may seem low—an appearance that strongly enhances the argument for transparent representation of algorithmic results in court—it is a significant improvement in accuracy over random chance (the flip of a coin). This exemplifies how sufficient accuracy must be determined with available alternatives in mind.

22. Jiaming Zeng, Berk Ustun & Cynthia Rudin, *Interpretable Classification Models for Recidivism Prediction*, 180 J. ROYAL STAT. SOC'Y 689, 689–90 (2016) ("[Anne Milgram's] observations are in line with longstanding work on clinical versus actuarial judgment, which shows that humans, on their own, are not as good as risk assessment as statistical models.").

23. Allen, *supra* note 10, at 548, 550.

24. *See, e.g.*, Angwin et al., *supra* note 19 (detailing 137 different COMPAS assessment factors including length of current residence, average high school grades, and whether or not the defendant's friends or family had been victims of crime).

25. Jon'a Meyer & Paul Jesilow, *Research on Bias in Judicial Sentencing*, 26 N.M. L. REV. 107, 130 (1996) ("Sentencing may reflect many external factors including the social mores of the surrounding communities from which the judges are often drawn . . . ."); Mosi Secret, *Wide Sentencing Disparity Found Among U.S. Judges*, N.Y. TIMES, Mar. 6, 2012, at A23.

26. Keith Bradsher, *Boy Who Killed Gets 7 Years; Judge Says Law Is Too Harsh*, N.Y. TIMES, (Jan. 14, 2000), https://www.nytimes.com/2000/01/14/us/boy-who-killed-gets-7-years-judge-says-law-is-too-harsh.html.

crime."[27] Risk assessment scores treat similarly situated defendants similarly, which results in less disparities and increased sentence predictability.[28] Similarly, risk assessment algorithms impose internal judicial consistency. A judge's bad day or heavy docket does not affect the algorithm.

Risk assessment algorithms are commonly praised because they purportedly "divert" the would-be incarcerated.[29] In fact, many states developed these programs in response to the increased attention to the United States' mass incarceration problem.[30] When used correctly, these algorithms identify groups of defendants whose incarceration is likely to be unnecessary and provide them with alternative sources of rehabilitation, such as community supervision. This results in less unnecessary incarceration and a better administration of justice.

Another benefit of diversion is financial.[31] The cost of incarceration is quite high and typically community supervision and other rehabilitation programs are less expensive. For example, Virginia's early stage cost benefit analysis of its CRA instruments identified a benefit of 1.2 million dollars.[32]

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27. Kate Berry, *Terrance Williams and His "Tough on Crime" Judge*, BRENNAN CTR. FOR JUST. (Feb. 29, 2016), https://www.brennancenter.org/blog/terrance-williams-and-his-tough-crime-judge.

28. *See* Tonry, *supra* note 1, at 5 (noting that "well-designed systems of presumptive sentencing guidelines can reduce disparities [and] make sentencing more consistent and predictable").

29. *See, e.g.*, Lapowsky, *supra* note 19; JUDICIAL COUNCIL OF CALIFORNIA, INVITATION TO COMMENT, SPR17-27, at 2 (2017), http://www.courts.ca.gov/documents/SPR17-27.pdf ("This proposal would . . . advance the legislative directive to improve public safety outcomes by routing offenders into community-based supervision informed by evidence-based practices.").

30. *See, e.g.*, BRIAN J. OSTROM ET AL., NAT'L CTR. FOR STATE COURTS & VA. CRIMINAL SENTENCING COMM'N, OFFENDER RISK ASSESSMENT IN VIRGINIA, A THREE-STAGE EVALUATION: PROCESS OF SENTENCING REFORM, EMPIRICAL STUDY OF DIVERSION & RECIDIVISM & BENEFIT-COST ANALYSIS 1 (2002) ("The [Virginia Criminal Sentencing Commission] designed the risk assessment instrument to identify. . . offenders who would otherwise be recommended for incarceration . . . with the lowest probability of being reconvicted of a felony crime, and divert them to some form of alternative punishment."); MAYOR'S TASK FORCE ON BEHAVIORAL HEALTH AND THE CRIMINAL JUSTICE SYSTEM, ACTION PLAN 9 (2014) ("To reduce crime and unnecessary incarceration . . . . The Task Force recommended that we improve public safety by using a broad risk-based approach to inform decisions about which defendants are most appropriate for an expanded array of supervised release programs.").

31. *See* Cecelia Klingele, *The Promises and Perils of Evidence-Based Corrections*, 91 NOTRE DAME L. REV 537, 539 (2015) ("[Proponents of CRAs] want to reduce the number of people behind bars, improve the fairness of sentencing and supervision, [and] decrease the financial cost of punishment . . . .").

32. OSTROM ET AL., *supra* note 30, at 108 (finding that "quantifiable benefits exceeded quantifiable costs by about $1.2 million").

C. Criticisms of Risk Assessment in Sentencing

1. Criticisms of the Underlying Algorithms

States have come under fire for the "black box" nature of their risk assessment algorithms. Because the tools are typically proprietary and defendant data is highly protected, information that could help assess the performance of algorithms is typically immune to public records requests.[33] Furthermore, validation studies, which are conducted to assess the accuracy and reliability of algorithms, are often non-existent or private.[34]

Even when validation studies exist, they may be inadequate.[35] For example, Ohio's validation study suffered from an underrepresentation of certain types of offenders such as "sex offenders, Hispanic offenders, [and] female offenders."[36] Further, because the study was voluntary, there may have been a selection bias in the sample.[37] Inmates were required to obtain "movement passes" to meet with researchers, and "the pass may not have been granted if it interrupted school or job duties."[38] As a result, the study may have underrepresented inmates with school or job duties.

The use of these assessment systems has also sparked hotly contested allegations of algorithmic bias. For example, ProPublica, a nonprofit news organization, published an article analyzing the use of COMPAS—Correctional Offender Management Profiling for Alternative Sanctions—a popular risk assessment tool created by a third-party company called Northpointe.

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33. *See* Nicholas Diakopoulos, *We Need to Know the Algorithms the Government Uses to Make Important Decisions About Us*, CONVERSATION (May 23, 2016, 8:48 PM), https://theconversation.com/we-need-to-know-the-algorithms-the-government-uses-to-make-important-decisions-about-us-57869 (detailing responses received after filing CRA public records requests in all fifty states including "flat-out" denials and "refusal[s] to disclose details about their criminal justice algorithms on the claim that the information was really owned by a company.").

34. *Algorithms in the Criminal Justice System*, ELECTRONIC PRIVACY INFO. CTR., https://epic.org/algorithmic-transparency/crim-justice/ (last visited Mar. 20, 2018) (finding that twenty-nine states have not released validation information and one state has no validation).

35. *See, e.g.*, State v. Loomis, 881 N.W.2d 749, 762 (Wis. 2016) ("Unlike New York and other states, Wisconsin has not yet completed a statistical validation study of COMPAS for a Wisconsin population.").

36. LATESSA ET AL., *supra* note 20, at 45 (remarking that limitations of the study included the underrepresentation of certain demographics and "a sample size of 65 females").

37. *Id.* at 15.

38. *Id.*

ProPublica's reporters analyzed risk assessment score and actual recidivism data for over 7000 arrestees in Broward County, Florida. They found that the COMPAS algorithm was significantly more likely to incorrectly classify black offenders as high-risk than white offenders.[39] Similarly, the algorithm was significantly more likely to incorrectly classify white offenders as low-risk than black offenders.[40] In effect, the analysis found that classification errors favored white defendants.

In one instance, COMPAS classified a young black woman with a few juvenile misdemeanor convictions as high-risk, but a middle-aged white man with several armed robbery convictions classified as low-risk.[41] Despite these classification scores, the white man reoffended, whereas the black woman did not.[42] This anecdote exemplifies how algorithmic assessment systems inevitably fail to properly classify some groups of people and how this failure can lead to disparate racial impacts.

Even in systems that strive to minimize racial disparities, there are at least two factors that could contribute to bias. The first is the use of racial proxies—that is, factors that correlate with race—in CRA algorithms. Although none of these systems use race as an input value, certain other factors, such as family criminality and residence, could be highly correlated with race and therefore unintentionally "represent" race in the algorithm.[43] Proxy variables are not necessarily bad; while they may serve as reminders of systemic bias, if used correctly, they can enhance an algorithm's predictive accuracy. However, proxy variables can become problematic when they are improperly incorporated into the algorithm, biasing the algorithm on race, or if they are intentionally included to represent race, possibly raising equal protection concerns.[44]

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39. Angwin et al., *supra* note 19 ("The formula was particularly likely to falsely flag black defendants as future criminals, wrongly labeling them this way at almost twice the rate as white defendants."). For Northpointe's response to ProPublica's analysis, see WILLIAM DIETERICH ET AL., NORTHPOINTE, INC., COMPAS RISK SCALES: DEMONSTRATING ACCURACY EQUITY AND PREDICTIVE PARITY (2016). For ProPublica's response to Northpointe's analysis, see Jeff Larson & Julia Angwin, *Technical Response to Northpointe*, PROPUBLICA: MACHINE BIAS (July 29, 2016, 11:55 AM), https://www.propublica.org/article/technical-response-to-northpointe.

40. Angwin et al., *supra* note 19.

41. *Id.*

42. *Id.*

43. Bernard E. Harcourt, *Risk as a Proxy for Race* (Univ. of Chi. Law & Econ., Olin Working Paper No. 535 & Univ. of Chi., Pub. Law Working Paper No. 323, 2010), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1677654.

44. *See* Megan Stevenson & Sandra G. Mayson, *Pretrial Detention and Bail*, *in* 3 REFORMING CRIMINAL JUSTICE 21, 36–37 (Erik Luna ed., 2017).

Another cause of disparate impact in algorithmic prediction is different rates of incarceration across protected groups. CRA algorithm designers seek "predictive parity"—equal predictive accuracy across protected factors like race.[45] An algorithm satisfying this principle would classify populations of black and white defendants such that the probability of recidivism is the same for black defendants classified as high-risk as for white defendants classified as high-risk. This approach is essential to algorithmic fairness; to classify racial populations with different rates of accuracy would be arguably problematic because its application would be prejudiced against some races.[46]

Predictive parity, however, does not consider the *type* of inaccuracy. Of specific concern is that it treats a false positive (false high-risk classification) as equivalent to a false negative (false low-risk classification). ProPublica's study found that, despite maintaining predictive parity, COMPAS "favored" whites in the types of errors it made.[47] Its algorithm disproportionately classified whites who later reoffended as low-risk and blacks who did not reoffend as high-risk.[48] However, data tells us that black offenders are more likely to reoffend than white offenders, resulting in a different probability distribution of reoffense for black and white offenders.[49] Unfortunately, this means the differences in population distributions mean that it is impossible to craft an algorithm that satisfies both predictive parity and equity across error types.[50]

2. *Criticisms of the Assessment's Application*

Even if a CRA algorithm is sufficiently transparent and has eliminated issues of bias, its implementation is subject to criticism.

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45. DIETERICH ET AL., *supra* note 39.

46. Note, however, that this means accuracy will be compromised for some races at the expense of equality across all races. An alternative approach, such as providing clear measures of accuracy to judges, may be favored.

47. Angwin et al., *supra* note 19.

48. *Id.*

49. DIETERICH ET AL., *supra* note 39; *see also* Julia Angwin & Jeff Larson, *Bias in Criminal Risk Scores Is Mathematically Inevitable, Researchers Say*, PROPUBLICA: MACHINE BIAS (Dec. 30, 2016, 4:44 PM), https://www.propublica.org/article/bias-in-criminal-risk-scores-is-mathematically-inevitable-researchers-say.

50. DIETERICH ET AL., *supra* note 39, at 9. ("[The] requirement that the risk scale classification obtains the same *Sensitivity* and *Specificity* for blacks and whites at a particular cut point is unrealistic because the two groups have different risk scale distributions and different base rates.").

First, CRA scores are not dispositive.[51] A judge looks at these scores in conjunction with the PSI—a report that contains a plethora of other information. Although there is data that suggests that judges strongly consider risk scores,[52] no jurisdiction permits judges to base sentences solely on these values. The underlying rationales of criminal punishment—retribution and utilitarianism—strongly support this utilization of CRA scores. Sentences should reflect not only individual recidivism risk, but also other factors like societal deterrence and retribution.[53] However, the freedom provided to judges to integrate risk scores as they see fit may compromise the values of accuracy and consistency. If a judge can choose to rely on an objective risk score when it aligns with her personal assessment and reject it when it does not, the algorithm serves little purpose towards an accurate or consistent sentence. In fact, such use of a CRA score may help judges rationalize their biases.

Furthermore, judges may inadvertently "double down" on certain defendant characteristics. If a judge does not entirely defer to the risk score as a representation of the defendant's future risk, the judge may incorporate factors into the sentencing calculus that were already considered in the score. For example, a judge may penalize a defendant because of a long criminal history in her sentencing decision. She may also rely on a negative risk score to further penalize that defendant. However, that risk score may be negative entirely because of (or at least in part due to) that long criminal history. This "double down" issue is strongly tied to the "black box" aspect of these algorithms—both because of their proprietary nature and of their utilization of advanced statistical methods.

Second, the assessment algorithms will have an inherent bias because they actually predict "future arrest" or "future conviction" in a set time period, not future recidivism or reoffense.[54] It is well-accepted that policing and prosecution are biased against certain communities and certain types of crime.[55] For example, certain groups are

51. *See, e.g.*, State v. Loomis, 881 N.W.2d 749, 751 (Wis. 2016) (noting that CRA scores are "one of many factors that may be considered and weighed at sentencing" and are not dispositive).

52. Klingele, *supra* note 31, at 552 ("[J]udges increasingly refer to defendants' 'criminogenic needs' when imposing sentence[s].").

53. Tonry, *supra* note 1, at 16–23.

54. *See, e.g.*, LATESSA ET AL., *supra* note 20, at 15 ("The primary measure of recidivism for this study was arrest for a new crime."); THOMAS BLOMBERG ET AL., CTR. FOR CRIMINOLOGY & PUB. POLICY RESEARCH, FLA. STATE UNIV., VALIDATION OF THE COMPAS RISK ASSESSMENT CLASSIFICATION INSTRUMENT (2010).

55. One scholar notes:

searched more often than others, despite lower or equal likelihoods of criminal activity.[56] But this issue is not just restricted to community bias. It is also a bias routed in the type of crime. Some crimes—for example, sexual assault and burglary—are under-prosecuted.[57] This is because of unequal rates of crime solving[58] and reporting across various types of crime.[59]

Inherent bias is also implicated in the time period needed for crime detection. Many studies only predict recidivism over one or two years.[60] However, the time period to find evidence and arrest a defendant for drug use is drastically shorter than that for insider trading. The algorithms that are publicly detailed do not appear to account for these factors in their determination of future offenses.[61] This means that individuals that are chronic reoffenders of these certain classes of crimes will be found less risky than similar reoffenders of commonly prosecuted crimes.

A similar issue is the severity of reoffense. General "reoffense" risk is normally based off a future arrest or conviction.[62] But jumping the turnstile to catch a train is drastically different from rape. In response, many states include both a general and violent recidivism

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> The U.S. system of arresting, charging, detaining, convicting, and imprisoning defendants is notoriously discriminatory. Police disproportionately target African-American individuals in making traffic stops and arrests, and the percentage of African Americans imprisoned (controlling for crime rate) is extremely high, both viewed independently and as compared to other groups.

Samuel R. Wiseman, *Fixing Bail*, 84 GEO. WASH. L. REV. 417, 470 (2016).

56. Philip Bump, *Why Racism in Numbers Will Bring Down the NYPD in the Stop-and-Frisk Trial*, ATLANTIC (May 24, 2013), https://www.theatlantic.com/national/archive/2013/05/nypd-stop-and-frisk-numbers/314931/ ("The likelihood a stop of an African American New Yorker yielded a weapon was half that of white New Yorkers stopped."); AM. CIVIL LIBERTIES UNION, THE WAR ON MARIJUANA IN BLACK AND WHITE: BILLIONS OF DOLLARS WASTED ON RACIALLY BIASED ARRESTS 17 (2013) (finding that despite roughly equal usage, "[b]lacks are 3.73 times more likely than whites to be arrested for marijuana possession.").

57. FED. BUREAU OF INVESTIGATION, CRIME IN THE UNITED STATES, 2015, at 2–3 (2016) (finding that of offenses reported to law enforcement, an arrest is made and referred to prosecution for 61.5% of murder and nonnegligent manslaughter cases and 54.0% of aggravated assault cases versus 37.8% of rape (revised definition) cases, 36.2% of rape (legacy definition), and 12.9% of burglary cases.).

58. *Id.*

59. *See* LYNN LANGTON ET AL., U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, VICTIMIZATIONS NOT REPORTED TO THE POLICE, 2006–2010 (2012).

60. LATESSA ET AL., *supra* note 20, at 10 ("Outcome measures were gathered between May 2008 and April 2009, providing an average of a one year follow-up for recidivism.").

61. *See, e.g.*, *id.* at 15 (measuring recidivism based on arrest for any new crime).

62. *See, e.g.*, *id.*

score.[63] However, this still does not get to the heart of the severity problem. For example, differentiating between violent and non-violent crimes fails to capture other differences in severity (e.g., a small-time drug user would be treated the same as a long-time drug dealer).

Finally, there is the issue of consistent administration.[64] According to Ohio's risk assessment system report, mathematicians and statisticians were sent to solicit the information that trained and tested the algorithm.[65] However, officers or administrators will be the ones actually soliciting information from defendants day-to-day. Due to this inconsistency, the testing and training data may not be consistent with the population data. Also at issue is the fact that the defendants solicited to create the system had no stake in the system's consequences and had no incentive to take it seriously or to "game" the system in the way that today's defendants do. This biases the initial sample. These scenarios exemplify how an algorithm's implementation population may not behave the same way as the algorithm's validation population.

3. Legal and Policy Criticisms

In addition to concerns with the practical use of CRA algorithms, there have been critiques of the theoretical use of CRA algorithms. Although the federal system uses formulas to calculate sentencing guidelines, it does not rely on information that is outside of the defendant's control.[66] This is in sharp contrast to the CRA algorithms utilized by most states which, like COMPAS, rely on factors outside of the defendant's control.[67] For example, the default COMPAS questionnaire provides 137 interview questions from which these inputs are determined.[68] The questions are categorized as pertaining to "Current Charges," "Criminal History," "Non-compliance," "Family Crim-

63. BLOMBERG ET AL., *supra* note 54, at 31 (validating the COMPAS assessment for both general and violent rearrests).

64. LATESSA ET AL., *supra* note 20, at 45 ("In short, the structured interview process utilized to gather the data will likely be somewhat different than the process used by criminal justice officials to interview cases and assign risk once the ORAS is implemented.").

65. *Id.* at 12 ("Data collection teams were comprised of trained research assistants from the University of Cincinnati. Depending on the size of the pilot site and the availability of spare rooms, the research staff size varied from three to 13 staff members.").

66. The federal sentencing guidelines primarily use information about the convicted crime and the defendant's criminal history. U.S. SENTENCING GUIDELINES MANUAL § 3E1.1 (U.S. SENTENCING COMM'N 2016).

67. *See* Angwin et al., *supra* note 19.

68. *Id.*

inality," "Peers," "Substance Abuse," "Residence/Stability," "Social Environment," "Education," "Vocation (Work)," "Leisure/Recreation," "Social Isolation," "Criminal Personality," "Anger," and "Criminal Attitudes."[69] The questions solicit information regarding factors such as length of stay at current residence, high school grades, and whether or not the offender was raised by a single parent.[70] Former Attorney General Eric Holder cautioned that by basing sentencing decisions on "immutable characteristics"—like education level, socioeconomic background, or neighborhood—these algorithms "may inadvertently undermine . . . efforts to ensure individualized and equal justice," and ultimately "exacerbate[ ] unwarranted and unjust disparities . . . in our criminal justice system and in our society."[71]

Furthermore, there have been concerns about the constitutionality of CRA systems. Several Due Process issues have been raised including potential violations of a defendant's right to be sentenced on accurate information, to not be sentenced on protected factors, and to an individualized sentence. For example, the Wisconsin Supreme Court recently heard a Due Process challenge to Wisconsin's CRA, but ultimately held that the CRA did not violate the Due Process Clause when correctly administered.[72] However, the U.S. Supreme Court denied a petition for a writ of certiorari in that case and has yet to hear a similar case.[73] Additionally, CRAs that use protected variables may be vulnerable to an Equal Protection Clause challenge.[74]

Finally, there are democratic concerns with these technologies.[75] Their complexity and the practice of outsourcing their creation and validation to private companies means that even the most well-intending governmental entities cannot be held accountable to the pub-

69. *Id.*

70. *Id.*

71. Katherine Freeman, *Algorithmic Injustice: How the Wisconsin Supreme Court Failed to Protect Due Process Rights in* State v. Loomis, 18 N.C. J.L. & TECH. 75, 83 (2016).

72. The *Loomis* court found, among other things, that Wisconsin's COMPAS tool did not violate a defendant's Due Process rights, so long as its use was limited (not determinative and restricted to certain scenarios) and its limitations were transparent (for example, the court was informed of a lack of validation, data transparency, etc.). State v. Loomis, 881 N.W.2d 749, 770–771 (Wis. 2016).

73. State v. Loomis, 137 S. Ct. 2290 (2017).

74. *See Loomis*, 881 N.W.2d at 766 (discussing the potential of an Equal Protection Clause issue, but finding that Loomis did not raise an appropriate challenge); Sonja B. Starr, *Evidence-Based Sentencing and the Scientific Rationalization of Discrimination*, 66 STAN. L. REV. 803 (2014).

75. Robert Brauneis & Ellen P. Goodman, *Algorithmic Transparency for the Smart City*, 20 YALE J.L. & TECH. 103, 109 (2018).

lic.[76] They lack the competence and access needed to properly assess and understand the tools they use.[77] For this very reason, organizations have urged governments to require agency expertise in these tools and to reject "black box" tools to which no meaningful access can ever be obtained.[78] Further, even when the government has the adequate levels of competence and access, the opaque process by which these tools are acquired and deployed presents a threat to democracy. As Nicholas Diakopoulos explained in his article *Accountability in Algorithmic Decision Making*, "[t]he government is legitimate only to the extent it is accountable to the citizenry. But algorithms are largely unregulated now, and they are indeed exercising power over individuals or policies in a way that in some cases (for example, hidden government watch lists) lacks any accountability whatsoever."[79] This has led some organizations and scholars to stress the importance of public input and engagement in the adoption of these technologies and their processes.[80]

Regardless of the net value of CRA algorithms, the arguments detailed above demonstrate the many circumstances in which they might fail. One method of circumventing the failures of these systems to produce an appropriate outcome is simply to take them out of the equation—in particular, for defendants to invoke their Fifth Amendment right to remain silent during the criminal risk assessment process.

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76. *Id.*; Joseph Jerome, *NYC May Be at the Vanguard of Algorithmic Accountability in 2018*, CTR. DEMOCRACY & TECH., (Dec. 22, 2017), https://cdt.org/blog/nyc-may-be-at-the-vanguard-of-algorithmic-accountability-in-2018/ ("[P]ublic insight into how these systems work and how these decisions are being reached is inadequate. This poses a serious challenge to core democratic values and responsible (and responsive) government, particularly when automated decision-making systems are deployed by well-meaning but ill-equipped public authorities.").

77. Brauneis & Goodman, *supra* note 75, at 109.

78. AI Now Inst., *Algorithmic Impact Assessments: Towards Accountable Automation in Public Agencies*, MEDIUM (Feb. 21, 2018), https://medium.com/@AINowInstitute/algorithmic-impact-assessments-toward-accountable-automation-in-public-agencies-bd9856e6fdde (arguing that "we need to increase the internal capacity of public agencies to better understand and explicate potential impacts before systems are implemented" and that "[b]lack boxes must not prevent agencies from fulfilling their responsibility to protect basic democratic values").

79. Nicholas Diakopoulos, *Accountability in Algorithmic Decision Making*, 59 COMM. ACM 56, 58 (2016).

80. Barry Friedman & Maria Ponomarenko, *Democratic Policing*, 90 N.Y.U. L. REV. 1827, 1853 (2015) (arguing that law enforcement technologies should be vetted by the public and that public policy changes when proper public engagement occurs); AI Now Inst., *supra* note 78 (finding that the public should have the opportunity to hold agencies accountable for their uses of technology).

II.
THE FIFTH AMENDMENT ALLOWS DEFENDANTS TO REFRAIN FROM THE SENTENCING RISK ASSESSMENT PROCESS

A defining characteristic of the American justice system is the privilege against self-incrimination.[81] Accordingly, the Fifth Amendment provides that "no person . . . shall be compelled in any criminal case to be a witness against himself."[82] In *Murphy v. Waterfront Commission of New York Harbor*, the Supreme Court enumerated three rationales for this privilege and its status as "one of the great landmarks in man's struggle to make himself civilized."[83] First, is an "unwillingness to subject those suspected of crime to the cruel trilemma of self-accusation, perjury[,] or contempt."[84] Second, is a fear that "self-incriminating statements will be elicited by inhumane treatment and abuses."[85] Third, is the "fair state-individual balance" dictated by the adversarial system which requires "the government to leave the individual alone until good cause is shown for disturbing him."[86] Perhaps underlying some of these rationales is an additional concern for judicial integrity—facing the cruel trilemma may result in perjury; inhumane elicitation is coercive and likely to encourage false or inaccurate testimony.

This Fifth Amendment protection against the compulsion of incriminating testimony manifests itself in many ways. Fundamentally, it requires the privilege against compelled incriminating testimony.[87] But the Fifth Amendment includes other protections as well. When the circumstances of interrogation are inherently compelling, certain warnings, known as *Miranda* warnings, may be required to ensure the testimony is voluntary.[88] The right to invoke silence instead of an-

81. Kastigar v. United States, 406 U.S. 441, 444 (1972) ("The privilege [against self-incrimination] reflects a complex of our fundamental values and aspirations, and marks an important advance in the development of our liberty.").

82. U.S. CONST. amend. V.

83. Murphy v. Waterfront Comm'n of N.Y. Harbor, 378 U.S. 52, 55 (1964) (quoting Ullman v. United States, 350 U.S. 422, 426 (1956)).

84. *Id.*

85. *Id.*

86. *Id.*

87. Bram v. United States, 168 U.S. 532, 548 (1897) ("In short, the true test of admissibility is that the confession is made freely, voluntarily, and without compulsion or inducement of any sort." (quoting Wilson v. United States, 162 U.S. 613, 623 (1896)).

88. The *Miranda* Court concluded that:

> [W]ithout proper safeguards the process of in-custody interrogation of persons . . . contains inherently compelling pressures which . . . compel him to speak where he would not otherwise do so freely. In order to

swering questions that will lead to incriminating testimony is also a corollary to the protection against compulsion. If a defendant cannot choose silence, then she is effectively being compelled to testify. Baked into this "right to remain silent" is the guarantee that no adverse inference can be drawn from a defendant's silence—the silence is itself inadmissible as evidence of guilt.[89] If an adverse inference of guilt were permissible, silence would be self-incrimination. These protections will be further analyzed in the context of CRA interviews later in this paper, but are helpful to understand the context of the caselaw and arguments that follow.

A. Sentencing Risk Assessment Interviews Are Protected Against Compulsion by the Fifth Amendment

Following the words of the Constitution, for a proceeding to qualify for protections against compulsion under the Fifth Amendment, it must qualify as one which exposes incriminating testimony.[90] Despite its traditional depiction and the qualifier "*in any criminal case*," the Fifth Amendment is not restricted in its application to testimony at trial.[91] The Supreme Court has affirmed several times that its protection applies broadly to *any* incriminating testimony that may implicate a defendant in current or future criminal proceedings.[92] Furthermore, while the safeguards against compulsion mandated by the Fifth Amendment may be heightened in certain custodial settings, the

> combat these pressures and to permit a full opportunity to exercise the privilege against self-incrimination, the accused must be adequately and effectively apprised of his rights and the exercise of those rights must be fully honored.

Miranda v. Arizona, 384 U.S. 436, 467 (1966); *see also* Charles D. Weisselberg, *Mourning Miranda*, 96 CALIF. L. REV. 1519 (2008) (explaining the *Miranda* warnings, their underlying rationales, and an analysis of their usage).

89. Griffin v. California, 380 U.S. 609, 615 (1965) ("We . . . hold that the Fifth Amendment . . . forbids either comment by the prosecution on the accused's silence or instructions by the court that such silence is evidence of guilt.").

90. U.S. CONST. amend. V ("[N]o person . . . shall be compelled in any criminal case to be a *witness* against himself." (emphasis added)).

91. Minnesota v. Murphy, 465 U.S. 420, 426 (1984) ("[The Fifth Amendment] privileges him not to answer official questions put to him in any other proceeding, civil or criminal, formal or informal, where the answers might incriminate him in future criminal proceedings." (quoting Lefkowitz v. Turley, 414 U.S. 70, 77 (1973)); Estelle v. Smith, 451 U.S. 454, 469 (1981) (finding that questioning during psychiatric interviews later used as evidence in criminal proceedings were protected by the Fifth Amendment); McCarthy v. Arndstein, 266 U.S. 34, 40 (1924) (finding that the Fifth Amendment right to remain silent applies even to civil proceedings if the information revealed may implicate the witness in future criminal proceedings).

92. *Id.*

determination of whether testimony is sufficiently incriminating as to warrant any protection is irrespective of custody.[93]

In practice, the threshold for what qualifies as incriminating testimony depends, in part, on whether the defendant is asserting a right to refrain from testimony or contesting the admission of already spoken testimony.[94] This is because the determination of whether unspoken testimony would be incriminating is typically left to the defendant and it is difficult for the prosecution to contest unless it offers immunity.[95] However, the theoretical threshold traditionally encompasses testimony that "includes information which would furnish a link in the chain of evidence that could lead to prosecution, as well as evidence which an individual reasonably believes could be used against him in a criminal prosecution."[96]

In *Estelle v. Smith*, the Supreme Court confirmed that incriminating testimony additionally encompasses testimony that may be used against the defendant at sentencing.[97] In *Estelle*, the defendant sought federal habeas corpus relief following the imposition of a death sentence. He claimed the use of the results of a psychiatric evaluation at sentencing by the prosecution or the court was a violation of his Fifth Amendment rights.[98] During the sentencing proceeding, the doctor testified that the defendant would "continue his previous behavior" and that "his sociopathic condition will 'only get worse'" on the basis of a ninety-minute interview.[99] Although the psychiatric evaluation had not been ordered or requested by the prosecution and its sole purpose was to determine competency to stand trial, the Court concluded that the interview qualified as a proceeding protected by the Fifth Amendment.[100] The Court noted that "the availability of the [Fifth Amendment] privilege does not turn upon the type of proceeding in

93. *See* Salinas v. Texas, 133 S. Ct. 2174 (2013) (suggesting that the Fifth Amendment right to remain silent may be exercised in a noncustodial setting if expressly invoked, but deciding on other grounds).

94. *See* Kastigar v. United States, 406 U.S. 441 (1972).

95. *See id.*

96. Maness v. Meyers, 419 U.S. 449, 461 (1975) (citing Hoffman v. United States, 341 U.S. 479, 486 (1951)).

97. Estelle v. Smith, 451 U.S. 454 (1981); *see also* Mitchell v. United States, 526 U.S. 314, 326–27 (1999) ("Where the sentence has not yet been imposed a defendant may have a legitimate fear of adverse consequences from further testimony" and "[a]ny effort by the State to compel [the defendant] to testify against his will at the sentencing hearing clearly would contravene the Fifth Amendment" (alteration in original) (internal quotation marks omitted) (quoting *Estelle*, 451 U.S. at 463).

98. *Estelle*, 451 U.S. at 460.

99. *Id.* at 459.

100. *Id.* at 468–69.

which its protection is invoked, but upon the nature of the statement or admission and the exposure which it invites."[101]

Estelle is the only Supreme Court case that squarely addresses the Fifth Amendment in the context of interviews used at sentencing. Federal appellate cases have not spoken directly to CRA interviews,[102] but some circuits have upheld the applicability of the Fifth Amendment to general presentence interviews. In *Jones v. Cardwell*, for example, the Ninth Circuit considered whether compelled statements made during a presentence interview could be used against the defendant at sentencing. The court applied the logic of *Estelle* and found that *Jones*, "like *Estelle*, involve[d] statements and admissions by an incarcerated defendant to an individual acting on behalf of the state that *exposed the defendant to serious consequences*"[103] and therefore required Fifth Amendment protections.[104] In *United States v. Chitty*, the Second Circuit faced the question of whether compelled statements made during a psychiatric examination could be considered as part of a presentence investigation report.[105] The facts of the case were similar to *Estelle*, except that the defendant was not facing a capital determination by a jury.[106] Despite the prosecution's insistence, the *Chitty* court declined to read *Estelle* as limited to capital cases and applied Fifth Amendment protections to a psychiatric assessment used in the presentence investigation.[107]

Jones and *Chitty* exemplify that *Estelle* is not a narrow holding limited to psychiatric examinations or capital sentences, but rather a broad proposition that that there is "no basis to distinguish between the guilt and penalty phases of [a defendant's] trial so far as the protection of the Fifth Amendment privilege is concerned."[108] Other lower courts have questioned the applicability of heightened *Miranda* warnings in the presentence context (whether or not presentence in-

101. *Id.* at 462 (quoting *In re* Gault, 387 U.S. 1, 49 (1967)).

102. As mentioned earlier, the federal system does not use CRA scores at sentencing. *See supra* text accompanying note 6.

103. Jones v. Cardwell, 686 F.2d 754, 756 (9th Cir. 1982) (emphasis added) (footnote omitted).

104. *Id.* ("[W]here . . . the state's agent seeks from the convicted defendant a confession . . . used to enhance a defendant's criminal sentence, we think it beyond peradventure that the defendant may properly claim the protection of the privilege against self-incrimination.").

105. United States v. Chitty, 760 F.2d 425 (2d Cir. 1985).

106. *Id.* at 431–32.

107. *Id.* at 432.

108. Estelle v. Smith, 451 U.S. 454, 462–63 (1981).

vestigations are custodial), but not the general Fifth Amendment protection.[109]

CRA interviews are proceedings subject to Fifth Amendment privilege because some questions directly solicit information about criminal activity and all questions implicate the same high exposure as the interview in *Estelle*. Questions asked in the administration of the COMPAS interview include: "Did you use heroin, cocaine, crack or methamphetamines as a juvenile?"; "Do you think you would benefit from getting treatment for drugs [or alcohol]?"; "Is it easy to get drugs in your neighborhood?"; and "How often did you get into fights at school?"[110] Additionally, COMPAS asks defendants to assess how well certain sentences describe themselves including: "If people make me angry or lose my temper, I can be dangerous"; and "I won't hesitate to hit or threaten people if they have done something to hurt my friends or family."[111] Some of these questions—such as those regarding drug use—indisputably solicit incriminating testimony. If a defendant's answer to those questions is yes, she would be reasonable in believing that those statements could be used against her in a prosecution because the conduct is criminal. Other questions are the sort that could produce answers which provide a link to establish prosecution. For example, admitting that it is easy to find drugs in one's neighborhood supports that inference that one has experience or knowledge of purchasing drugs.

Other questions may not appear to meet the dictionary definition of "incriminating," but they certainly meet *Estelle*'s test. *Estelle* turned on the level of exposure implicated by the psychiatric assessment—namely the risk posed to the defendant's sentence length. As the court declared:

> [T]he ultimate penalty of death was a potential consequence of what respondent told the examining psychiatrist. Just as the Fifth

109. *See* United States v. Rogers, 921 F.2d 975, 979–80 (10th Cir. 1990) (finding that a post-conviction presentence interview does not qualify as the "type of inherently coercive situation and interrogation by the government for which the *Miranda* rule was designed" in part because "at that stage of the proceedings defendants are conversant with their Fifth Amendment rights"); Baumann v. United States, 692 F.2d 565, 576–77 (9th Cir. 1982) (finding that *Miranda* warnings are unnecessary in routine presentence interviews and distinguishing between the Fifth Amendment right to silence and the prophylactic *Miranda* warning). *But see* United States v. Jackson, 886 F.2d 838, 841 n.4 (questioning the rationale behind *Jones v. Cardwell* because presentence interviews are administered by probation officers and not the prosecution.).

110. NORTHPOINTE, RISK ASSESSMENT (2011), https://www.documentcloud.org/documents/2702103-Sample-Risk-Assessment-COMPAS-CORE.html.

111. *Id.*

> Amendment prevents a criminal defendant from being made the deluded instrument of his own conviction, it protects him as well from being made "the deluded instrument of his own execution."[112]

The same type of exposure is at issue in CRA interviews because they are used to create classifications, which in turn influence sentence length determination. Although most defendants are not facing the death penalty, the logic of *Estelle* is applicable to non-capital cases.[113] CRA responses influence sentence length; given the amount of discretion afforded to judges, the potential consequences may include decades of lost liberty.

Although CRA interviews are not psychiatric evaluations, the *Estelle* Court emphasized that the Fifth Amendment privilege depends not on a formal category of proceedings but instead on the potentially adverse use of statements made.[114] In *Estelle*, the defendant answered a series of questions, the psychiatrist testified to the defendant's likelihood to reoffend—"that he 'is going to go ahead and commit other similar or same criminal acts if given the opportunity to do so'" and "his sociopathic condition will 'only get worse'"—and that assessment was a factor in sentencing.[115] Similarly, in the CRA process, a defendant answers a series of questions, the algorithm creates a score indicative of the defendant's likelihood to reoffend, and the judge uses that score as a factor in sentencing. Furthermore, the level of exposure posed by the CRA process may be greater than from a typical psychiatric evaluation. In a typical psychiatric evaluation, a doctor is often determining the defendant's competence to stand trial. In contrast, the sole purpose of the CRA process is to identify traits of a defendant that make her more or less prone to criminal activity. In these circum-

112. *Estelle*, 451 U.S. at 462 (quoting Culombe v. Connecticut, 367 U.S. 568, 581 (1961)).

113. *See* United States v. Chitty, 760 F.2d 425, 429, 432–33 (2d Cir. 1985) (finding a violation of defendant's Fifth Amendment rights when statements made during a court-ordered psychiatric examination without *Miranda* warnings were used at sentencing because the *Estelle* Court "emphasized the Fifth Amendment considerations, not the gravity of the particular sentence at issue"); *see also* Mitchell v. United States, 526 U.S. 314 (1999) (finding a privilege against self-incrimination in non-capital sentencing).

114. *Estelle*, 451 U.S. at 465 (holding that if the findings of the psychiatric evaluation had been limited to the neutral purpose of "determining his competency to stand trial," no Fifth Amendment privilege would apply, but that the privilege did apply because the "results of that inquiry were used by the State for a much broader objective that was plainly adverse to respondent").

115. *Id.* at 459–60.

stances, it is clear that a defendant would "reasonably believe[ ] [CRA responses would] be used against him in a criminal prosecution."[116]

B. Invocation of Silence During a Sentencing Risk Assessment Interview Cannot Negatively Affect a Defendant's Sentence

As described above, the Fifth Amendment protects against the compulsion of incriminating testimony. When a proceeding elicits incriminating testimony, certain rights and protections against compulsion become available to criminal defendants. One of these rights is the "right to remain silent."[117] The invocation of this right allows defendants to abstain from answering questions and to terminate questioning for a period of time.[118] Although the "right to remain silent" warning was introduced in *Miranda*, its application is not necessarily restricted to only custodial interrogation.[119]

When faced with the prospect of providing incriminating testimony, defendants are always afforded the right to remain silent. But remaining silent does not, in itself, fulfill the Fifth Amendment protections. In *Griffin v. California*, the Supreme Court considered whether a judge's instructions that the "jury may take [the] failure [of the defendant to testify] into consideration" when determining guilt was constitutional.[120] The Court determined that "any comment by court or counsel" regarding the defendant's refusal to testify "is a penalty imposed by courts for exercising a constitutional privilege" and held that such instructions were impermissible.[121] The Court's issue with the judge's instructions was that permitting an adverse inference would devalue the right to remain silent.[122] Without such a protection, courts would be permitted to assume the worst about a defendant, effectively requiring a defendant's testimony to redeem herself and defeating the purpose of the Fifth Amendment protection against self-incrimination.

116. Maness v. Meyers, 419 U.S. 449, 461 (1975) (citing Hoffman v. United States, 341 U.S. 479, 486 (1951)).

117. Miranda v. Arizona, 384 U.S. 436, 444 (1966).

118. Michigan v. Mosley, 423 U.S. 96, 100 (1975) ("If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease.").

119. *See* Salinas v. Texas, 133 S. Ct. 2174, 2180 (2013) (suggesting that the Fifth Amendment right to remain silent may be exercised in a noncustodial setting if expressly invoked, but deciding on other grounds).

120. Griffin v. California, 380 U.S. 609, 610 (1965).

121. *Id.* at 620.

122. *See id.* at 614 (finding issue with the trial judge's decision to permit adverse inferences from silence because "[i]t cuts down on the privilege by making its assertion costly").

But this protection was insufficient. Sixteen years later, in *Carter v. Kentucky*, the Court considered whether a judge was required to affirmatively give a so-called "no-adverse-inference" instruction to the jury.[123] Rooted in the same rationale as *Griffin*—that it is a "basic constitutional principle" that the jury should not consider the defendant's silence in its determination of guilt—*Carter* held that such an instruction was required upon request.[124] These principles require that no adverse inference be made from a defendant's invocation of silence during CRA interviews.

1. Sentencing is a Proceeding in Which No Adverse Inference Can Be Drawn from Silence

In *Mitchell v. United States*, the Supreme Court confirmed that a no-adverse-inference instruction in connection with a defendant's invocation of the Fifth Amendment right to remain silent applies to sentencing proceedings.[125] In *Mitchell*, the defendant pled guilty to conspiracy to distribute cocaine.[126] Due to statutorily prescribed mandatory-minimum sentencing, the judge was required to impose at least ten years of prison time if the government could demonstrate an intent to distribute at least five kilograms of cocaine.[127] Otherwise, the judge was only required to impose a minimum one-year sentence.[128] During her sentencing hearing, the defendant invoked her right to remain silent and the district court used this silence as "[o]ne of the things" to determine an intent to distribute at least five kilograms of cocaine and imposed the ten-year mandated minimum sentence.[129] Yet the Supreme Court ruled that the defendant's silence could not be used against her in the sentence determination process.[130] Specifically, it stated, "[w]e decline to adopt an *exception* for the sentencing phase

123. Carter v. Kentucky, 450 U.S. 288, 289–90 (1981).
124. *Id.* at 303. The Court explained:
> Just as adverse comment on a defendant's silence "cuts down on the privilege by making its assertion costly," the failure to limit the jurors' speculation on the meaning of that silence, when the defendant makes a timely request that a prophylactic instruction be given, exacts an impermissible toll on the full and free exercise of the privilege. . . . [A] state trial judge has the constitutional obligation, upon proper request, to minimize the danger that the jury will give evidentiary weight to a defendant's failure to testify.

Id. at 305 (quoting *Griffin*, 380 U.S. at 614).
125. *See* Mitchell v. United States, 526 U.S. 314, 326–27 (1999).
126. *Id.* at 317–19.
127. *Id.* at 319.
128. *Id.* at 317.
129. *Id.* at 319.
130. *Id.* at 328.

of a criminal case *with regard to factual determinations respecting the circumstances and details of the crime*."[131]

Lower courts are split as to whether *Mitchell*'s holding encompasses presentence testimony unrelated to factual determinations concerning the committed crimes.[132] The Supreme Court has yet to expressly rule on the matter, although it did comment on the matter in *White v. Woodall*.[133] In that case, the defendant—guilty of the kidnapping, rape, and murder of a sixteen-year-old—invoked his right to remain silent at the penalty phase and the judge declined to instruct the jury that this silence could not prejudice him.[134] The defendant claimed that his silence was used to infer a lack of remorse and was instrumental in his capital sentence.[135] The *White* majority wrote that *Mitchell* expressly declined to determine whether silence could "bear[ ] upon the determination of a lack of remorse[ ] or upon acceptance of responsibility," and it was therefore not unreasonable that the trial court refused a no-adverse-inference instruction.[136] Of particular note was the Court's "difficult-to-meet standard [which permitted the] court to grant federal habeas relief . . . only if [the prior] adjudication resulted in a decision that was contrary to, or involved an unreasonable application of, clearly establish Federal law."[137] Despite that standard, which was frequently conceded by the majority, three Justices issued a strong dissent urging that *Mitchell*, *Carter*, and *Estelle* clearly require a no-adverse-inference instruction for all incriminating testimony at sentencing and that the *Woodall* court's application met the high standard of unreasonableness.[138] The dissent emphasized *Estelle*'s holding that "the Fifth Amendment applies equally to the guilt and penalty phases" in combination with *Carter*'s holding "that the Fifth Amendment requires a trial judge to give a requested no-ad-

131. *Id.* (emphasis added).

132. *Compare, e.g.*, Woodall v. Simpson, 685 F.3d 574, 577 (6th Cir. 2012) (finding that *Estelle* and *Mitchell* require a no-adverse-inference instruction to a defendant's silence at sentencing), *and* United States v. Caro, 597 F.3d 608, 630 (4th Cir. 2010) ("Thus, *Estelle* and *Mitchell* together suggest that the Fifth Amendment may well prohibit considering a defendant's silence regarding the non-statutory aggravating factor of lack of remorse."), *with* Miller v. Lafler, 505 Fed. Appx. 452 (6th Cir. 2012) (same).

133. White v. Woodall, 134 S. Ct. 1697, 1700 (2014) ("This Court need not decide whether a no-adverse-inference instruction is required in these circumstances, for the issue before the Kentucky Supreme Court was, at a minimum, not 'beyond any possibility for fairminded disagreement.'")

134. *Id.* at 1700–01.

135. *Id.*

136. *Id.* at 1703.

137. *Id.* at 1699.

138. *Id.* at 1707–10 (Breyer, J., dissenting).

verse-inference instruction during the guilt phase of the trial."[139] It also noted that *Mitchell*'s allegedly ambiguous statement "decline[d] to adopt an exception" and concluded that "[t]he normal rule that a defendant is entitled to a requested no-adverse-inference instruction at the penalty phase as well as the guilt phase is clearly established."[140]

The dissent in *Mitchell* touches on the heart of the Fifth Amendment protection. If, as *Estelle* purports, testimony that exposes defendants to adverse consequences in a sentencing proceeding qualifies as incriminating testimony warranting Fifth Amendment protection, then it is illogical to use invocation of the Fifth Amendment protection against the defendant in that very proceeding.

Even if *Mitchell* does not cover the entire scope of questioning pertaining to sentencing—an unlikely scenario[141]—its exceptions would not encompass CRA interviews. As noted above, the lower court in *Woodall* was found not unreasonable, in large part, because *Mitchell* indicated that lack of remorse and acceptance of responsibility were outside of its holding. Criminal risk assessment determinations more closely resemble the kinds of incriminating facts at issue in *Mitchell* than they do the kind of indications of a defendant's attitude at issue in *Woodall*. First, a lack of remorse and acceptance of responsibility were expressly noted as possible limitations to *Mitchell*'s holding; the motley of CRA interview questions were not.

Second, with respect to defendant attitude, silence can have two meanings. The Sixth and Seventh Circuits have noted that "silence can be consistent not only with the exercise of one's Fifth Amendment right, but also with a lack of remorse."[142] In fact, it is arguable whether some silence—the failure to apologize, for example—is even incriminating post-conviction. Silence during CRA interviews, on the other hand, does not imply a lack of remorse. A defendant is fully able to apologize for her crimes and still opt out of the CRA process.

Third, there is the sentiment in courts that a show of remorse provides a "downward departure" at sentencing and therefore a lack of remorse is not penalizing the defendant. Although this distinction is arguably just semantics, it is clearly inapplicable in the CRA context.

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139. *Id.* at 1708.
140. *Id.* at 1709.
141. *See* Hessick & Hessick, *supra* note 7, at 65 ("For a defendant to express remorse for committing a crime, she must admit to having committed that crime. The availability of a shorter sentence is contingent on her making such an incriminating statement, and thus the ordinary Fifth Amendment privilege, which would protect silence, is not fully recognized at sentencing.").
142. Miller v. Lafler, 505 F. App'x 452, 461 (6th Cir. 2012) (citing Burr v. Pollard, 546 F.3d 828, 832 (7th Cir. 2008)).

While some states have claimed that the purpose of CRA scores is to "divert," many have not.[143]

Fourth, a lack of remorse "speaks to traditional penological interests such as rehabilitation (an indifferent criminal is not ready to reform) and deterrence (a remorseful criminal is less likely to return to his old ways)."[144] This argument appears to cut against a no-adverse-inference rule at sentencing for silence during CRA interviews because CRA scores are also used to inform penological interests. However, while a lack of remorse may inform an individual's willingness to reform or likelihood of non-recidivism, a CRA score only reveals the statistical likelihood of a group of defendants sharing similar attributes with the defendant. The former is much more powerful and individualized. It is also based on factors entirely within the defendant's control as opposed to external factors outside of the defendant's control.

Finally, while CRA responses are incriminating in that they affect a defendant's sentence, they are also incriminating because they provide evidence that can support future convictions. Questions about drug use and fighting history are common. Additionally, evidence that could be used against defendants as indicative of poor character or reputation in a criminal trial appears throughout most questions.

No federal courts have directly addressed the issue of adverse inferences with respect to the CRA process, but a handful of other courts have. For example, in *State v. Spencer*, the defendant invoked her right to remain silent during the criminal risk assessment process. As a result, the court had no criminal risk assessment information at sentencing. The court presumed a high-risk score and sentenced her to probation with community correction services instead of with court services. The court found that "Spencer exercised her Fifth Amendment rights during the preparation of the PSI report."[145] However, it also declared that it was "not going to score lower by default" and that "she ha[d] to be scored high because otherwise the whole [criminal risk assessment] process loses even the last shred of credibility and liability."[146]

An important distinction between *Spencer* and typical CRA sentencing cases is that the assessment in *Spencer* was used solely for the purposes of determining probation. The *Spencer* court distinguished

143. *See, e.g.*, OSTROM ET AL., *supra* note 30, at 51–112.
144. *Miller*, 505 F. App'x at 461 (citing Bergmann v. McCaughtry, 65 F.3d 1372, 1379 (7th Cir. 1995)).
145. State v. Spencer, 70 P.3d 1226, 1229 (Kan. Ct. App. 2003).
146. *Id.* at 1227; *see also infra* Section II.C.

itself from *Mitchell*, stating: "[t]here is a great difference between the imposition of a minimum 10-year prison sentence and the question of the trial court's statutorily granted discretion in the determination of the terms and conditions of the beginning of probation."[147] In fact, *Spencer* cited to another Kansas case, *State v. Aikman*, as an instance where adverse inferences from silence at sentencing are impermissible.[148] In *Aikman*, the Kansas court found that a court could not impose a harsher sentence due to the defendant's "refusal to disavow affiliation with a gang."[149] *Spencer* found *Aikman* to be "materially different" because "a harsher sentence was imposed . . . without factors justifying such action."[150] This comparison suggests that *Spencer* would have had a different outcome had it been concerned with the determination of sentence length.

Illinois considered the use of sex offender evaluations at sentencing in *People v. Hillier*.[151] After conviction for sexual assault of a child, the trial court ordered the defendant to participate in a sex offender evaluation.[152] The sex offender evaluation was a specialized form of CRA used to predict "sexual and violent recidivism for sexual offenders."[153] Hillier received a score of six on the assessment, indicating a likelihood of reoffense of thirty-nine percent over five years. He was later sentenced to twenty years in prison, "based, in part on the results of the sex offender evaluation."[154] The court explained that "[t]his might be an entirely different situation had that assessment come back and said that [Hillier was] not at risk of re-offending, but this, in fact, indicated that [he was] at a higher risk of re-offending."[155] Hillier claimed that because of a lack of *Miranda* warnings, his testimony could not be used against him at sentencing and therefore his twenty year sentence was improper.[156] The court disagreed, but its analysis is instructive.[157] It found that the Fifth Amendment *did* apply during the sex offender evaluation and that the defendant's claim failed because he "never asserted his [F]ifth [A]mendment privilege" and was therefore "not entitled to its protections."[158] This deter-

147. *Spencer*, 70 P.3d at 1229.
148. *Id.*
149. *Id.*
150. *Id.*
151. People v. Hillier, 910 N.E.2d 181, 183 (Ill. App. Ct. 2009).
152. *Id.* at 183.
153. *Id.* at 184.
154. *Id.* at 183.
155. *Id.* at 184.
156. *Id.* at 186.
157. *Id.* at 187–88.
158. *Id.* at 188.

mination suggests that, had Hillier invoked his right to remain silent, he would have been entitled to a no-adverse-inference instruction.

2. *Selective Invocation of Silence During Risk Assessment Interviews Is Not a Waiver of the Fifth Amendment Privilege*

An important limitation on the Fifth Amendment privilege is waiver by prior testimony. It is clear that a defendant has the right to invoke complete silence during an entire proceeding which may criminally implicate her. However, does she have the right to selectively answer questions? The Supreme Court considered this question in *Brown v. United States*. In that case, the defendant was accused of having "fraudulently procured citizenship in 1946 by falsely swearing that she was attached to the principles of the Constitution [and being] a member of the Communist Party and the Young Communist League, both organizations advocating the overthrow of the Government of the United States by force and violence."[159] She testified on her own behalf in a denaturalization proceeding, both about her pre-1946 involvement in communist organizations and her "present disposition towards the United States."[160] On cross-examination, she attempted to invoke her privilege against self-incrimination in response to government questions concerning her post-1946 involvement with communist organizations.[161] The Court found that she could not invoke her privilege against self-incrimination: "[Sh]e has no right to set forth to the jury all the facts which tend in [her] favor without laying [her]self open to a cross-examination upon those facts."[162] The principles of *Brown* govern waiver today where "[t]he privilege is waived for the matters to which the witness testifies, and the scope of the 'waiver is determined by the scope of relevant cross-examination.'"[163]

Mitchell held that a guilty plea at the conviction stage does not waive privilege with respect to the facts of that crime at the sentencing stage.[164] Recall that in *Mitchell*, the defendant pled guilty to conspiracy to distribute cocaine and admitted that she had done "some of the

159. Brown v. United States, 356 U.S. 148, 149 (1958).

160. *Id.* at 150–51.

161. *Id.* at 152.

162. *Id.* at 155 (quoting Fitzpatrick v. United States, 178 U.S. 304, 315 (1900)).

163. Mitchell v. United States, 526 U.S. 314, 321 (1999) (quoting Brown v. United States, 356 U.S. 148, 154–55 (1958)).

164. *Id*. at 325–26; Paul Peterson, *A Decade Redrawn: Presentence Boundaries of the Privilege Against Compelled Self-Incrimination Since* Mitchell v. U.S., 25 FED. SENT'G REP. 81, 81 (2012).

proffered conduct."[165] Her silence at sentencing as to the extent of her participation was found inadmissible.[166] Given that the overwhelming majority of defendants plead guilty,[167] this likely means that testimony prior to sentencing will not have constituted a waiver in the CRA interview context.

A more pertinent question is whether defendants have the right to selectively opt out of specific CRA questions or if they must opt out of the CRA interview as a whole. This paper advocates for the former. The justification of the *Brown* rule is that "[a] witness may not pick and choose what aspects of a particular subject to discuss without casting doubt on the trustworthiness of the statements and diminishing the integrity of the factual inquiry."[168] But the context of *Brown*—testimony during an adversarial proceeding—is very different from the context of a CRA interview.[169] *Brown* is concerned with the facts represented to the jury and distinguishes itself from cases in which the defendant is "compelled to testify" as opposed to voluntarily taking the stand.[170] Cases about interrogations or interviews outside of the adversarial courtroom are more instructive.

For example, in *Miranda v. Arizona*, the Court considered what types of warnings might be required to ensure voluntary testimony in a custodial environment.[171] In analyzing the requirement of warnings, the Court articulated the rights defendants have during questioning. One such right is the aforementioned "right of silence" and "a continuous opportunity to exercise it."[172] The Court found that "where incustody interrogation is involved, there is no room for the contention that the privilege is waived if the individual answers some questions or gives some information on his own prior to invoking his right to remain silent when interrogated."[173] The Court acknowledged that this finding is inconsistent with other cases regarding grand jury (and presumably trial) testimony, but noted that "[n]o legislative or judicial fact-finding authority is involved here, nor is there a possibility that the individual might make self-serving statements of which he could

165. *Mitchell*, 526 U.S. at 318 (internal quotation marks omitted).
166. *Id.* at 330.
167. Erica Goode, *Stronger Hand for Judges in the 'Bazaar' of Plea Deals*, N.Y. TIMES, Mar. 23, 2012, at A12 ("[Ninety-seven percent] of federal cases and 94 percent of state cases end in plea bargains.").
168. *Mitchell*, 526 U.S. at 322.
169. Brown v. United States, 356 U.S. 148, 155 (1958).
170. *Id.*
171. Miranda v. Arizona, 384 U.S. 436 (1966).
172. *Id.* at 467.
173. *Id.* at 475–76.

make use at trial while refusing to answer incriminating statements."[174] This suggests that *Brown*'s concept of a waiver, which predates *Miranda*, is not applicable to certain interview and interrogation settings.

Although *Miranda* addressed custodial interrogation, the same logic that renders *Brown* inapplicable to the *Miranda* context should also render *Brown* inapplicable to CRA interviews. First, as Part III of this paper will demonstrate, most CRA interviews are custodial and therefore analogous to *Miranda*. Second, as in *Miranda*, there is no "fact-finding authority," such as a judge or a jury, involved. In fact, the information ascertained is selectively represented at sentencing to a judge. The probation officer conducting the interview is not required to produce a full transcript to the sentencing judge, but rather to select pertinent information from the proceeding.[175] Third, the likelihood of a defendant making "self-serving statements" is minimal. Unlike at trial, the defendant has no control over the questions asked and extraneous information can be disregarded. The concern about distortion or manipulation of facts is moot because the defendant does not have an advocate strategically eliciting favorable information. For these reasons, it is likely that the *Miranda* rule—not the *Brown* rule—applies to CRA interviews. It follows that defendants may selectively opt in and out of questioning.

C. Sentencing Risk Assessment Algorithms May Not Impute Values Where Defendants Invoked Silence

Earlier sections of this paper demonstrate that defendants should be able to invoke their right to remain silent during the sentencing risk assessment interview.[176] Invocation of this right requires that no adverse inference be made from silence during the interview in the sentence determination. While not dispositive, CRA scores are considered as a factor in sentencing in many jurisdictions,[177] just like the amount of drugs in *Mitchell* and the likelihood of reoffense in *Estelle*.[178] In fact, *Estelle* is a cut-and-dry example of how the no-adverse-inference rule extends to recidivism determinations based on interview question-

174. *Id.* at 476 n.45.
175. State v. Loomis, 881 N.W.2d 749, 769 (Wis. 2016) (requiring only the risk assessment and advisements of its limitations at sentencing).
176. *See supra* Section II.A.
177. *See, e.g.*, KY. REV. STAT. ANN. § 532.007(3)(a) (West 2016) (requiring sentencing judges to consider "the results of the defendant's risk and needs assessment included in the presentence investigation").
178. Mitchell v. United States, 526 U.S. 314, 317 (1999); Estelle v. Smith, 451 U.S. 454, 459–60 (1981).

ing.[179] Therefore, because the court cannot make an adverse inference from a defendant's invocation of her right to remain silent and the court utilizes the risk score in sentencing, the CRA algorithm cannot make an adverse inference from the defendant's invocation of her right. When a defendant invokes her right to remain silent during the sentencing CRA process, assessment systems and courts have five intuitive options on how to proceed.

Scenario One: Assuming the Highest Risk Score or Value

In this scenario, a court would presume the highest risk score available for a defendant who opts out of the risk process entirely; an algorithm would impute the most "risky" value for any unanswered question.[180] This scenario is very similar to that described in *State v. Spencer*.[181] In that case, Spencer invoked her Fifth Amendment right to remain silent and therefore had no criminal risk assessment score.[182] The court decided to infer the highest possible score because it was not "going to score lower by default . . . . because otherwise the whole risk [assessment] process loses even the last shred of credibility and liability."[183] As explained above, *Spencer*'s holding was restricted to determination of probation type, not sentence length, but it serves as an important example.

If the court had inferred a high-risk score and used it as a factor in determining Spencer's sentence length, its actions that would have violated Spencer's Fifth Amendment rights. Similar to how the defendant's silence in *Mitchell* could not be inferred to indicate a higher quantity of drugs sold and therefore require a higher sentence, silence cannot be inferred to demonstrate high risk where a defendant's riskiness is one of the factors included in the PSI report and directly the nature and the length of sentence imposed.[184]

179. Recall that in *Estelle*, a doctor's assessment of the defendant's likelihood of recidivism was inadmissible because it was informed entirely by the defendant's statements in a custodial psychiatric interview. *Estelle*, 451 U.S. at 459–460.

180. In this scenario, the algorithm would essentially identify the value that produces the most negative algorithmic result. This is admittedly computationally expensive if several values are imputed and the algorithm is complex, but the analysis here is conducted for legal reasons, not practical ones. Furthermore, there is no evidence to suggest that the algorithms being employed are very complicated. *But see* RICHARD BERK, CRIMINAL JUSTICE FORECASTS OF RISK: A MACHINE LEARNING APPROACH (2012) (detailing a more sophisticated machine learning approach to criminal justice classification and forecasting).

181. State v. Spencer, 70 P.3d 1226, 1227 (Kan. Ct. App. 2003).

182. *Id.*

183. *Id.*

184. *See supra* Section II.B.1.

Scenario Two: Assuming the Lowest Risk Score or Value

In this scenario, the defendant would experience the most favorable outcome because the algorithm would impute the value that results in the lowest possible risk score. However, this would render many CRA systems useless, as every defendant would opt out of the process and low scores would be meaningless. For those who oppose CRAs or want them to be less subjective (for example, by relying on public data as opposed to interviewer opinions of the defendant), this might be a sound result. However, decreased access to input data may result in less accurate CRA algorithms.

Scenario Three: Assuming the Risk Score or Value Consistent with Other Available Information About the Defendant

In this scenario, a court would presume a risk score aligned with its view of the defendant's risk based on external factors; an algorithm would impute a value for any unanswered question that aligns with the "riskiness" of defendant's other responses. Returning to the *Spencer* example, the court might assume a risk score of "high," not because she refused to participate in the assessment, but because her criminal history, which the judge had already seen, indicated a high risk.

On its face, this scenario seems fair—the court and algorithm are imputing values based on their understanding of the defendant, effectively leaving the risk score unchanged. However, it is impermissible because the court's existing view of the defendant is self-reinforced, without evidence to support such reinforcement.

Consider *Spencer*, where the court had no risk score, but knew that the defendant had a criminal history indicating a high risk of reoffense.[185] In a similar case, a court might be inclined to impose a somewhat higher sentence irrespective of the CRA score based on its knowledge of the defendant's criminal history. Hypothetically, if the court then discovers that the defendant also had drug habits, residence habits, education, and work experience indicative of a person the judge views as "high-risk," the court will be even more certain of its assessment. The court may then impose an even higher sentence because of this increased confidence in its accuracy. Without the additional information, the court might have felt uncomfortable with its level of accuracy in its determination. The incorporation of additional negative information, even if it is of the same magnitude as existing information, poses a risk of leading the court to a more negative holistic opinion of the defendant because of its increased confidence in its

185. *See supra* notes 145–51 and accompanying text.

determination. It will, in effect, "double down" on its current perception of the defendant. Extended to the CRA algorithm context, if courts choose to impute values in line with other information it knows about the defendant, it will similarly punish the defendant by representing a false vision of accuracy, effectively punishing silence. Because punishment for silence is impermissible, this scenario is unacceptable.

Scenario Four: Assuming a "Neutral" Default Score or Value

In this scenario, a court would presume the average risk score across all defendants for a particular defendant who opts out of the risk process; an algorithm would impute the value that produces the most "average" result for any unanswered question. This scenario seems fair—it treats the defendant as "neutral" where there is a lack of information. However, this still penalizes the defendant in half of all sentencing decisions:[186] those where the defendant is less risky than the average defendant. If the defendant exhibits less risky characteristics or behavior, then assuming a "neutral" score penalizes the defendant who refuses the assessment. Furthermore, assigning a neutral score is representing an assessment to the judge that is non-existent.

Practically speaking, in the absence of information, a judge might still be forced to assign an average sentence to a defendant in the absence of a risk score. However, this practical assignment is easily distinguished from the provision of a false neutral risk assessment score. The former situation represents a solution to a practical dilemma, whereas the latter is an illusion of assessment where no determination exists.

Scenario Five: Removing the Variables Altogether

In this scenario, a court would completely eliminate reliance on or knowledge of a risk score; an algorithm would entirely remove reliance on missing information. I believe this is the only scenario that properly respects the offender's Fifth Amendment rights. This scenario looks like Scenario Two, in that removing a variable from an algorithm provides the same score as imputing a value aligned with the results of the original algorithm without the additional variable. How-

186. It is arguable that in practice this number would be lower because defendants who need or want to opt out of the CRA process are more likely to have higher than average risk scores. Even still, the impact this strategy has on any below-average risk individuals is a Fifth Amendment violation.

ever, this scenario requires an additional added layer—a redetermination of accuracy.

What judges see along with the risk score on a PSI varies. Some jurisdictions provide PSI report templates that leave a blank space where the score goes. Wisconsin, in *Loomis*, created certain warnings that must accompany CRA scores on PSI:

> (1) [T]he proprietary nature of COMPAS has been invoked to prevent disclosure of information relating to how factors are weighed or how risk scores are to be determined; (2) risk assessment compares defendants to a national sample, but no cross-validation study for a Wisconsin population has yet been completed; (3) some studies of COMPAS risk assessment scores have raised questions about whether they disproportionately classify minority offenders as having a higher risk of recidivism; and (4) risk assessment tools must be constantly monitored and re-normed for accuracy due to changing populations and subpopulations.[187]

Interestingly, there is no requirement that a judge be made aware of the accuracy of the CRA score. However, there is a requirement that CRA "tools must be constantly monitored and re-normed for accuracy."[188] In Scenario Five, the *new* algorithm—one lacking any reliance on the unanswered questions—would need to be assessed for sufficient accuracy.[189] If it met an acceptable accuracy threshold or the accuracy was portrayed to the judge in the PSI report, the new CRA score would be acceptable.

D. Some Defendants Should Invoke Their Right to Remain Silent During the Sentencing Risk Assessment Interview

Defendants can and may find it desirable to opt out of (or at least parts of) the risk assessment interview. Defendants who do not fit the mold—who behave unlike those with similar characteristics—might be particularly incentivized to avoid the assessment process, as the assessment tools are less accurate in predicting the recidivism of these particular defendants.

For the sake of this paper, consider "statistically risky" characteristics to be characteristics that will have a negative effect on a defen-

187. State v. Loomis, 881 N.W.2d 749, 763–64 (Wis. 2016).

188. *Id.* at 769.

189. *See supra* note 21 for a discussion of what qualifies as "sufficient accuracy." When variables are imputed into an algorithm, it loses its assessed accuracy. In Scenario Two, there is no recalculation of accuracy to determine that the risk score has "sufficient accuracy." In Scenario Five, however, a new algorithm is generated—albeit with the same output score as in Scenario Two—and it is assessed to see if it meets the "sufficient accuracy" threshold.

dant's risk score. For example, Oregon's recidivism algorithm shows that factors like older age decrease the recidivism score (not statistically risky), whereas factors like a high number of statutory arrests in the previous five years increase the recidivism score (statistically risky).[190] This concept is complicated by the interplay between variables and the range of possible values assigned to a given variable. For example, in the same Oregon algorithm, a prior theft conviction will increase the risk score, but the combination of a prior theft conviction and a last sentence of prison will partially mitigate that effect.[191] This means that some variables are only statistically risky (or statistically risky to a certain degree) when observed in combination with (or without) other variables. Regardless, we can still identify these statistically risky variables if we assume a truthful assessment of the defendant and knowledge of the algorithm. Accepting the existence of these variables, it is easy to see that if a defendant's answer to a question will result in a negative assessment effect, the defendant may prefer removing the variable altogether. Following the scheme described in the proceeding section, removal of the variable should be accompanied by a new assessment of accuracy so that the court does not overweight a likely more favorable new risk score. Regardless, the new score is still preferable because we are assuming a defendant who "doesn't fit the mold."

Unfortunately, the underlying statistical models driving sentencing criminal risk classifications are often not public, making the identification of statistically risky characteristics difficult. Attorneys do not typically have access to the algorithm and PSI reports are confidential. However, the interview questionnaires provide all the possible input factors and the range of possible risk scores is known. Therefore, some, and possibly all, the factors influence the defendant's score. This means that while relative weights are unknown, some responses will have a negative effect on the risk score, while others may be positive. Because these statistical models are often validated or peer reviewed, it makes sense that the statistically risky traits we see every day are likely to have negative effects on risk scores.[192] For example, old age, female gender, a non-violent criminal history, and responses that indicate remorse or responsibility are probably not statistically risky. On the other hand, frequent drug use, living in a crime-ridden neighborhood, and undesirable responses to behavioral questions—

190. *See* Diakopoulos, *supra* note 33 (follow "the 16 variables and their weights" hyperlink).

191. *Id.*

192. *See, e.g.*, BLOMBERG ET AL., *supra* note 54.

like agreeing that a "hungry person has a right to steal" in the COMPAS assessment—seem more likely to be statistically risky. In addition to projecting well-known statistical correlations onto interview questions, defendants may be able to use their personal knowledge to deduce correlations. This method is difficult due to the sheer number of input variables and the limited amount of data each attorney is exposed to, but is theoretically sound.

Although some information in the PSI can be drawn from public databases and interviews with family members and close friends, a lot of information is difficult to otherwise ascertain.[193] For example, whether a defendant has used an illegal drug in the past six months may be known only to the defendant and/or a few other people. Additionally, others aware of illegal activity may be unidentifiable, unwilling to cooperate, or unwilling to incriminate themselves.

When a court has no practical way of ascertaining statistically risky traits about a defendant, the provision of those traits by the defendant will further incriminate her in her risk assessment score. Therefore, if a defendant in this situation is likely to receive a higher than average risk score, it is in her interest to remain silent and receive an adjusted score that does not rely on these traits.[194]

III.
SENTENCING CRIMINAL RISK ASSESSMENT INTERVIEWS REQUIRE *MIRANDA*-LIKE WARNINGS

Part II demonstrated that defendants likely have the Fifth Amendment right to remain silent during sentencing CRA ("SRA") interviews and this silence cannot be used against them at sentencing. Whether or not SRA interviews require *Miranda* warnings is irrelevant to this showing.[195] However, the application of *Miranda*-like warnings to these proceedings is unsettled and possibly has huge implications.

In *Miranda v. Arizona*, the Supreme Court confronted the "inherently compelling pressures" of "in-custody interrogation of persons suspected or accused of crime."[196] Plaintiffs asserted that the circum-

193. For a list of COMPAS's 137 questions, see NORTHPOINTE, *supra* note 110.

194. Note that it is very important that the "risky" information is unlikely to be revealed to the court. This is not just because an assessment may be completed without the defendant's input. If the negative information becomes known to the judge she may independently incorporate it into her sentencing and it may be that a risk assessment score may have been alleviating.

195. A showing of *Miranda* custody does, however, enhance the argument in Section II.B for selective invocation of silence.

196. Miranda v. Arizona, 384 U.S. 436, 467 (1966).

stances of custodial interrogations were so compelling that testimony was ascertained from these proceedings in violation of the Fifth Amendment. The Court's response was to require the now-famous safeguards—the declaration of a suspect's rights—to ensure against compulsion. As a result, for testimony ascertained from a custodial interrogation to be admissible, it must be proceeded by a declaration that (1) the suspect has the right to remain silent, (2) that anything she says can be used against her in court, (3) that she has a right to an attorney, and (4) that if she cannot afford an attorney, one will be appointed to her.[197]

A. Sentencing Risk Assessment Interviews Often Rise to the Level of Custodial Interrogation

In order to require *Miranda* protection, CRA interviews must qualify as custodial interrogation. The first prong of custodial interrogation, custody, is assessed according to a reasonableness standard—whether a "reasonable person [would] have felt he or she was not at liberty to terminate the interrogation and leave."[198] Historically, the Court has interpreted this standard to broadly encompass any questioning in police custody, regardless of the location.[199] However, the doctrine has relaxed in some circumstances, including for questioning that occurs when a prisoner is isolated from the general prison population.[200]

One difficulty in showing that CRA interviews are custodial interrogation is the variation in administration across jurisdictions and defendants. There are three important factors worth establishing in the determination of whether CRA interviews are "custodial." First, CRA interviews are typically conducted by probation officers on government premises.[201] Second, the timing of CRA interviews can either be

197. *Id.* at 471–73.

198. Howes v. Fields, 565 U.S. 499, 509 (2012) (alteration in original) (quoting Thompson v. Keohane, 516 U.S. 99, 112 (1995)).

199. Orozco v. Texas, 394 U.S. 324, 326–27 (1969) (finding custody for *Miranda* purposes where police interrogated defendant in his own bedroom because he was going to be "under arrest and not free to leave").

200. *Fields*, 565 U.S. at 508 ("In sum, our decisions do not clearly establish that a prisoner is always in custody for purposes of *Miranda* whenever a prisoner is isolated from the general population and questioned about conduct outside the prison."); *see also* Berkemer v. McCarty, 468 U.S. 420, 441–42 (1984) (finding that an initial traffic stop does not render a motorist in custody for *Miranda* purposes.).

201. *See e.g.*, TIM BRENNAN ET AL., NORTHPOINTE INST. FOR PUB. MGMT., INC., A RESPONSE TO "ASSESSMENT OF EVIDENCE ON THE QUALITY OF CORRECTIONAL OFFENDER MANAGEMENT PROFILING FOR ALTERNATIVE SANCTIONS (COMPAS) (SKEEM & LOUDEN 2007) 20 (2009).

pre-trial or post-trial (and presentencing).[202] Third, the status of the defendant at the time of the CRA interview can be classified as incarcerated or not incarcerated, as some defendants are released on bail pending trial or sentencing, whereas other defendants are held.

Many of the previously described cases support the proposition that CRA interviews qualify for *Miranda* protections. In *Estelle*, the Court refused to admit a doctor's assessment of future recidivism based on a psychiatric examination because the defendant had not been given *Miranda* warnings.[203] The exposure of the testimony is what invoked the Fifth Amendment protection described above; the custodial situation is what required heightened *Miranda* warnings.[204]

The Second and Ninth Circuits also support this proposition. In *Jones v. Cardwell*, the Ninth Circuit considered whether unwarned statements made during a presentence interview could be used against the defendant at sentencing.[205] The court found that they could not because the statements were made in a custodial setting without the required *Miranda* warnings.[206] In *United States v. Chitty*, the Second Circuit faced a situation similar to that in *Estelle*, but the defendant was not facing a life sentence.[207] It similarly ruled that the psychiatric exam was custodial and therefore required *Miranda* warnings.[208]

Perhaps the CRA interview given to an incarcerated convict is the type most vulnerable to noncustodial classification. However, Supreme Court precedent establishes that an incarcerated individual can still be in custody for *Miranda* purposes. In *Mathis v. United States*, the Internal Revenue Service (IRS) questioned the defendant in prison, who was incarcerated for a different crime, without *Miranda* warnings. The prosecution presented two theories as to why Miranda warnings were unnecessary in that context: (1) that questioning was a "routine tax investigation where no criminal proceedings might even be brought" and (2) "that the petitioner had not been put in jail by the officers questioning him, but was there for an entirely separate offense."[209] The Supreme Court rejected both theories, stating that "tax

202. CRA interviews are also given post-sentencing to determine rehabilitation treatments, prison placement, etc., but this paper focuses on sentencing implications.

203. Estelle v. Smith, 451 U.S. 454 (1981).

204. *Id.* at 469.

205. Jones v. Cardwell, 686 F.2d 754, 756 (9th Cir. 1982).

206. *Id.*

207. United States v. Chitty, 760 F.2d 425 (2d Cir. 1985).

208. *Id.* at 432. *But see* United States v. Nichols, 438 F.3d 437, 444 n.6 (4th Cir. 2006) (refusing to apply *Estelle* as requiring the exclusion of un-Mirandized statements in a non-capital case).

209. Mathis v. United States, 391 U.S. 1, 4 (1968).

investigations frequently lead to criminal prosecutions" and that it found "nothing in the Miranda opinion which calls for a curtailment of the warnings to be given persons under interrogation by officers based on the reason why the person is in custody."[210]

The logic of *Mathis* supports a custodial determination for CRA interviews. CRA interviews mirror "routine tax investigations" in that, although they are not conducted solely for future prosecution, their findings can support prosecution. Further, the Court's determination that the reason for custody is irrelevant supports the proposition that defendants in prison pending sentencing are not afforded reduced *Miranda* protections.

However, the Court's findings in *Mathis* were seriously called into question in *Howes v. Fields*.[211] In *Fields*, the suspect, incarcerated for a different crime, was questioned in a prison conference room about crimes he had not been prosecuted for.[212] He was explicitly told he could return to his prison cell at any time and the conference room door was open during some of the questioning.[213] During the interview, which lasted between five and seven hours, Fields stated multiple times that he no longer wished to talk, but never asked to return to his cell.[214] After his confession, Fields had to wait twenty minutes to be escorted back to his cell.[215] The Court found that the interrogation of Fields did not constitute custody for *Miranda* purposes.[216] It explained that "*Mathis* did not hold that imprisonment, in and of itself, is enough to constitute Miranda custody," but rather "a prisoner who otherwise meets the requirements for *Miranda* custody is not taken outside the scope of *Miranda* because he was incarcerated."[217]

The Court gave three reasons why *Fields* was distinguishable from other custodial determinations. First, it found that the interrogation lacked the "shock" factor traditionally accompanying post-arrest interrogation.[218] Second, it found that long-term prisoners lack the hope of a "prompt release" which may be coercive in other custodial situations. Whereas a recent arrestee may believe cooperation will return her home, a prisoner will only return to her prison cell.[219] Finally,

210. *Id*. at 4–5.
211. Howes v. Fields, 565 U.S. 499 (2012).
212. *Id.* at 502–03.
213. *Id.* at 503.
214. *Id.*
215. *Id.* at 503–04.
216. *Id.* at 502.
217. *Id.* at 507.
218. *Id.* at 511.
219. *Id.*

the Court distinguished that "a prisoner, unlike a person who has not been convicted and sentenced, knows that the law enforcement officers who question him probably lack the authority to affect the duration of his sentence."[220]

Even under *Fields*'s unusual standard, CRA interviews are clearly custodial. First, many jurisdictions administer these interviews pending trial, which is much closer to the shocking post-arrest interview than it is to an interview following years of incarceration. Even if the interview occurs post-trial, it follows a different shocking event—conviction. Second, for both pre-trial and post-trial interviews, there is often a hope of "prompt release." Many convicts are not held in custody pre-sentencing, so there is an incentive to cooperate quickly in order to align affairs prior to incarceration.[221] Third, whereas Fields probably knew "that the law enforcement officers who question[ed him] . . . lack[ed] the authority to affect the duration of his sentence,"[222] the primary goal of CRA interviews is to determine punishment type and duration. Concerns over authority and sentence impact would certainly be present in a CRA interview and it is likely a convict would feel compelled to cooperate. Therefore, CRA interviews are clearly custodial.

The second requirement for *Miranda* protection, that the CRA interview be interrogation, is easily met. In fact, the Court has stated that interrogation constitutes both express questioning and its much broader functional equivalent.[223] CRA interviews are clearly express questioning.

B. Evidence Secured in Violation of Miranda *is Inadmissible at Sentencing*

In *Miranda*, the Court determined that testimony secured in custodial interrogation without adequate warnings is inadmissible.[224] In

220. *Id.* at 512.

221. For example, in Washington, D.C., eighty-five percent of defendants are released pending trial. *See* Clifford T. Keenan, *We Need More Bail Reform*, PRETRIAL SERVS. AGENCY FOR D.C. (2013), https://www.psa.gov/?qNºde/390.

222. *Fields*, 565 U.S. at 512.

223. Rhode Island v. Innis, 446 U.S. 291, 301 (1980) ("[T]he term 'interrogation' under *Miranda* refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect." (footnote omitted)).

224. Miranda v. Arizona, 384 U.S. 436, 492 (1966) ("Without these warnings the statements were inadmissible.").

line with this traditional rule, *Estelle*, *Chitty*, and *Jones* found un-Mirandized testimony inadmissible at sentencing.[225]

Nonetheless, both the Tenth Circuit, in *United States v. Rogers*,[226] and the Seventh Circuit, in *United States v. Jackson*,[227] rejected the analyses in *Estelle*, *Chitty*, and *Jones*. Despite ruling on other grounds, *Jackson* distinguished *Jones* and *Chitty* from *Estelle* based on who offered the testimony.[228] Whereas the State offered Estelle's testimony to support a death penalty sentence, Jones and Chitty's testimony was offered by probation officers to inform sentencing.[229] According to the *Jackson* court, "[t]he custodial statements by Jackson, which arguably exposed him to serious consequences, were not made to someone acting on behalf of the government prosecutors."[230]

It is somewhat unclear whether *Jackson* takes issue with the party receiving the testimony or the party moving to admit the testimony in court. However, neither should be an issue. First, the Court addressed the Fifth Amendment privilege as it pertains to interviews with probation officers in *Minnesota v. Murphy*.[231] In that case, the defendant made incriminating statements to his probation officer and tried to have them subsequently excluded.[232] The interview was less custodial than a typical CRA interview—it occurred during a short, post-release meeting with his probation officer, and was a condition of the defendant's release for a prior conviction.[233] The Court's analysis indicated that a defendant can invoke her rights against self-incrimination during interviews with probation officers. Although the Court found no custody in the post-release interview in that case, it did not reject the possibility of *Miranda*-protected custodial interviews with probation officers.[234] Therefore, it is likely irrelevant whether a probation officer, police officer, or prosecutor conducts the CRA interview.

225. *See* Estelle v. Smith, 451 U.S. 454, 469 (1981); United States v. Chitty, 760 F.2d 425, 432 (2d Cir. 1985); Jones v. Cardwell, 686 F.2d 754, 756 (9th Cir. 1982).
226. 921 F.2d 975, 979 (10th Cir. 1990).
227. 886 F.2d 838 (7th Cir. 1989).
228. *Id.* at 841 n.4 ("[O]f overriding significance is the fact that it was the exposure to the state's—that is the prosecution's—use of the defendant's statement made during a psychiatric examination that the Supreme Court determined to be unconstitutional. . . . [W]e do not believe that a federal probation officer acts on behalf of the prosecution.").
229. *Estelle*, 451 U.S. at 463; *Jones*, 686 F.2d at 755; *Chitty*, 760 F.2d at 430–31.
230. *Jackson*, 886 F.2d at 841 n.4.
231. Minnesota v. Murphy, 465 U.S. 420, 422 (1984).
232. *Id.* at 425.
233. *Id.* at 422–23.
234. *Id.*

Second, if the court is concerned with who is seeking to admit the evidence, it reaches an illogical result. It bases the applicability of the Fifth Amendment at the time of solicitation on something that happens in the future. To be clear—the *Jackson* court does not consider the *intended* future use of the testimony. It bases the applicability of the Fifth Amendment on the actual, entirely unknown future use of the testimony.[235] Under *Jackson*'s theory, *Estelle*'s outcome would have been different if the capital determination had been left to a judge and a PSI report instead of the jury and a prosecutor. Crucial to *Jackson*'s analysis is its attempt to portray probation officers as neutral third parties.[236] But such a portrayal is irrelevant to the underlying concerns of the Fifth Amendment privilege—desire to avoid the "cruel trilemma of self-accusation, perjury[,] or contempt"; "preference for an accusatorial [system]"; "fear of [elicitation] by inhumane treatment and abuses"; and a "fair state-individual" balance.[237] These rationales focus on the horribles at the time of elicitation, not at the time of admission. It is therefore irrational to allow admission of an interview during interrogations and not CRAs. Furthermore, the distinction between probation officer and prosecutor is misguided. The sole purpose of the probation officer is to elicit information that will inform proper sentencing. *Estelle*'s conclusion that sentencing decisions are incriminating places probation officers squarely in the same adversarial position as prosecutors.

The *Rogers* Court similarly found that, although defendants are in custody for presentence interviews, *Miranda* warnings are unnecessary.[238] It emphasized that the presentence interview does not present the "coercion inherent in custodial interrogation."[239] To support its contention that presentence interviews do not possess coercive properties it distinguished them as "standardized, well documented, publicized, and accessible to defendants through their counsel or otherwise."[240] It emphasized that defendants "can refuse altogether to

235. *Jackson*, 886 F.2d at 844 ("A district judge's *use* of a defendant's statement to a probation officer in applying the Sentencing Guidelines is markedly unlike the *prosecutor's* adversarial *use* of a defendant's pretrial statement to a psychiatrist . . . ." (emphasis added)).

236. *Id*. ("The probation officer does not have an adversarial role . . . . [T]he probation officer serves as a neutral information gatherer for the sentencing judge.").

237. Murphy v. Waterfront Comm'n of N.Y. Harbor, 378 U.S. 52, 55 (1964).

238. United States v. Rogers, 921 F.2d 975, 979 (10th Cir. 1990) ("A routine post-conviction presentence interview by a probation officer does not constitute the type of inherently coercive situation and interrogation by the government for which the *Miranda* rule was designed.").

239. *Id.* at 980 (citing Miranda v. Arizona, 384 U.S. 436, 457 (1966)).

240. *Id*.

be interviewed" and that "[m]ost of the information on the presentence report is gathered from other sources in any event."[241] The *Rogers* opinion demonstrates the stark differences between the federal sentencing system and the varied state CRA interview processes. First, unlike the uniform federal sentencing guidelines, CRAs are not standardized. In California alone, there are at least six different CRA systems in use, administered on a county-by-county basis.[242] Because of the novelty in CRA use at sentencing, their administration is constantly changing. Second, one of the most common criticisms of CRAs is the lack of documentation and transparency.[243] It is rare that the questions are publicized, let alone their interpretation and the role they play in the CRA algorithm. This lack of transparency means that the CRA process is often inaccessible to defendants and their lawyers. Third, it's not clear to defendants that they have the option to opt out of the CRA process. As mentioned above, the court in *Spencer* effectively prevented defendants from refusing the interview by assuming a high-risk score for all defendants who opted out.[244] Fourth, and perhaps most importantly, the information ascertained from CRA interviews is often not gathered from other sources. In fact, more than half of the 137 questions on the COMPAS assessment are about the defendant's feelings or opinions.[245] Examples include asking the defendant to agree or disagree with statements like: "A hungry person has a right to steal", "I have never intensely dislike anyone", and "I have never felt sad about things in my life."[246] Other questions like personal drug use, grades, and living situations are difficult to verify. For these reasons, CRA interviews are very different from the PSI interview at issue in *Rogers* and should require *Miranda* warnings.

C. Sentencing Risk Assessment-Specific Warnings Would Better Serve the Rationales Requiring Miranda *Warnings*

As a derivative of the Fifth Amendment, the *Miranda* safeguards exist to ensure against the compulsion of incriminating testimony. As mentioned earlier, there are at least four rationales for the Fifth

241. *Id.*

242. *See* MICHELLE WEBSTER & KRISTIN BECHTEL, CRIME & JUST. INST. COMTY. RES. JUST., EVIDENCE-BASED PRACTICES FOR ASSESSING, SUPERVISING AND TREATING DOMESTIC VIOLENCE OFFENDERS 24–27 (2012) (providing a county-by-county comparison of CRA tools used by probation departments, including CAIS, COMPAS, LSCMI, ORAS, SARA, and STRONG).

243. *See, e.g.*, *Algorithms in the Criminal Justice System*, *supra* note 34.

244. State v. Spencer, 70 P. 3d 1226, 1229–30 (Kan. Ct. App. 2003).

245. NORTHPOINTE, *supra* note 110.

246. *Id.*

Amendment privilege: desire to avoid the "cruel trilemma," fear of inhumane treatment, preservation of the adversarial system, and, perhaps, judicial integrity.[247]

Traditionally, incriminating testimony was considered compelled if it was involuntary.[248] The *Miranda* decision, however, changed the inquiry in cases of custodial interrogation, finding instead that without certain safeguards, this form of interrogation was necessarily inherently compelling.[249] It acknowledged that "[i]n these cases, we might not find the defendants' statements to have been involuntary in traditional terms. Our concern for adequate safeguards to protect precious Fifth Amendment rights is, of course, not lessened in the slightest."[250]

While a risk assessment interview is "custodial interrogation" and therefore raises many of the same concerns as the traditional *Miranda* setting, it also raises new concerns—namely, opacity. This same opacity is what drove the Wisconsin Supreme Court to require certain warnings when presenting risk score information to the judge at sentencing.[251] Similarly, this paper proposes alternative warnings for these interviews by projecting the rationales of the Fifth Amendment and *Miranda* onto the risk assessment process.

1. The Rationales for Miranda *Safeguards*

The *Miranda* Court suggested many factors motivating the need for warnings. At a high level, it expressed concerns over the level of privacy afforded to a custodial interrogation.[252] In particular, it acknowledged a history of police violence, the "third degree," and physical brutality in obtaining confessions.[253] However, it acknowledged that "the modern practice of in-custody interrogation is psychologically rather than physically oriented."[254] It listed an array of tactics utilized: selecting uncomfortable interview environments, pretending that guilt has already been established, using "good cop, bad cop" techniques, staging fake lineups and witness identifications, etc.[255] It found that although not "physical intimidation," it is "obvious that such an interrogation environment is created for no purpose other than

247. Murphy v. Waterfront Comm'n of N.Y. Harbor, 378 U.S. 52, 55 (1964).
248. Miranda v. Arizona, 384 U.S. 436, 461 (1966).
249. *Id.* at 457.
250. *Id.*
251. State v. Loomis, 881 N.W.2d 749, 763 (Wis. 2016).
252. *Miranda*, 384 U.S. at 448–49.
253. *Id.* at 445–46.
254. *Id.* at 448.
255. *Id.* at 450–56.

to subjugate the individual to the will of his examiner."[256] Examining the historical relevance of the Fifth Amendment, the Court further found that "policies point to one overriding thought: the constitutional foundation underlying the privilege is the respect a government—state or federal—must accord to the dignity and integrity of its citizens."[257]

With respect to specific warnings, the Court enumerated several justifications. First, the Court mentioned the importance of informing individuals of their rights.[258] This need helped justify bright-line Constitutional safeguards because "[a]ssessments of the knowledge the defendant possessed, based on information as to his age, education, intelligence, or prior contact with authorities, can never be more than speculation; a warning is a clearcut fact."[259]

Second, the Court was concerned that the declaration of the right—regardless of the individual's pre-existing knowledge—"is an absolute prerequisite in overcoming the inherent pressures of the interrogation atmosphere."[260] Declaration gives individuals the reassurance that, regardless of the psychological tactics employed, their rights prevail and will be recognized.[261]

Third, the Court was concerned with the coercion present when an individual is unaware of the consequences of her speech. It found that:

> [I]t is only through an awareness of the[ ] consequences that there can be any assurance of real understanding and intelligent exercise of the privilege. Moreover, [the warning that anything said can and will be used against the individual] may serve to make the individual more acutely aware that [s]he is faced with a phase of the adversary system—that [s]he is not in the presence of persons acting solely in [her] interest.[262]

Fourth, the Court justified its warnings of the right to counsel by enumerating the many benefits of counsel including "mitigat[ing] the dangers of untrustworthiness," decreasing the likelihood of coercion, and "guarantee[ing] that the accused gives a fully accurate statement [and] that the statement is rightly reported by the prosecution."[263]

This paper suggests alternative warnings for the risk assessment process, through the lens of these rationales—preservation of dignity

256. *Id.* at 457.
257. *Id.* at 460.
258. *Id.* at 468.
259. *Id.* at 468–69 (footnote omitted).
260. *Id.* at 468.
261. *Id.*
262. *Id.* at 469.
263. *Id.* at 470.

and integrity, avoidance of coercion, notice of rights, consequences, and the adversarial nature of interrogation, and demonstration of respect and recognition of rights at the time of interview.

2. Proposed Risk Assessment Warnings

This paper proposes the following warnings prior to a sentencing risk assessment interview: (1) "You have the right to remain silent and your silence cannot be used to impose a higher sentence"; (2) "Anything you say can and will be used to determine your sentence, which can range from X to Y"; (3) "You have the right to an attorney competent in the risk assessment process"; and (4) "If you cannot afford an attorney, one will be appointed to you. Exercising your right to an attorney will not affect your ability to participate in the risk assessment process."

Warning One: You Have the Right to Remain Silent and Your Silence Cannot Be Used to Impose a Higher Sentence

This first warning is justified on the same grounds as the identical *Miranda* warning. It provides notice to individuals of their right to remain silent and demonstrates respect for that right in a compelling custodial interrogation. It also encourages integrity and accuracy because it prevents individuals from facing the cruel trilemma.

This second part of the warning is necessary in the risk assessment context because case law has been inconsistent as to how silence is applied at sentencing. The Supreme Court's *Mitchell* decision made it clear that silence with respect to the facts and circumstances of the case *cannot* be used against an individual at sentencing.[264] Policy rationales and case law strongly support the conclusion that this principle applies to circumstances beyond sentencing as well. However, the admissibility of lack of remorse deduced from an individual's silence at sentencing is currently unsettled.[265] Therefore, it must be made clear to the individual when she can and cannot exercise her right to silence without exposing herself to a heightened sentence.

Warning Two: Anything You Say Can and Will Be Used to Determine Your Sentence, Which Can Range from X to Y

Just like its *Miranda* counterpart, this warning provides an individual with notice of the consequences of speech. This warning should be more specific than a traditional *Miranda* warning—including the

264. *See supra* Section II.B.
265. White v. Woodall, 134 S. Ct. 1697, 1703 (2014).

potential sentence range—because of the opacity inherent in the risk assessment process. The questions asked in the risk assessment interview do not always resemble questions that a layperson would think might warrant an increased sentence. For example, questions about the neighborhood one grew up in or about one's family may come across as administrative instead of adversarial. The media outrage over the use of these questions at sentencing demonstrates how unclear it is to a layperson that this type of information would be informative at sentencing.[266] A declaration of the potential sentence range clearly informs individuals of what is at stake when they answer risk assessment questions.

A potential counterargument is that similar issues occur in typical police interrogation and no such warning is required. Police often ask questions that are not directly related to incriminating activity. For example, an officer can ask a suspect regarding her whereabouts on a certain date without disclosing that she is suspected of committing a particular crime at that time. However, this situation is easily distinguishable. Although there is some opacity related to the officer's intended use of the information, the information is ultimately only damning so long as there is evidence beyond a reasonable doubt to establish commission of the crime. In contrast, the information ascertained in a CRA interview will be used against the defendant. In short, it is against the law for an individual to commit a crime; it is not against the law for an individual to be statistically risky.

Although "mistake of law" is not typically a defense to a criminal act, the accessibility of criminal laws and their general conformance with societal expectations serves to counteract any lack of specific notice. However, unlike criminal codes, an individual cannot go to government websites or local libraries to understand what conduct may incriminate her. This information is both completely opaque and often out of the control of the individual. For these reasons, the individual is entitled to notice of how this information may be utilized.

In addition, the assessment interview is a coercive environment because it appears to be administrative and typical. Notice of the right and its exposure alleviates this silent coercion by revealing the true adversarial nature and that silence will be respected.

266. *See e.g.*, Jason Tashea, *Courts Are Using AI to Sentence Criminals. That Must Stop Now*, WIRED (Apr. 17, 2017, 7:00 AM), https://www.wired.com/2017/04/courts-using-ai-sentence-criminals-must-stop-now/.

Warning Three: You Have the Right to an Attorney Competent in the Risk Assessment Process

Just as in traditional Miranda contexts, an individual should be made aware of her right to an attorney. However, the attorney should be more than just a run-of-the-mill public defender. Instead, the attorney should be someone specifically trained and competent in risk assessment. The Model Rules of Professional Conduct require that attorneys be competent.[267] Normally, competence comes from experience, subject-matter familiarity, resources, etc.[268]

The risk assessment process presents a special wrinkle to the concept of competence—it is hard to be competent in a process that is so opaque. Although no lawyer can say with one hundred percent certainty what will or will not happen in a particular circumstance, typically a lawyer can advise her client on the law and apply her interpretation of the facts. In the risk assessment realm, the lawyer is unaware of the "law." Certainly, some experienced defenders may extract an understanding of the risk assessment process over time, learning which questions are more likely to elicit negative sentencing consequences. However, this ability is significantly more restricted than in the normal legal process because the PSI report is confidential. An attorney cannot search Westlaw or LexisNexis for precedent, nor can she share her own client experiences with others due to confidentiality concerns.

For these reasons, the *best* situation would be the provision of attorneys that have been trained to understand how the underlying algorithm works. In this scenario, attorneys would be able to advise their clients as to how the risk assessment process may produce adverse consequences, without exposing the proprietary underlying information. Such a proposal is not entirely unprecedented. An essential element of an attorney's work is strict adherence to confidentiality and privilege rules. If we trust attorneys with our most sensitive information, then concerns regarding the proprietary nature of the software are less daunting.

In addition to providing adequate counseling, competent attorneys encourage judicial integrity. The risk assessment process may prompt individuals to lie or embellish the truth in the hopes of gamesmanship. An attorney can ensure accuracy of the statements made and inputted into the assessment algorithm. Furthermore, while an incompetent attorney may instruct all individuals to opt out of the process

267. MODEL RULES OF PROF'L CONDUCT r. 1.1 (AM. BAR ASS'N 2017).
268. *See e.g.*, *id.*

because she is unaware of how each question may affect the individual's sentence, a competent attorney can direct her client to answer questions that will benefit the client. For example, a competent attorney will know that certain characteristics will decrease the risk score. If her client exhibits these characteristics, she will advise the client to truthfully answer, as opposed to abstaining. This will result in an accurate and reliable lower risk score, likely resulting in a lower or diverted sentence. Because diversion was one of the major benefits of the risk assessment process, the provision of such a competent attorney should be embraced as a matter of policy.

Warning Four: If You Cannot Afford an Attorney, One Will Be Appointed to You. Exercising Your Right to an Attorney Will Not Affect Your Ability to Participate in the Risk Assessment Process

The *Miranda* Court recognized that its attorney provision warnings were useless for indigent defendants and therefore required the first part of this warning.[269] For the same reasons, it should be retained in the CRA context.

Additionally, there should be a declaration that exercising the right to an attorney will not effectively deny defendants of their right to participate in the risk assessment process. This second part of this warning is necessary because, unlike a police interview, the risk assessment process must be made available to all defendants. A conviction is a binary decision hinging on whether there is evidence beyond a reasonable doubt. For that reason, denying a suspect a police interview is not problematic because substantial external evidence is necessary to support a conviction. Furthermore, the adversarial nature of the criminal process allows defendants' attorneys to present exonerating evidence. However, the risk assessment score and sentencing determination exist on a government-controlled spectrum. Denying an individual the right to participate in the risk assessment process, while allowing many others to participate, is effectively restricting the range of that individual's sentence. This is because limiting the defendant's participation results in the judge or jury having less information about the defendant, and therefore less certainty in imposing a deviating sentence. This restriction, combined with the fact that the individual's attorney cannot present a risk score on her own—the risk score can

269. Miranda v. Arizona, 384 U.S. 436, 473 (1966) ("Without this additional warning, the admonition of the right to consult with counsel would often be understood as meaning only that he can consult with a lawyer if he has one or has the funds to obtain one.").

only come from the government—endorses the idea that the risk score must be offered to all.

Conclusion

The use of risk assessment tools in the criminal justice system, particularly at sentencing, raises an interesting array of technological, policy, and constitutional questions. It is clear that defendants retain their right to remain silent during the risk assessment interview and their silence cannot be used against them at sentencing. Furthermore, the circumstances of custodial interrogation during the interview necessitate *Miranda* warnings. Instead of traditional *Miranda* warnings, however, CRA-specific warnings will better serve that rationales of the Fifth Amendment and *Miranda* because of the added layer of opacity present in the risk assessment process.

Determining how the Fifth Amendment protects individuals in CRA systems is critically important. CRAs play a predominant role in other sectors of the criminal justice system, such as bail determination. Bail CRAs implicate some of the same concerns as sentencing CRAs. They involve questioning *prior* to an upcoming trial. A plethora of literature suggests that bail proceedings have serious consequences—defendants who are denied bail are more likely to be convicted and more likely to reoffend.[270]

Further, as the use of opaque technologies and decision-making processes make it increasingly easier for defendants to inadvertently incriminate themselves, algorithms are only one of many potential tools that implicate the same concerns of coercion. For example, facial recognition developments have grown significantly and technology can easily identify emotional reactions solely by observing a defendant's face.[271] It is not hard to imagine policing techniques that make use of these technologies to incriminate individuals. These innovations will require policymakers and courts to make critical decisions in the near future. As they do this, they should consider the rationales behind and protect the core Constitutional principles engrained in the Fifth Amendment.

270. *See* Stevenson & Mayson, *supra* note 44, at 22.

271. *See, e.g.*, Hamish Pritchard, *New Emotion Detector Can See When We're Lying*, BBC News (Sept. 13, 2011), http://www.bbc.com/news/science-environment-14900800.