Constitutional Challenges, Risk-based Analysis, and Criminal History Databases: More Demands on the U.S. Sentencing Commission

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Criminal history has traditionally been a component of any sentence determination. In guideline systems, it has become one of the two axes that determine an offender's sentence. This FSR Issue focuses largely on the important role criminal history plays in the federal Guidelines, though it also provides an update on recent developments in England. The Contributors to this Issue discuss a host of empirical and legal questions, the resolution of many of which require crucial value judgments and call for a more focused re-thinking of the justifications underlying the federal Guideline structure.

This Issue continues FSR's ongoing coverage of the criminal history category, a topic we have taken up in two other recent Issues.[1] The impetus for this Issue were two recent Sentencing Commission studies on criminal history. One, entitled *Measuring Recidivism: The Criminal History Computation of the Federal Sentencing Guidelines* examines the predictive statistical power of Chapter Four, as it is currently written. Linda Drazga Maxfield, a senior research associate with the Commission, presents a synopsis of this report in this Issue. The second study focuses on *Recidivism and the "First Offender."* It analyzes recidivism rates among federal offenders with little or no criminal history prior to the federal offense at issue.[2] Former Commissioner O'Neill includes some of the major findings of this study in his article in this Issue.

I. The Underpinnings of Criminal History

A. Criminal History Meets Punishment Theory

How to consider criminal history in sentencing has been subject to a healthy, albeit unresolved, debate. Some retributivists argue that a prior criminal conviction should lead to enhanced punishment because the offender has already been warned and has proven himself unable or unwilling to follow society's commands.[3] Others find such additional punishment inappropriate and instead advocate a sentence discount for first offenders, which still effectively punishes repeat offenders more harshly.[4] According to Julian Roberts, the pre-2003 English sentencing framework allowed for such a sentencing discount for offenders with up to a handful of prior convictions while anyone with more convictions would progressively lose the discount.

The difficulty with considering criminal history as part of a retributive framework is that it dislocates the dominant proportionality calculus between the offense and the sentence. The new English approach, for example, elides this tension by allowing the offender's criminal history to help define offense seriousness. This allows criminal history to be weighed as part of the proportionality calculus rather than situating it outside of the relationship between offense seriousness and punishment.

Incapacitation, deterrence, and even rehabilitation also play a role in assessing whether recidivists merit additional punishment. Has an offender with a prior conviction not already

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shown that he needs more deterrence and a longer incapacitative and rehabilitative period before he can re-enter society? The Sentencing Commission justifies longer sentences for recidivists in part on public safety grounds.[5]

Julian Roberts critiques the new English sentencing framework which promises to reflect the seriousness of an offender's prior record in the sentence while enhancing public safety and retaining sentencing proportionality. He calls the process by which the Home Office arrived at this formula "penal alchemy'" because it could only claim to attain all these goals by "enlarging the definition of crime seriousness to include previous convictions.'' The Criminal Justice Act of 2003 now requires sentencing courts to consider each previous conviction, with special regard to the nature of the offense and the age of the conviction.

Roberts fears that the increased consideration of prior convictions in England with its move away from proportionality between the offense of conviction and the sentence imposed will lead to substantially extended and unnecessarily long sentences for repeat property offenders. The cost to the prison system will be substantial, he predicts. In addition, Roberts suspects that the profile of prison inmates will change, with property offenders constituting a larger percentage than has been the case. Andrew Ashworth, the Vinerian Professor of English Law at Oxford, is yet more critical of the developments in English sentencing. He charges that the changes will "result in unjustifiably heavy sentencing on small-time offenders, sentencing that will be both disproportionate and futile.'' For many of these offenders the social welfare or the mental health systems might provide more appropriate solutions than the criminal justice system. Moreover, he argues that government data indicate that the incarceration of these repeat offenders has little impact on public safety but instead may wreak a great injustice.

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B. Criminal History and Empirical Findings

Recidivism data are easily manipulable depending on the definition of the term. Narrow definitions may require a prior *conviction* of specific types of offenses to have been incurred within a short period of time. More expansive definitions may remove the limiting factors, and include arrest data for any type of offense, at any point during an offender's lifetime.

Nevertheless, recidivism studies indicate that those with a prior conviction are more likely to commit future crimes. Some studies have indicated that more than half of those serving a prison sentence in the United States and in England and Wales had a prior adult criminal record.[6] Of the 272,111 persons released from prisons in 15 states in 1994, almost half were reconvicted, and about one quarter were resentenced to prison for a new crime.[7] However, these studies do not indicate directly the seriousness of the subsequent offense. Such data would provide an important measure of the social harm the offender continued to inflict.

Linda Drazga Maxfield and Michael O'Neill's articles describe and analyze research conducted as part of the Sentencing Commission's recidivism project which begins to fulfill the promise expressed in the Introduction to Chapter Four that the Commission review the empirical basis for its prior offense computation. Maxfield discusses the predictive statistical power of the existing criminal history categories (CHCs). She finds that CHCs I through VI are closely correlated to the percentage of offenders who recidivate. This correlation also holds once the recidivism measures are disaggregated into subsequent convictions, arrests, and revocations. Even though criminal history *points* are more predictive than criminal history *categories*, Maxfield cautions against abolishing the CHCs. She notes that "the CHC provides a simplicity and efficiency that argues for its continued use in the sentencing process,'' especially in light of the small difference in predictive power between the two measurements. Whether all federal judges would agree with Maxfield's characterization of the CHCs is doubtful but they would likely join her in rejecting further complications of Chapter Four.

One set of measurements, however, clearly lacked a correlation. The measurement of how rapidly offenders recidivate during a two-year follow-up period showed virtually no difference between CHCs V and VI. Maxfield explains this with the mandatory placement of so-called career offenders and armed career criminals in CHC VI even if they have fewer than the otherwise required minimum criminal history points for that placement. Career offenders must have at least two prior felony convictions of either a crime of violence or a controlled substance offense at the time they are convicted for a crime of violence or a controlled substance offense.[8] The armed career criminal provision implements congressional legislation mandating that a defendant be subject to an enhanced sentence if the offense of conviction is a violation of 18 U.S.C. § 922(g) and

the defendant has at least three prior convictions for a "violent felony'' or "serious drug offense,'' or both.[9] Maxfield notes that the placement of these offenders "is justified by a culpability rationale, rather than a recidivism risk rationale.'' This seems too facile an argument though which is only defensible because the Guidelines lack an explicit sentencing rationale. Switching retributive and utilitarian arguments to justify the choices made in Chapter Four makes the criminal history computation virtually unassailable. There is more blame to go around, however. In its desire to incarcerate for long periods of time those offenders it perceives as dangerous, Congress failed to consider sufficiently the empirical basis for such a categorization. Congress should commission empirical studies from the Commission before it legislates based on perception.

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Former Commissioner O'Neill focuses on the opposite end of the Guidelines' criminal history computation – CHC I. He notes that the Guidelines make it difficult to identify the true first offender, i.e., the person without any prior criminal justice contacts. While the majority of U.S. citizen offenders have zero criminal history points, their prior connections with the criminal justice system make them distinguishable from each other: some of them have no arrests, others have no convictions, and some have only minor convictions. O'Neill's paper presents an in-depth analysis of the demographic, offense-specific, and dispositional differences between these three offender groups. The three possible configurations of first offenders which O'Neill proposes differ in their likelihood of recidivating. To capture true first offenders who have the lowest recidivism rates, O'Neill considers four different options, ranging from the creation of a new CHC Zero to a guided departure which would be part of Chapter Five. O'Neill appears to advocate a re-thinking of CHC I because of the differences he perceives between true first offenders – those without any prior criminal justice contacts – and others currently grouped in that category.

Curious about the findings in the first offender study is the difference between those offenders who have no convictions but prior arrests and those who have convictions for minor offenses. Surprisingly, the latter category has a lower recidivism rate than the former. O'Neill provides no explanation for this difference. Further quantitative, and possibly qualitative analysis, might be needed to explain this puzzle which may possibly hold the key to a successful re-thinking of recidivism and re-entry.

C. Risk-Based Analysis

None of the Commentators in this Issue discuss the possibility of using risk-based assessments to divert offenders from prisons. Prior criminal record, however, may form part of a scoresheet that assesses an offender's recidivism risk. As Richard Kern and Meredith Farrar-Owens discussed in a recent FSR Issue, Virginia's Criminal Sentencing Commission has developed a risk assessment instrument to divert fraud, larceny and drug offenders from prison.[10] While offenders with prior violent felony and those with certain cocaine convictions were automatically excluded from participating in the study, all others who would usually go to prison were eligible for such a risk assessment consideration. Diversion based on risk assessment may be less controversial than the use of enhanced penalties following such an assessment. Nevertheless, Virginia has integrated the latter strategy into its guidelines for sex offenders. Most interestingly, the risk assessment instruments consider not only prior convictions but also arrest history.[11]

An explicit risk assessment instrument as developed in Virginia would be of further use to sentencing judges. The Commission, however, would tackle such a project only if it recognized the value of diverting offenders from imprisonment in light of a more utilitarian and cost-based analysis.

These examples may demonstrate a future usage of prior criminal record which has not been explored sufficiently. As O'Neill indicates, more true first offenders than any others are diverted from prison. An explicit risk assessment instrument as developed in Virginia would be of further use to sentencing judges. The Commission, however, would tackle such a project only if it recognized the value of diverting offenders from imprisonment in light of a more utilitarian and cost-based analysis. It is more likely that the Virginia model will attract followers among the state commissions than the U.S. Sentencing Commission and Congress.

II. *Almendarez-Torres, Booker*, and *Shepard*

A number of the Contributors to this Issue have tackled issues arising out of the Supreme Court's recent Sixth Amendment decisions and the continued survival of *Almendarez-Torres*.[12] Colleen Murphy and David Johnson agree that a jury must find the existence of a prior conviction beyond a reasonable doubt. According to Murphy, a professor at Roger Williams Law School, for a prior conviction to be considered at sentencing, it must have been imposed under the beyond a

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reasonable doubt standard. However, she finds no need for the conviction to have been imposed by a jury, subject to one exception. Non-jury juvenile delinquency adjudications should be treated differently because of the distinct goals of the juvenile system. They should not be allowed to enhance the maximum punishment for a subsequent conviction.

Johnson, currently a second-year law student at Ohio State University, discusses the Supreme Court's 1912 decision in Graham v. West Virginia[13] as helpful in determining the meaning and scope of *Almendarez-Torres*. In *Graham* the Court determined that the fact of a prior conviction need not be included in the indictment. While the Court did not have to reach the Sixth Amendment argument whether a jury must find Graham's prior convictions, in dicta it indicated that it may have been ready to do so had a jury not determined Graham's identity before the judge re-sentenced him. *Graham* reiterates the distinction between offense-specific and offender-related facts,[14] and determines that only the former must be alleged in an indictment. More importantly, according to Johnson, *Graham* may show us the way to allow for the consideration of facts not known at the time of indictment, such as juror intimidation or perjury. Under West Virginia's statute at the time a jury could be empaneled after the sentencing to determine the underlying facts in this case — two prior convictions. Upon an affirmative jury finding, the judge could proceed to re-sentencing. Johnson cautions though that legislatures must determine a point after which it should no longer be possible to re-examine a sentence.

Sigmund Popko, a professor at Arizona State University College of Law and a former public defender, untangles the definition of "crime of violence.'' Its importance derives from its power to enhance sentences under § 4B1.1 and § 2L1.2. Even though the Commission has attempted to define the term with some clarity, it has not prescribed a judicial methodology for sentencing courts. Popko asks that it do so. While the Supreme Court determined that "burglary'' under 18 U.S.C. § 924(e)'s "crime of violence'' provision must be analyzed under a categorical approach, many of the lower courts have adopted different ways to determine whether an offense constitutes a "crime of violence" when the statutory elements cover both violent and non-violent offenses.

To some extent, the Supreme Court's decision in *Shepard* has resolved the methodological problems. The Court determined that under *Taylor* the sentencing court is permitted only to consider "the statutory definition, charging document, written plea agreement, transcript of plea colloquy, and any factual finding by the trial judge to which the defendant assented'' in finding whether the prior conviction was for a generic burglary. A plurality of the Court explained its limitations on the scope of judicial factfinding in light of the doctrine of constitutional doubt. Justice Thomas, however, indicated that he had no doubt that *Apprendi* requires that a jury find a prior conviction, and that 18 U.S.C. § 924(e) was therefore unconstitutional.

In the context of the Armed Career Criminal Act Popko raises a crucial question that the Commission must face today. How can it accommodate the Supreme Court's Sixth Amendment jurisprudence into the Guideline system? Rather than relying on the continued validity of *Almendarez-Torres*, the Commission should develop contingency plans, or possibly plan a preemptive strike, to respond to a Supreme Court pronouncement on the issue.

III. Databases and Due Process

Some of the issues pertaining to criminal convictions deal with the ability of probation officers to ascertain the offender's criminal record correctly. While three-strikes laws, as Johnson explains, are not a novel development, their effectiveness has increased dramatically in light of national criminal record databases. Such databases, however, do not (yet?) capture foreign convictions.

A. Foreign Convictions

Because of the large number of immigrants in the United States and in the criminal justice system,[15] some of whom have criminal records from their home countries or from countries of transit, the Commission and courts face two sets of questions. First, how can the process of detecting these convictions be improved? Second, how should a guideline system treat such convictions?

The Supreme Court in Small v. United States recently weighed in on the use of foreign convictions under 18 U.S.C. § 922(g)(1), the so-called felon-in-possession statute.[16] A majority of the Court, construing the statute, determined that a foreign conviction could not trigger a

prosecution under this statute. Even though it admitted that the rationale of the felon-in-possession statute would counsel in favor of the inclusion of foreign convictions, it viewed the statutory language as too broad to include foreign convictions as some of them might inappropriately trigger the weapons ban. While the current treatment of foreign criminal history under the Guidelines provides judges with the flexibility of assessing the substance of a foreign conviction and the procedure used, concerns may arise.

The Commission in the first offender part of its recidivism study, excluded non-citizens because it assumed that it was not in a position to ascertain their non-U.S. criminal record accurately and comprehensively. In this context the distinction between non-citizen and citizen is artificial and imprecise. Natural-born and naturalized citizens may have convictions from a foreign country, especially if they have spent extended periods of time abroad. Some non-citizens, on the other hand, who have spent almost their entire life in the United States, have never had an opportunity to acquire a foreign record.

While the exchange of criminal records might be improved with some foreign countries,[17] it is unlikely to function effectively, at least in the near future, with respect to all foreign countries. Should non-citizen offenders for whom no foreign criminal record can be ascertained be treated automatically as true first offenders, or should there be a presumption against this benefit? Depending on the solution proposed for citizen offenders, this question of how to treat non-U.S. citizens will be crucial in achieving fairness and uniformity in sentencing.

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Assuming that the sentencing court has knowledge of a foreign conviction, Murphy's analysis would allow the judge to consider a foreign conviction to enhance a maximum sentence for the present offense as long as the foreign conviction was imposed under a standard equivalent to the reasonable doubt standard. She would not require a jury trial. This assessment appears to strike the right balance even though it leaves unanswered larger questions of systemic equity for foreign offenders which arise from the probation officers' inability to unearth criminal records in some foreign countries.

The U.S. resistance to the International Criminal Court hinges in part on the absence of a jury system. Most countries in the world, however, do not allow for jury trials but either have a professional panel of judges or a mixed lay-professional panel. It seems disingenuous to reject convictions entered in highly developed legal systems as insufficiently reliable or lacking due process protections merely because those courts do not use the jury system.

On the other hand, Murphy's requirement of the reasonable doubt standard may create unexpected difficulties for courts. How equivalent does the foreign country's standard have to be? Would similar language be required, or merely similar interpretations?

Foreign convictions are not the only group of offenses not directly counted in the computation of criminal history points. A number of our Contributors focus on the counting of tribal records.

B. Tribal Convictions

Tribal records do not factor directly into the Chapter Four computation. However, judges may consider them in departure decisions. Kevin Washburn, a professor at the University of Minnesota, advocates the inclusion of tribal court misdemeanor convictions in the criminal history computation to the same extent as state, county, and municipal convictions. Procedurally and substantively he finds state court convictions more comparable to tribal court convictions than to foreign convictions. Among the reasons, he notes the extensive due process protections granted in tribal courts. He acknowledges though that tribal courts are not required to provide defense counsel at government expense but believes that the Commission could allow courts only to consider convictions entered when the defendant was represented by counsel. Washburn's overarching rationale for counting tribal court convictions in the Chapter Four computation is not so much based on criminal justice grounds than on the recognition of tribal self-determination and self-governance that also pervades other areas of federal law.

While concern about respect for tribes drives Washburn's argument, he also claims that the failure to consider tribal court convictions violates the Guidelines' goals of reducing disparity and increasing the fairness and accuracy of sentences. Among Washburn's most interesting arguments is the suggestion for an opt-out provision for tribes which would allow them to preclude federal courts from considering tribal convictions when determining prior record. This proposal mirrors Congress's creation of a tribal opt-out provision for the federal death penalty.

Washburn justifies his proposal with the recognition that the federal government has largely imposed its jurisdiction upon the tribes.

Washburn's article has generated substantial commentary. Jon Sands and Jane McClellan, both federal public defenders in Arizona, oppose Washburn's suggestions on fairness grounds. Judge Black of the District of New Mexico shares their concern. Sands and McClellan note that under *Booker*, courts are more easily able to consider tribal court convictions in setting a sentence. And courts have always not only been able to select a sentence within the guideline range but also to depart upward, if necessary. Sands and McClellan urge caution though since tribal court due process protections are inadequate. They deem Washburn's proposal to count only convictions in which the defendant had counsel administratively burdensome. Often, they suggest, it would be impossible to determine whether counsel was present. Judge Canby of the Ninth Circuit goes yet a step further. He notes that counsel in tribal court do not have to be trained lawyers. For that reason, he envisions the need for district courts to distinguish between different types of advocates in attempting to determine which convictions to count.

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Sands and McClellan add further arguments against the consideration of tribal criminal history. They note that tribal convictions serve different goals than those in state criminal justice systems. They are most concerned though that the proposal would greatly enhance sentence length and increase disparity because of the differences between tribal criminal justice systems. Judge Canby shares this concern but agrees with Washburn that recognition of tribal court decisions trumps in light of law-enforcement problems in Indian country. Judge Kornmann of the District of South Dakota disagrees as he "cannot favor anything that mandates further increases in the length of sentences for Native Americans.''

While Sands and McClellan focus solely on guideline issues, Judge Canby modifies Washburn's opt-out provision so as to limit it only to cases where the crime arises in Indian country and Indian offenders are being sentenced. Judge Kornmann wants to see the tribal court systems to be funded adequately and to accord defendants procedural protections. Judge Black proposes a new model of tribal sentences to address the inequities wrought by the sentencing of Native Americans in federal court. He proposes granting the tribes the ability to create their own sentencing structure, separate from either the Guidelines or state systems.

While Washburn and the commentators have different perspectives on the issue of how tribal convictions should be counted, all find the treatment of Native Americans in tribal and federal courts disconcerting. They propose different remedies which go well beyond the narrow question of prior criminal history.

C. Expungements

The treatment of foreign and tribal convictions ultimately raises larger questions about how useful and necessary it is to include all prior convictions, and possibly all contacts with the criminal justice system, in the computation of criminal history.[18] Will such a comprehensive approach perceptibly increase the predictive power of criminal history? Even if this were not the case, would a no-exclusion approach help the judge set a fairer sentence? Even though the commentators do not argue this point, counting foreign and tribal convictions appears to close a loophole which allows recidivists to escape their just deserts and prevents an accurate estimate of their likelihood to recidivate. This question becomes magnified in the context of expunged records.

Ultimately, the consideration of prior criminal record raises not only fairness questions but also fiscal considerations. To what extent are prior convictions an adequate measure of future dangerousness, and to what extent will the public be willing to fund the incarceration of recidivists who pose only a minor danger of serious future crime?

While the 1960's and 1970's witnessed an increase in expungement proceedings, expungements have declined over the last decade. This holds particularly true for juvenile convictions, as states increasingly deny the expungement and sealing of such records.[19] The charge most frequently levied against expungement is that it falsifies reality, thwarts law-enforcement efforts, and shields a re-offender from receiving a just sentence. Moreover, some have argued that because of the high predictive quality of convictions, and especially of juvenile convictions, expungements deny the sentencer an effective prediction tool.

On the other hand, as a panoply of collateral sanctions and civil disabilities impede an offender's re-entry, and such non-criminal consequences continue for prolonged periods of time, expungements could serve the salutory purpose of helping reintegration and ultimately restoring the rights of a person who has served her sentence and succeeded to remain crime-free for a certain period of time. Empirical studies may aid the recidivism debate. Certain crime-free time periods might be indicative of the offender likely remaining a law-abiding citizen. The Guidelines implicitly acknowledge this assumption as they do not count decayed convictions. Rather than

disregarding convictions only at sentencing, a more affirmative expungement process may assist the ex-offender in remaining crime free. Once expungement functions as a reward for success, this recognition may encourage her further to remain crime free.

IV. Conclusion

Often underestimated in importance and difficulty, criminal history raises issues critical to sentencing. It presents a series of empirical questions, policy issues, and legal and logical concerns. Ultimately, the consideration of prior criminal record raises not only fairness questions but also fiscal considerations. To what extent are prior convictions an adequate measure of future dangerousness, and to what extent will the public be willing to fund the incarceration of recidivists who pose only a minor danger of serious future crime?

Notes

1 *See* Vols. 9(4) and 13(6).

2 Both studies are available on the Commission's website at www.ussc.gov/research.htm.

3 *See, e.g.*, U.S. Sentencing Commission, Guidelines Manual, Ch. 4, Introduction ("A defendant with a record of prior criminal behavior is more culpable than a first offender and thus deserving of greater punishment.'') [hereinafter Guidelines Manual].

4 *See, e.g.*, Andrew von Hirsch, *Desert and Previous Convictions, in* PRINCIPLED SENTENCING: READINGS IN THEORY AND POLICY 191 (Andrew von Hirsch & Andrew Ashworth eds., 1998).

5 Guidelines Manual, *supra* note 3, Ch. 4, Introduction ("General deterrence of criminal conduct dictates that a clear message be sent to society that repeated criminal behavior will aggravate the need for punishment with each recurrence. To protect the public from further crimes of the particular defendant, the likelihood of recidivism and future criminal behavior must be considered. Repeated criminal behavior is an indicator of a limited likelihood of successful rehabilitation.'')

6 Bureau of Justice Statistics, James P. Lynch et al., *Profile of Inmates in the United States and in England and Wales, 1991* (Oct. 1994), NCJ-145863, at www.ojp.usdoj.gov/bjs/pub/ascii/walesus.txt (visited last Apr. 22, 2005).

7 Bureau of Justice Statistics, *Criminal Offenders Statistics*, at www.ojp.usdoj.gov/bjs/crimoff.htm#recidivism (visited last Apr. 22, 2005).

8 Guidelines Manual § 4B1.1. For a discussion of the meaning of "crime of violence'', see Sigmund Popko, in this Issue.

9 Guidelines Manual § 4B1.4.

10 Richard P. Kern & Meredith Farrar-Owens, *Sentencing Guidelines with Integrated Offender Risk Assessment*, 16 FED. SENT. REP. 165, 165–66 (2004). *See also* Brian J. Ostrom et al., *Offender Risk Assessment in Virginia* (2002).

11 Kern & Farrar-Owens, *supra* note 10, at 167–68.

12 *See* Apprendi v. New Jersey, 530 U.S. 466 (2000); Blakely v. Washington, 124 S. Ct. 2531 (2004); United States v. Booker, 125 S. Ct. 738 (2005); Almendarez-Torres v. United States, 523 U.S. 224 (1998). *See also* Shepard v. United States, 544 U.S. ___ (Mar. 7, 2005).

13 224 U.S. 616 (1912).

14 *See* Douglas A. Berman, *Conceptualizing Blakely*, 17 FED. SENT. REP. 90 (2004).

15 In 2002 approximately one third of all federal offenders were non-citizens. U.S. Sentencing Commission, *2002 Sourcebook of Federal Sentencing Statistics* 19, Tbl 9 (2002) (Citizenship of Offenders in each Primary Offense Category, Fiscal Year 2002), at http://www.ussc.gov/ ANNRPT/2002/table9.pdf (visited last Apr. 22, 2005). Within offense categories, the percentages range from zero (for manslaughter) to almost 91 (for immigration offenses). *Id.*

16 544 U.S. ___, 2005 U.S. Lexis 3700 (Apr. 26, 2005).

17 The United States might, for example, gain access to the planned European Union wide criminal record database.

18 *See, e.g.*, Elizabeth Stull, *Protesters Lose Bid for Review of Use of Prior Arrests in Upcoming Sentencing*, New York L.J., Sept. 30, 2004 (discussing use of sealed arrest records at a later sentencing).

19 *See, e.g.*, T. Markus Funk, *Considering Juvenile Criminal Records in Criminal Sentencing*, 11 FED. SENT. REP. 282 (1999) (arguing for the creation of a national database for serious juvenile offenses and their consideration in later sentencing proceedings).