IDEOLOGICAL TESTING*

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This Article describes and critiques a practice I call the ideological testing of criminal defendants. Ideological testing occurs when state actors within the criminal legal system elicit and evaluate the defendant's views of the criminal legal system. For example, as part of the presentence investigation process in some jurisdictions, probation or parole officers are required to ask defendants questions like, "Do you think the criminal justice system is fair?," "Do you feel you have been treated fairly by the criminal justice system?," and "How do you feel about the police that arrested you?"

This Article introduces the concept of ideological testing and describes how it occurs at multiple sites within the criminal legal system, including presentence investigations, risk assessments, and parole hearings. In theory, ideological testing helps state actors predict a defendant's recidivism risk and assess their remorse. Where a defendant expresses critical views of the criminal legal system—such as the view that the system is unfair, or that their sentence was excessively harsh—this supposedly indicates their "criminal thinking," lack of remorse, and failure to accept responsibility.

Ideological testing undermines the core First Amendment value of governmental respect for dissent. It also denies the reality of pervasive injustice within the criminal legal system and deepens racial injustice. This Article calls on advocates to challenge ideological testing on First Amendment grounds and proposes the elimination of ideological testing as a matter of policy.

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INTRODUCTION

"Do you think the criminal justice system is fair?"[1]

"What is your opinion of the law, police, court, and probation?"[2]

"Do you feel you have been treated fairly by the criminal justice system?"[3]

"How do you feel about the police that arrested you?"[4]

1. N.D. Dep't of Corr. & Rehab., Sex Offense Pre-Sentence Investigation Questionnaire Form 20 (2022) [hereinafter N.D. Dep't of Corr. & Rehab., Sex Offense Form (2022)] (on file with the North Carolina Law Review).

2. Minn. Dep't of Corr., PSI Questionnaire 2 (2021) (on file with the North Carolina Law Review).

3. *Id.*

4. W. Va. Dep't of Corr., Pre-Sentence Investigation Report 30 (2017) [hereinafter W. Va. Dep't of Corr., Pre-Sentence Investigation Report] (on file with the North Carolina Law Review).

Each of these is a standard question for criminal defendants being interviewed by a probation or parole officer as part of a presentence investigation.[5] These examples are drawn from presentence questionnaires used by community supervision agencies in North Dakota, Minnesota, and West Virginia. In these states, and others, probation or parole officers conducting presentence investigations are required to ask defendants facing sentencing about their views of the criminal legal system—either in general, or in their particular case.[6]

These questions are examples of what this Article terms the *ideological testing* of criminal defendants. Ideological testing, as I define it, occurs when state actors within the criminal legal system elicit and evaluate a defendant's views of the criminal legal system.[7]

Ideological testing is not limited to presentence investigations. State actors also conduct ideological testing as part of risk assessments and parole hearings. Several risk assessment instruments that are widely used at sentencing and in post-conviction settings produce risk scores based, in part, on the defendant's views of the criminal legal system. And at parole hearings, parole board members sometimes consider the defendant's views of the criminal legal system in deciding whether to grant or deny parole. The defendant's responses to ideological testing questions at each of these sites can inform decisions about their sentence, risk classification, and release from prison.[8]

Scholarship on defendants' voices within the criminal legal system has highlighted the many ways in which state actors devalue defendants' perspectives and knowledge about the system that has arrested, convicted, and punished them.[9] On the surface, ideological testing might seem like a notable

5. Probation and parole officers conduct presentence investigations in order to write a report for the judge, before sentencing, about the crime of conviction and the defendant as a person. *See* Renagh O'Leary, *Supervising Sentencing*, 57 U.C. DAVIS L. REV. 1931, 1947–72 (2024) (describing the presentence investigation process).

6. *See infra* Section I.A.1.

7. I use the term "defendant" broadly to include people who are facing criminal charges, people who have been convicted of a crime and are awaiting sentencing, and people who are serving a criminal sentence.

8. For some risk assessment instruments, such as the Level of Service Inventory-Revised ("LSI-R"), it is possible to quantify the impact of ideological testing on the defendant's overall risk score and resulting risk classification (e.g., low, medium, or high risk). *See infra* Section I.A.2. At sentencing and parole hearings, however, it will typically be difficult to tease out whether and to what extent ideological testing played a role in the ultimate outcome of any individual case. Where state actors ask a defendant ideological testing questions as part of presentence investigations or parole hearings, a defendant's answers are one factor (of many) that the decisionmaker can consider in imposing a sentence or making a parole decision.

9. *See generally, e.g.*, Alexandra Natapoff, *Speechless: The Silencing of Criminal Defendants*, 80 N.Y.U. L. REV. 1449 (2005) (identifying legal doctrine and practices that silence defendants); M. Eve Hanan, *Talking Back in Court*, 96 WASH. L. REV. 493 (2021) [hereinafter Hanan, *Talking Back*] (analyzing three types of power that prevent defendants from expressing critical views of the criminal

counterexample of state actors *valuing* defendants' perspectives and knowledge: in ideological testing, after all, state actors explicitly ask defendants what they think about the criminal legal system. But ideological testing is not a sincere invitation for defendants to share their views and experiences so that the state institutions at issue can learn from them, incorporate their feedback, and try to improve. Rather, the purpose of ideological testing is to assess if the defendant's views of the criminal legal system align with the state's preferred perspective: one in which the system works, defendants are treated fairly, and state actors deserve trust and respect.

There are two justifications for ideological testing. The first is that ideological testing reveals whether and to what extent the defendant exhibits "criminal thinking," an ostensible risk factor for recidivism.[10] The second is that ideological testing sheds light on whether the defendant feels sincere remorse and accepts responsibility for their crime.[11] While distinct, the criminal thinking and remorse/responsibility frameworks for ideological testing share a foundational assumption: that a defendant's critical views of the criminal legal system indicate some kind of a problem within the defendant, rather than a problem within the system itself.

This Article makes three primary contributions. First, it introduces the concept of ideological testing to the criminal law and procedure literature.[12] Recent scholarship has analyzed and critiqued how state actors evaluate defendants' views and attitudes about a wide range of subjects as part of presentence investigations, risk assessments, and parole hearings.[13] This Article

legal system in court); M. Eve Hanan, *Invisible Prisons*, 54 U.C. DAVIS L. REV. 1185 (2020) [hereinafter Hanan, *Invisible Prisons*] (applying theories of epistemic injustice to critique the lack of attention, by lawmakers and judges, to incarcerated people's experiences of prison); Evelyn Lia Malavé, *Distorted Narratives in the Treatment Program Complex*, 93 FORDHAM L. REV. 843 (2024) (describing how the "treatment program complex" suppresses defendants' voices about what help they need and the impact of court policies); Russell Gold, Look What You Made Me Do (July 1, 2024) (unpublished manuscript) (on file with the North Carolina Law Review) (describing pressures on defendants to endorse a simplistic and individualistic account of why they are involved in the criminal legal system). Lisa Washington has described similar dynamics within the family regulation system. *See* S. Lisa Washington, *Survived and Coerced: Epistemic Injustice in the Family Regulation System*, 122 COLUM. L. REV. 1097, 1141 (2022) (describing how "[t]he family regulation system pathologizes women who share knowledge that does not align with victimhood narratives and the need for state intervention by challenging their right to parent").

10. *See infra* Section I.B.1.

11. *See infra* Section I.B.2.

12. To be clear, my original contribution here is the concept of ideological testing, as I define it—not the phrase "ideological testing." Other scholars have used the phrase in different contexts. *See, e.g.*, John S. Baker Jr., *Ideology and the Confirmation of Federal Judges*, 43 S. TEX. L. REV. 177, 189 (2001) ("[T]he very same kind of ideological testing was applied to the nomination of former Senator Ashcroft for the office of Attorney General.").

13. *See generally* O'Leary, *supra* note 5, at 1966–72 (describing how probation and parole officers conducting presentence investigations are required to "make meaning" about the defendant's attitude toward their crime of conviction); Beth Karp, *What Even Is a Criminal Attitude? And Other Problems*

conceptualizes ideological testing as a distinct practice within these broader evaluative processes.

Second, this Article describes how and why ideological testing occurs at multiple sites within the criminal legal system. In doing so, it highlights continuities and shared logics across the domains of presentence investigations, risk assessments, and parole hearings.

This Article's descriptive account of ideological testing is based on a wide range of sources. Like my prior work on presentence investigations,[14] this Article presents findings from presentence questionnaires and related policy documents that I obtained through open records requests to community supervision or corrections agencies in every state.[15] My description of ideological testing as part of risk assessments and parole hearings draws on other scholars' work, as well as my own original research.[16] To understand how ideological testing occurs as part of risk assessments and parole hearings, I completed a training course on how to administer the Level of Service Inventory-Revised ("LSI-R"), one of the most widely used risk assessment instruments at sentencing and in post-conviction settings; reviewed publicly available transcripts of New York parole hearings; and conducted a fifty-state survey of statutes and regulations governing the factors that parole boards consider.[17]

Third, this Article critiques ideological testing on normative grounds and proposes strategies for challenging and ultimately eliminating ideological testing. I identify three primary harms of ideological testing within the criminal thinking and remorse/responsibility frameworks. First, ideological testing contravenes the core First Amendment value of governmental respect for dissent.[18] Among the First Amendment's central concerns is ensuring that

with Attitude and Associational Factors in Criminal Risk Assessment, 75 STAN. L. REV. 1431 (2023) (describing and critiquing how several widely used risk assessment instruments assess a range of attitude and associational factors); Kathryne M. Young & Hannah Chimowitz, *How Parole Boards Judge Remorse: Relational Legal Consciousness and the Reproduction of Carceral Logic*, 56 LAW & SOC'Y REV. 237 (2022) (analyzing how California parole commissioners assess remorse in parole hearings).

14. *See generally* O'Leary, *supra* note 5 (describing the presentence investigation process).

15. *See infra* Section I.A.1.

16. Here, Beth Karp's research on attitude factors in risk assessments, and Kathryne Young and Hannah Chimowitz's research on how parole commissioners assess remorse, have been especially helpful. Among their many valuable contributions, their articles provide evidence of the practice I describe as ideological testing, though the authors do not describe it in these terms. *See, e.g.*, Karp, *supra* note 13, at 1502 (noting that the Offender Screening Tool and the Structured Assessment of Violence Risk in Youth both assess the defendant's views of the police); Young & Chimowitz, *supra* note 13, at 254 (describing parole commissioners' expectation that sincerely remorseful parole candidates will "articulate[] an understanding of the criminal justice system that echoes the way the criminal justice system understands itself").

17. *See infra* Section I.A.2 (discussing risk assessments); *infra* Section I.A.3 (discussing parole hearings).

18. *See infra* Section II.A.

citizens may freely criticize the government.[19] In ideological testing, however, state actors question defendants in order to assess whether they hold the state's preferred, positive views about other state actors and institutions. Defendants who express critical views about criminal legal system actors and institutions may be tagged as exhibiting criminal thinking, lacking remorse, or failing to accept responsibility—labels that can negatively impact their sentence, risk classification, or parole release prospects.

Ideological testing also denies the reality of pervasive injustice within the criminal legal system. To illustrate this point, consider an example from Wisconsin. Wisconsin's presentence questionnaire asks defendants, "Is the law fair?" and "Does 'the [criminal justice] system' work?"[20] There are, to say the least, many compelling reasons to answer "no" to both questions.[21] To list just a few: Wisconsin's public defense delivery system is plagued by acute attorney shortages, such that indigent defendants in many counties routinely wait for over a month to have a lawyer appointed in their case.[22] Wisconsin has the highest incarceration rate for Black adults of any state in the country and the second most severe Black/white disparity in adult incarceration rates.[23] Research commissioned by Wisconsin's own court system found that, controlling for six factors highly relevant to sentencing, Black men were twenty-eight percent more likely than similarly situated white men to receive a prison sentence.[24] Nonetheless, where a Wisconsin defendant subjected to ideological

19. *See, e.g.*, Rosenblatt v. Baer, 383 U.S. 75, 85 (1966) ("Criticism of government is at the very center of the constitutionally protected area of free discussion.").

20. Wis. Dep't of Corr., Pre-Sentence Investigation Worksheet 5, 13 (2014) [hereinafter Wis. Dep't of Corr., Worksheet] (on file with the North Carolina Law Review). The question "Does the system work?" appears under the heading "Defendant's perspective of the criminal justice system." *See id.* at 13.

21. *See infra* Section II.B.

22. *See* Megan Carpenter, *"It's Not Going to Be a Quick Fix": A Shortage of State Public Defenders Plagues Wisconsin*, SPECTRUM NEWS 1 (Dec. 23, 2024), https://spectrumnews1.com/wi/milwaukee/news/2024/12/19/wisconsin-faces-a-shortage-of-state-public-defenders [https://perma.cc/5M5J-7SZH] (reporting that in Milwaukee County, as of December 2024, there were 300 defendants who had waited more than thirty days for the appointment of an attorney to represent them in their criminal case); Bruce Vielmetti, *Wisconsin Is Sued over Delayed Lawyer Appointments in Criminal Cases*, MILWAUKEE J. SENTINEL (Aug. 24, 2022), https://www.jsonline.com/story/news/2022/08/24/wisconsin-sued-over-lack-defense-lawyers/7874165001/ [https://perma.cc/QR7H-DMNJ] (describing delays across Wisconsin in appointing counsel for indigent defendants).

23. ASHLEY NELLIS, THE SENT'G PROJECT, THE COLOR OF JUSTICE: RACIAL AND ETHNIC DISPARITY IN STATE PRISONS 7–10 (2021), https://www.sentencingproject.org/app/uploads/2022/08/The-Color-of-Justice-Racial-and-Ethnic-Disparity-in-State-Prisons.pdf [https://perma.cc/559A-SX66]; *see also* Claire Amari, *Wisconsin Imprisons 1 in 36 Black Adults. No State Has a Higher Rate*, WIS. WATCH (Oct. 13, 2021), https://wisconsinwatch.org/2021/10/wisconsin-imprisons-1-in-36-black-adults-no-state-has-a-higher-rate/ [https://perma.cc/5UNE-JQBV] (describing reactions in Wisconsin to the Sentencing Project report).

24. WIS. CT. SYS. OFF. OF RSCH. & JUST. STAT., RACE AND PRISON SENTENCING IN WISCONSIN: INITIAL OUTCOMES OF FELONY CONVICTIONS, 2009–2018, at 4 (Draft Jan. 2020), https://www.documentcloud.org/documents/20478391-race-prison-sentence-felony-report-draft_

testing expresses the view that the law is *not* fair or the system does *not* work, these views may appear in the "Attitudes and Beliefs" section of the presentence report as evidence of their "thinking errors" or "cognitive distortions."[25]

Finally, ideological testing deepens racial injustice within the criminal legal system in several respects. Public opinion researchers have documented significant and long-standing racial polarization in views of the criminal legal system, suggesting that Black adults are significantly more likely than white adults to hold some of the critical views that are penalized in ideological testing.[26] The significant discretionary, interpretive dimension of ideological testing also leaves ample room for racial bias.[27] And more broadly, ideological testing within the criminal thinking and remorse/responsibility frameworks trivializes critical views of the criminal legal system based on concerns about racism and racial bias, by treating them as just another symptom of the defendant's criminal thinking patterns and moral deficiencies.[28]

2020_02_05/ [https://perma.cc/NEE5-5EGM]. The study accounted for six variables highly relevant to sentencing:

> (1) Highest Severity among Convicted Charges. This considers the highest severity class of the convicted felony charges and assigns a weight to each class. . . . (2) Highest Severity among Initial Charges. This considers the highest severity class of the initial felony charges and assigns a weight to each class. (3) Trial-Determined Guilt. This explores whether a defendant was found guilty at trial versus the defendant pleading guilty or no contest. (4) Exclusively Drug Offenses. This examines whether the defendant was convicted of only drug charges. (5) Criminal History. This explores whether the defendant was convicted of a felony or misdemeanor in the previous five years to the case. (6) Age at Offense Date. This accounts for the defendant's age when the offense was committed.

Id. at 3; *see also* Daniel Bice, *Supreme Court Didn't Release Study Showing Black Men 28% More Likely to Do Prison Time in Wisconsin*, MILWAUKEE J. SENTINEL, https://www.jsonline.com/story/news/investigations/danielbice/2021/02/12/bice-high-court-sat-on-report-showing-racial-disparities-in-wisconsinsentencing/6729261002/ [https://perma.cc/M93B-JHLQ (dark archive)] (last updated Feb. 12, 2021, 1:09 PM) (describing the report and noting that "it doesn't appear that [the report] was ever shared with the general public or even with the Wisconsin judiciary").

25. Wisconsin Department of Corrections policy encourages probation and parole officers writing presentence reports to "[p]lace special emphasis" on the defendant's "beliefs regarding . . . [t]he criminal justice system" when writing the "Attitudes and Beliefs" section of the report. Wis. Dep't of Corr., Elec. Case Ref. Manual: DCC—COMPAS PSI Process 180–81 (2019) [hereinafter Wis. Dep't of Corr., Elec. Case Ref. Manual] (on file with the North Carolina Law Review) ("Attitudes and Beliefs: This narrative section [of the presentence report] should discuss a summary of the defendant's behavior that would provide evidence for the existence of antisocial thoughts and feelings. Considerations should include the defendant's patterns of problem solving, thinking errors (cognitive distortions), coping skills, rationalization/justification for his/her behavior and how they view the world around them in general. . . . Place special emphasis on the offender's beliefs regarding: [t]he criminal justice system [as well as other factors]."). The criminal thinking framework for ideological testing treats critical views of the criminal legal system as thinking errors or cognitive distortions. *See infra* Section I.B.1.

26. *See infra* Section II.C.1.

27. *See infra* Section II.C.2.

28. *See infra* Section II.C.3.

These three critiques point toward the need for advocacy that challenges ideological testing and policy changes to eliminate it. The most promising litigation strategy is for defendants to raise First Amendment challenges to the consideration of ideological testing evidence at sentencing. Two lines of First Amendment caselaw—the first prohibiting the consideration of a defendant's "abstract beliefs" at sentencing, and the second promising special protection for speech on matters of public concern—together provide strong support for constitutional challenges to ideological testing.[29]

At the policy level, policymakers should eliminate ideological testing at each of the sites where it occurs.[30] One likely objection is that doing so will lead to worse criminal legal decision-making by depriving decisionmakers of information that informs their assessments of the defendant's recidivism risk, remorse, and acceptance of responsibility. But the evidence that ideological testing supports accurate assessment of any of these factors is weak or nonexistent.[31]

This Article proceeds in three parts. Part I describes how ideological testing occurs at multiple sites within the criminal legal system and analyzes the two dominant frameworks for ideological testing. Part II makes the normative case against ideological testing. Finally, Part III offers a roadmap for challenging ideological testing on First Amendment grounds and proposes the elimination of ideological testing as a matter of policy.

I. WHAT IS IDEOLOGICAL TESTING?

Ideological testing of criminal defendants occurs when state actors within the criminal legal system elicit and evaluate the defendant's views of the criminal legal system. State actors within the criminal legal system include judges, prosecutors, police, parole board members, probation and parole officers, and prison staff.[32] I focus here on three common sites of ideological testing: presentence investigations, risk assessments, and parole hearings. This is not an exhaustive list of sites where ideological testing occurs.[33] I focus on

29. *See infra* Section III.A.

30. *See infra* Section III.B.2.

31. *See infra* Section III.B.1.

32. *See* Alice Ristroph, *Farewell to the Felonry*, 53 HARV. C.R.-C.L. L. REV. 563, 616 (2018) (noting that state actors within the criminal legal system include "the police that investigate and arrest, the prosecutor that seeks conviction, the judge that sentences, and the probation officers or prison officials that administer the sentence"). I do not include public defenders and court appointed counsel in this definition because, while they are employed or compensated by the state, they represent the defendant.

33. For example, some jurisdictions use ideological testing to determine eligibility for mental health court or diversion programs. *See, e.g.*, DEKALB CO. MENTAL HEALTH CT., POLICIES AND PROCEDURES 7 (2016), https://dekalbcounty.org/wp-content/uploads/2019/09/trct-policy-mhc.pdf [https://perma.cc/9W3W-W3GQ] (discussing use of the Texas Christian University Criminal

these three sites because for each, there is evidence of ideological testing in multiple states.

A. *Sites of Ideological Testing*

1. Presentence Investigations

Before a defendant's sentencing hearing, it is common for a probation or parole officer to conduct a presentence investigation and write a presentence report.[34] Where a presentence report is prepared, it is typically "one of the most important documents" at sentencing,[35] often serving as the judge's "primary source of information about the defendant and the offense."[36]

As part of the presentence investigation, a probation or parole officer interviews the defendant, often using a standardized questionnaire developed by the probation or parole agency.[37] These standardized questionnaires are rarely available to the public. Through open records requests to community supervision agencies in every state, however, I obtained questionnaires from thirty-six probation and parole agencies across thirty states.[38]

The questionnaires reveal that ideological testing is a common part of the presentence investigation process.[39] Some questionnaires ask the defendant

Thinking Scale); *see also infra* notes 131–33 and accompanying text (discussing the Texas Christian University Criminal Thinking Scale).

34. While specific rules for when presentence reports are permitted or required vary by state, every state provides for the preparation of a presentence report in some or all felony cases. *See* O'Leary, *supra* note 5, at 1947–54.

35. MODEL PENAL CODE: SENTENCING § 7.07 (AM. L. INST., Proposed Final Draft 2017).

36. 6 WAYNE R. LAFAVE, JEROLD H. ISRAEL, NANCY J. KING & ORIN S. KERR, CRIMINAL PROCEDURE § 26.5(b) (4th ed. 2015).

37. O'Leary, *supra* note 5, at 1961.

38. For each state, I submitted open records requests to the relevant state-level agency and the relevant county-level agency in the state's most populous county. The agencies that provided questionnaires are: Jefferson County, Alabama; Alaska; Maricopa County, Arizona; Colorado; Connecticut; Florida; Miami-Dade County, Florida; Hawaii; Idaho; Indiana; Kentucky; Louisiana; Maine; Cumberland County, Maine; Montgomery County, Maryland; Michigan; Minnesota; Hennepin County, Minnesota; Missouri; Montana; Nevada; New York City; New York; North Dakota; Franklin County, Ohio; Oklahoma; Multnomah County, Oregon; South Carolina; Greenville County, South Carolina; South Dakota; Utah; Washington; West Virginia; Kanawha County, West Virginia; Milwaukee County, Wisconsin; and Wyoming. All questionnaires cited in this Article are on file with the North Carolina Law Review. In addition to questionnaires, I also obtained a range of other internal agency policy documents related to the presentence investigation process. For a full list of documents collected, see O'Leary, *supra* note 5, app. B.

39. In a little over one-third of the thirty-six jurisdictions that provided questionnaires, the presentence questionnaires include questions that I characterized as ideological testing. The thirteen jurisdictions that include ideological testing questions on their presentence questionnaires were: Alaska; Maricopa County, Arizona; Idaho; Indiana; Minnesota; New York City; North Dakota; Franklin County, Ohio; Multnomah County, Oregon; South Dakota; Utah; West Virginia; and Milwaukee County, Wisconsin. The questionnaire provided by the community supervision agency in Milwaukee County, Wisconsin, is used across the State of Wisconsin.

about their views of the criminal legal system broadly. For example, North Dakota's questionnaire asks, "Do you think the criminal justice system is fair?"[40] Wisconsin's questionnaire asks, "Is the law fair?" and "Does 'the [criminal justice] system' work?"[41] Other questionnaires probe the defendant's views about whether they, as an individual, received fair treatment within the criminal legal system. For example, several jurisdictions' questionnaires ask whether the defendant believes that they have been "treated fairly by the [c]riminal [j]ustice [s]ystem,"[42] "treated fairly during the legal process,"[43] or "treated fairly in comparison to others."[44]

Some questions focus more narrowly on the defendant's views about their conviction or possible/presumptive sentences. New York City's questionnaire asks defendants convicted by guilty plea, "What is your feeling about your sentence? Conviction? If you feel it was unfair, how so?"[45] Idaho asks, "Do you feel your plea agreement is fair? [yes/no] If no, what do you feel would be fair?"[46] Multnomah County, Oregon, (which includes Portland) asks, "What are your feelings about the presumptive sentence? Would you consider it fair?"[47] Some jurisdictions' questionnaires do not explicitly invoke fairness, but ask the defendant for their thoughts or feelings about the plea agreement,[48] "the possibility of jail time,"[49] or "possibility of being on . . . probation."[50]

Some questionnaires ask about the defendant's views of specific state actors within the criminal legal system, either in general or in their particular case. The presentence questionnaire used in Maricopa County, Arizona, (which includes Phoenix), asks, "Do you think the police really help anybody?"[51] Minnesota's questionnaire asks, "What is your opinion of the law, police, court,

40. N.D. Dep't. of Corr. & Rehab., Sex Offense Form (2022), *supra* note 1, at 20.

41. Wis. Dep't of Corr., Worksheet, *supra* note 20, at 5, 13. The question "Does 'the system' work?" appears under the heading "Defendant's perspective of the criminal justice system." *See id.* at 13.

42. Minn. Dep't of Corr., *supra* note 2, at 2.

43. Utah Adult Prob. & Parole, Presentence Report Questionnaire 8 (2019) (on file with the North Carolina Law Review).

44. Wis. Dep't of Corr., Worksheet, *supra* note 20, at 13.

45. N.Y.C. Dep't of Prob., Pre-Sentence Investigation Report 4 (2013) (on file with the North Carolina Law Review). The questionnaire instructs probation officers not to ask this question of defendants convicted at trial. *See id.*

46. Idaho Dep't of Corr., Presentence Investigation Personal History Questionnaire 7 (2021) (on file with the North Carolina Law Review).

47. Multnomah Cnty. Dep't of Comm. Just., PSI Interview Form 4 (2008) (on file with the North Carolina Law Review).

48. Minn. Dep't of Corr., *supra* note 2, at 2.

49. State of Alaska Dept. of Corr., Presentence Worksheet 15 (on file with the North Carolina Law Review).

50. Franklin Cnty. Adult Prob. Dep't, Pre-Sentence Investigation Questionnaire 29 (2017) (on file with the North Carolina Law Review).

51. Maricopa Cnty. Adult Prob., Your Presentence Interview 15 (1999) (on file with the North Carolina Law Review).

and probation?"[52] South Dakota's asks, "Do you think the Court treated you fairly?" and "How did officers handle your case?"[53] West Virginia's asks, "How do you feel about the police that arrested you?"[54]

The defendant's answers to ideological testing questions can influence the ultimate presentence report in two ways. First, the report may include a section summarizing the defendant's views of the criminal legal system. For example, North Dakota's presentence investigation policy instructs officers that the presentence report "must include the defendant's attitude towards the offense, judicial system, and community supervision in order to determine what and how the defendant thinks about himself or herself, other individuals, and the world."[55] Wisconsin's presentence investigation policy instructs officers that in writing the narrative portion of the presentence report captioned "Attitudes and Beliefs," they should "[p]lace special emphasis on the offender's beliefs regarding . . . [t]he criminal justice system."[56]

Second, the defendant's expressed views of the criminal legal system may also shape the officer's global evaluation of the defendant. In writing about the defendant, probation and parole officers do not merely report straightforward biographical information, such as where they live and work.[57] Agency policies governing the presentence process also require officers to describe who the defendant is as a person, in highly impressionistic and subjective ways.[58] For example, the probation or parole officer writing a presentence report may be required to include their overall "assessment" or "evaluation" of the defendant, or to describe the defendant's "personality" or "potential for positive change."[59] In theory, the defendant's views of the criminal legal system offer insight into how they think, what values they hold, and why they committed the crime of conviction—all topics that the officer may discuss in their report.

52. Minn. Dep't of Corr., *supra* note 2, at 2.

53. S.D. Dep't of Corr., Adult Pre-Sentence Investigation Interview Guide 23 (2021) (on file with the North Carolina Law Review).

54. W. Va. Dep't of Corr., Pre-Sentence Investigation Report, *supra* note 4, at 30.

55. N.D. Dep't of Corr. & Rehab., Pol'y No. 7A-8: Pre-Sentence Investigation (Non-Sex Offender) 8 (2020) (on file with the North Carolina Law Review). Similarly, presentence reports in Indiana include a section captioned "Attitudes and Behavioral Orientation." Ind. Off. of Ct. Servs., Standard Presentence Investigation Report Instructions 9 (2011) (on file with the North Carolina Law Review).

56. Wis. Dep't of Corr., Elec. Case Ref. Manual, *supra* note 25, at 180–81.

57. *See* O'Leary, *supra* note 5, at 1961.

58. *Id.* at 1966.

59. *See, e.g.*, S.C. Dep't of Prob. Parole & Pardon Servs., Presentence Investigation Report—Worksheet 5 (2016) (on file with the North Carolina Law Review) (instructing probation/parole officers to "evaluat[e]" the defendant's "personality, problems and needs, potential for growth, and future plans"); Ga. Dep't of Comm. Supervision, Policy and Procedure Statement No. 4.113: Supervisee Investigations 6 (2017) (on file with the North Carolina Law Review) (instructing officers to include their evaluation of the defendant's "personality and potential for positive change" in the report section titled "Evaluation, Summary, and Recommendation").

2. Risk Assessments

Ideological testing is a common aspect of several risk assessment instruments that are widely used at sentencing, in parole hearings, and in other post-conviction settings.[60] The risk scores that these instruments generate are based, in part, on the defendant's views about the criminal legal system.[61]

In considering how ideological testing occurs as part of risk assessment, it's helpful to begin with the Level of Service Inventory-Revised ("LSI-R") for two reasons. First, the LSI-R is among the most popular risk assessment instruments both at sentencing[62] and in parole hearings.[63] State actors also use the LSI-R to inform a range of other post-conviction decisions, such as probation and parole supervision conditions and prison security classifications.[64] Second, the LSI-R has been an influential model for other risk

60. The risk assessment instruments I discuss here purport to assess both risk *and* needs. *See* CHRISTOPHER SLOBOGIN, JUST ALGORITHMS: USING SCIENCE TO REDUCE INCARCERATION AND INFORM A JURISPRUDENCE OF RISK 37 (2021) ("Some [risk assessment instruments] are focused solely on answering the 'front-end' question of whether a person poses a significant risk. Others also aim at identifying ways of reducing risk through assessment of what are often called the person's 'needs' (such as substance abuse treatment) and of his or her 'responsivity' to intervention."). Some risk assessment instruments, such as the Public Safety Assessment, are designed specifically to inform pretrial release/bail decisions. Those instruments are not my focus here. For an overview of risk assessment instruments used in pretrial decision-making, see Sandra G. Mayson, *Dangerous Defendants*, 127 YALE L.J. 490, 507–15 (2018).

61. All of the risk assessment instruments that I describe here assess a variety of other attitude factors, as well. For an excellent description and critique of how these risk assessment instruments assess attitude and associational factors, see generally Karp, *supra* note 13. Karp's account covers a wide range of attitude factors; for example, she describes how the Offender Screening Tool penalizes agreement with the statement, "I think it is okay to have tattoos or bodypiercing." *Id.* at 1460–61. I build on Karp's foundational work by providing a more detailed description of how these risk assessment instruments assess one specific type of attitude factor: the defendant's views of criminal legal system institutions and actors.

62. Sonja B. Starr, *Evidence-Based Sentencing and the Scientific Rationalization of Discrimination*, 66 STAN. L. REV. 803, 812 (2014) ("The LSI-R is the most popular prediction instrument in use among states that have not adopted their own, state-specific instruments . . . .").

63. EBONY L. RUHLAND, EDWARD E. RHINE, JASON P. ROBEY & KELLY LYN MITCHELL, THE CONTINUING LEVERAGE OF RELEASING AUTHORITIES: FINDINGS FROM A NATIONAL SURVEY 24 (2017), https://robinainstitute.umn.edu/sites/robinainstitute.umn.edu/files/2022-02/final_national_parole_survey_2017.pdf [https://perma.cc/FTF7-WYRZ] ("The most commonly used tool [by parole boards] for conducting comprehensive offender risk assessments is the Level of Service Inventory-Revised (LSI-R).").

64. *See, e.g.*, KORT PRINCE & ROBERT P. BUTTERS, UTAH CRIM. JUST. CTR., UNIV. OF UTAH, RECIDIVISM RISK PREDICTION AND PREVENTION ASSESSMENT IN UTAH: AN IMPLEMENTATION EVALUATION OF THE LSI-R AS RECIDIVISM RISK ASSESSMENT TOOL IN UTAH 11 (2013), https://socialwork.utah.edu/_resources/documents/LSI-Implementation-Report-final.pdf [https://perma.cc/FH7T-X7GZ] ("[LSI-R] [s]cores are also used to determine supervision classification levels for probation and parole."); Nancy Burghart, *Parole Services*, KAN. DEP'T CORR., https://www.doc.ks.gov/cfs/parole-services [https://perma.cc/4FT4-AT6Q] (last updated July 14, 2021, 4:41 PM) (noting that for people on community supervision after release from prison, "[a]n offender's level of supervision and case management are determined through the use of classification

assessment instruments designed for use in post-conviction settings.[65] Even the makers of the Correctional Offender Management Profiling for Alternative Sanctions ("COMPAS") assessment, the LSI-R's major competitor, concede that the LSI-R "is considered a gold standard" of correctional risk and need assessment.[66]

To learn about the LSI-R, I completed a training course offered by the LSI-R's makers in LSI-R administration.[67] The training materials included the LSI-R Interview and Scoring Guide, which provides sample interview questions and scoring instructions for each LSI-R item.[68]

The LSI-R consists of fifty-four items, divided into ten subscales.[69] The LSI-R uses a simple and transparent manual scoring system, which assigns equal weight to each of the fifty-four items.[70] For each item, the evaluator decides whether a risk factor is present or absent.[71] To calculate the defendant's overall risk score, the interviewer simply tallies up the number of items indicating the presence of a risk factor; this produces a total score between zero and fifty-four.

tools such as the Level of Services Inventory-Revised (LSI-R). Classification assessments also assist in determining an offender's programming needs and resource referrals.").

65. Kelly Hannah-Moffat, *Actuarial Sentencing: An "Unsettled" Proposition*, 30 JUST. Q. 270, 273 (2012).

66. *See* EQUIVANT SUPERVISION, PRACTITIONER'S GUIDE TO COMPAS CORE 25 (2019).

67. The training was administered through the Global Institute for Forensic Research ("GIFR"). GIFR is owned by Multi-Heath Systems, Inc., the makers of the LSI-R. *See Who We Are*, GLOB. INST. FOR FORENSIC RSCH., https://gifrinc.com/ [https://perma.cc/SDB5-SK9J].

68. *See* LSI-R Interview & Scoring Guide (on file with the North Carolina Law Review).

69. *Id.* In 2004, Bonta and Andrews introduced a slightly condensed version of the LSI-R, called the Level of Service Case Management Inventory ("LS/CMI"). J. Stephen Wormith & James Bonta, *The Level of Service (LS) Instruments*, *in* HANDBOOK OF RECIDIVISM RISK/NEEDS ASSESSMENT TOOLS 117, 119 (Jay P. Singh, Daryl G. Kroner, J. Stephen Wormith, Sarah L. Desmarais & Zachary Hamilton eds., 2018). The LS/CMI "refined and combined the 54 LSI-R items into 43 items." *LS/CMI: Level of Service/Case Management Inventory: Overview*, MULTI-HEALTH SYS., https://storefront.mhs.com/collections/ls-cmi [https://perma.cc/6W6H-F4LE]. From an LS-CMI scoring sheet, it appears that the ideological testing items I describe in the LSI-R are all included in the LS/CMI. *See* D.A. Andrews, James L. Bonta & Stephen Wormith, QuikScore Form: Level of Service Case Management Inventory (2004) (on file with the North Carolina Law Review).

70. LSI-R Interview & Scoring Guide, *supra* note 68, at 1. Note that the 10 subscales are weighted differently, because some have more items than others. *See id.* The subscales are: criminal history (10 items), education/employment (10 items), financial (2 items), family/marital (4 items), accommodation (3 items), leisure/recreation (2 items), companions (5 items), alcohol/drug problems (9 items), emotional/personal (5 items), attitude/orientation (4 items). *Id.*

71. Some items are scored as yes (risk factor present) or no (risk factor not present). *See id.* Others, called "rater" items, require the interviewer to score that item on a 0–3 scale, with 0 indicating "a very unsatisfactory situation with a clear and strong need for improvement" and 3 indicating "a satisfactory situation with no need for improvement." D.A. Andrews & James L. Bonta, LSI-R: The Level of Service Inventory-Revised (1998) (on file with the North Carolina Law Review). Scores of 0 or 1 on "rater" items indicate the presence of a risk factor. LSI-R Interview & Scoring Guide, *supra* note 68, at 1.

The raw score corresponds to an overall risk classification, such as low, moderate, or high risk.[72]

The LSI-R requires ideological testing for three items in the "attitude/orientation" subscale. The evaluator must decide whether the following three risk factors are present or absent for the defendant: a "poor [attitude] toward sentence/conviction"; a "poor [attitude] toward supervision"; or an "[attitude] supportive of crime."[73] If the defendant meets any of these criteria, then that leads to a higher overall score—and potentially a higher risk classification. Together, the three ideological testing items on the LSI-R account for over five percent of the defendant's total risk score.

Suggested interview questions for these three attitude/orientation items include the following:

- "What is your feeling about your sentence? Conviction? . . . If you feel it was unfair, how so?"
- "What sentence do you think you should have received?"
- "What are the benefits or negative consequences of your sentence?"
- "What are the benefits or negative consequences of incarceration/supervision?"
- "How do you feel about being incarcerated/on supervision?"[74]

In scoring the three "attitude/orientation" items described above, the LSI-R Interview and Scoring Guide instructs evaluators to listen for whether the defendant "denies the fairness or appropriateness of the sentence," "view[s] themselves as the victims of circumstances, misunderstandings, other people, or an unfair system," "objects to his/her classification/or placement" in prison or on community supervision, or exhibits "values . . . supportive of crime."[75] The LSI-R Interview and Scoring Guide further instructs that "[p]oor attitudes and sentiments expressed about sentence/conviction[,] . . . supervision[,] or the system tend to indicate internalization of anti-social values."[76]

72. LSI-R proposes five risk classifications: Low (0–13), Low Moderate (14–23), Moderate (24–33), Medium High (34–40), High (41+). LSI-R Interview & Scoring Guide, *supra* note 68, at 1. Different jurisdictions or agencies can modify the risk classification system. *See, e.g.*, Idaho Dep't of Corr., Updated LSI-R Score Ranges 1 (2020) (on file with the North Carolina Law Review).

73. LSI-R Interview & Scoring Guide, *supra* note 68, at 83, 86–87.

74. *Id.* at 86–87.

75. *Id.*

76. *Id.*

Assessing the defendant's attitudes toward their sentence/conviction, supervision, and crime is a highly subjective determination.[77] The LSI-R Interview and Scoring Guide instructs evaluators to score these attitude/orientation items based on all information available, including their answers to other questions, their "affect," and information obtained from review of the defendant's criminal file.[78]

The LSI-R is not unique in its inclusion of ideological testing components. The Offender Screening Tool ("OST") is a risk assessment instrument developed in Maricopa County, Arizona, and now used across Arizona for sentencing purposes;[79] it is also used by probation agencies in Virginia.[80] The OST contains an "attitude" subscale very similar to the one in the LSI-R. Based on an interview with the defendant,[81] the evaluator assesses whether the defendant has "a poor attitude about his/her current conviction" or "a poor attitude about community supervision."[82] If so, the defendant will receive a higher risk score.[83] The OST attitude subscale includes the questions, "What

77. *See infra* Section II.C.2.

78. *See* LSI-R Interview & Scoring Guide, *supra* note 68, at 84. Notably, this means that even where a defendant's answers to some of specific attitudes/orientation questions described above express positive views of the criminal legal system, the evaluator may nonetheless conclude that they exhibit attitudes/orientation risk factors based on other answers or information in their criminal file. *See id.* For example, the first subsection of the LSI-R addresses the defendant's criminal history. *Id.* Suggested prompts for the criminal history questions include: "Tell me about what led up to you getting arrested" and "Tell me about the circumstances of your offense." *Id.* at 5. A defendant who suggests, for example, that a prior conviction was the result of racial profiling or says that they were innocent but pled guilty in a prior case in order to get out of jail may be seen as rationalizing a law violation or exhibiting signs of "values supportive of crime." *Cf. id.* at 5, 83 (describing how an interviewer should generally listen for "attitudes, values, and beliefs tolerant or supportive of crime" while asking about the person's criminal history).

79. MEGAN E. COLLINS, EMILY M. GLAZENER, CHRISTINA D. STEWART & JAMES P. LYNCH, DEP'T CRIMINOLOGY & CRIM. JUST. UNIV. OF MD., FOLLOW-UP REPORT TO THE MSCCSP: USING ASSESSMENT INSTRUMENTS DURING CRIMINAL SENTENCING 11 (2015), https://msccsp.org/Files/Reports/Follow_Up_Using_Assessments_During_Criminal_Sentencing_Nov2015.pdf [https://perma.cc/49MJ-7J6R]. In Arizona, the Offender Screening Tool ("OST") is used for sentencing purposes. *Offender Screening Tool (OST)*, ARIZ. JUD. BRANCH, https://www.azcourts.gov/apsd/evidence-based-practice/risk-needs-assessment/offender-screening-tool-ost [https://perma.cc/7ZK2-NPTW].

80. NAT'L CTR. FOR STATE CTS., PRELIMINARY FINDINGS FROM THE EVIDENCE BASED PRACTICES IMPLEMENTATION AND ORGANIZATION ASSESSMENT: LOCAL COMMUNITY-BASED PROBATION IN VIRGINIA: STATEWIDE REPORT 46 (2014), https://www.dcjs.virginia.gov/sites/dcjs.virginia.gov/files/publications/corrections/preliminary-findings-evidence-based-practices-implementation-and-organization-assessment.pdf [https://perma.cc/N34S-WPH8].

81. *See* COLLINS ET AL., *supra* note 79, at 11.

82. PENNY STINSON, INST. FOR CT. MGMT., DEVELOPMENT OF A RISK ASSESSMENT INSTRUMENT TO BE USED IN BAIL RELEASE DECISIONS IN MARICOPA COUNTY, ARIZONA 101 (2002) (describing the contents and scoring of the OST); *see also* Karp, *supra* note 13, at 1454–68 (discussing the OST).

83. *See* COLLINS ET AL., *supra* note 79, at 11 (describing the low, moderate, moderate-high, and high levels of risk for each of the nine domains' forty-two items and how needs are identified based upon the levels of each item/domain); STINSON, *supra* note 82, at 98–102.

do you think about being convicted on your current offense?" and "Will you be upset if you receive some type of community supervision (e.g., probation, parole, or FARE) for your current conviction?"[84]

Similarly, several post-conviction instruments within the Ohio Risk Assessment System ("ORAS") require the assessment of the defendant's "criminal attitudes and behavioral patterns."[85] A scoring guide for ORAS derivatives used in Indiana instructs evaluators that in scoring this domain, they should listen for attitudes/beliefs supporting criminal behavior, including "negative expression about the law," such as that "the law is unfair."[86]

The COMPAS, another risk assessment instrument that is widely used at sentencing and in post-conviction settings,[87] also includes ideological testing components in at least some versions.[88] COMPAS instruments used by

84. Karp, *supra* note 13, at 1461 (reprinting OST attitude questions); *see also* Maricopa Cnty. Adult Prob., *supra* note 51, at 15–16 (including identical questions). In Arizona, the OST attitude questions have been integrated into the general presentence questionnaire. Stinson, *supra* note 82, at 40 ("The OST has been incorporated into the presentence questionnaire to provide a seamless process of gathering offender information.").

85. *See* EDWARD J. LATESSA, BRIAN LOVINS & JENNIFER LUX, THE OHIO RISK ASSESSMENT SYSTEM MISDEMEANOR ASSESSMENT TOOL (ORAS-MAT) AND MISDEMEANOR SCREENING TOOL (ORAS-MST) 6–12 (2014), https://ocjs.ohio.gov/static/occs/ORAS%20MAT%20report%20%20occs%20version.pdf [https://perma.cc/MPJ2-68B9]; *id.* at 3 (describing the ORAS as a "system . . . comprised of five validated risk assessment instruments: 1) Pretrial Tool (PAT), 2) Community Supervision Tool (CST), 3) Prison Intake Tool (PIT), 4) Reentry Tool (RT), and 5) Supplemental Reentry Tool (SRT), as well as two screening tools: 1) Community Supervision Screening Tool (CSST) and 2) Prison Intake Screening Tool (PST)"); *see also* Karp, *supra* note 13, at 1451–54, 1452 n.68 (discussing the ORAS instruments and their derivatives and noting that they are used in Ohio, Texas, Indiana, Missouri, Alabama, New Hampshire, Connecticut, and other states).

86. Univ. of Cincinnati, Indiana Risk Assessment System: Community Supervision Tools (IRAS-CST) Scoring Guide 2-19 (2010) (on file with the North Carolina Law Review).

87. Starr, *supra* note 62, at 812 (describing the Correctional Offender Management Profiling for Alternative Sanctions ("COMPAS") as a "leading instrument").

88. There are many different permutations of the COMPAS instrument. *See* Tim Brennan & Will Dietrich, *Correctional Offender Management Profiles for Alternative Sanctions (COMPAS)*, *in* HANDBOOK OF RECIDIVISM RISK/NEEDS ASSESSMENT TOOLS, *supra* note 69, at 49, 53–54. In addition to the flagship version of the instrument (the "Core COMPAS"), the makers of COMPAS also produce several specialized versions of the COMPAS, including the Youth COMPAS, Reentry COMPAS, and Women's COMPAS. *Id.* Each version of the COMPAS can be further customized for each agency that uses it. *See id.* at 53. Agencies that use the COMPAS can add or omit particular scales as they see fit. *Id.* Accordingly, it is not possible to speak definitively about "the COMPAS," as if it were a single, consistent instrument. *See id.* ("COMPAS software allows agencies to select/suppress any scales to customize the selected assessment factors at each particular decision stage to match staff workload capacities and decision responsibilities."); JENNIFER L. SKEEM & JENNIFER ENO LOUDEN, CTR. FOR PUB. POL'Y RSCH., UNIV. OF CAL., DAVIS, ASSESSMENT OF EVIDENCE ON THE QUALITY OF THE CORRECTIONAL MANAGEMENT PROFILING FOR ALTERNATIVE SANCTIONS (COMPAS) 12 (2007), https://bpb-us-e2.wpmucdn.com/sites.uci.edu/dist/0/1149/files/2013/06/CDCR-Skeem-EnoLouden-COMPASeval-SECONDREVISION-final-Dec-28-07.pdf [https://perma.cc/E3MZ-6XXP] (noting that because agencies that use the COMPAS are allowed to "select or omit particular COMPAS scales, [the COMPAS] tool has no standard structure"). Even individual agencies may use different versions of the COMPAS, for different purposes. For example, the Michigan Department of

probation agencies in New York State and by the Wisconsin Department of Corrections both include a criminal thinking scale that requires the evaluator to assess (based on the interview portion of the assessment) whether the defendant "blames the criminal justice system" or "thinks [their] conviction/sentence is unfair."[89] However, because the COMPAS scoring system is a black box, it is unclear if ideological testing contributes to a defendant's overall risk score.[90]

That so many risk assessment tools include ideological testing components speaks to the influence of criminological theories about "criminal thinking" as a risk factor for recidivism, which I discuss in Section I.B.1.[91]

3. Parole Hearings

Ideological testing sometimes occurs as part of parole hearings, where members of the state's parole board decide whether someone will be released from prison.[92] Decisions by parole boards are a critical determinant of how

Corrections uses four different versions of the COMPAS. FIELD OPERATIONS ADMIN., MICH. DEP'T OF CORR., ADMINISTRATION AND USE OF COMPAS IN THE PRESENTENCE INVESTIGATION REPORT 9 (2017), https://www.michbar.org/file/news/releases/archives17/COMPAS-at-PSI-Manual-2-27-17-Combined.pdf [https://perma.cc/M8H5-R3RV].

89. SHARON LANSING, N.Y. STATE DIV. OF CRIM. JUST. SERVS., NEW YORK STATE COMPAS-PROBATION RISK AND NEED ASSESSMENT STUDY 26 (2012), https://archive.epic.org/algorithmic-transparency/crim-justice/EPIC-16-06-23-WI-FOIA-201600805-LansingNYcompas_probation_report_2012.pdf [https://perma.cc/D9GN-DTKA]. The New York instrument was published as an appendix to a 2014 report by a New York government agency. *Id.* at 20–34. A 2014 report by the makers of COMPAS on the COMPAS Reentry instrument used in Wisconsin describes that instrument's "Criminal Thinking Scale," which appears to correspond perfectly to the questions on the New York instrument. WILLIAM DEITRICH, BILL OLIVER & TIM BRENNAN, NORTHPOINTE INC., COMPAS REENTRY NORMS FOR MEN AND WOMEN: RESULTS FROM A PSYCHOMETRIC STUDY CONDUCTED FOR THE WISCONSIN DEPARTMENT OF CORRECTIONS 69 (2014), https://archive.epic.org/algorithmic-transparency/crim-justice/EPIC-16-06-23-WI-FOIA-201600805-WIDOC_Reentry_norm_report021114.pdf [https://perma.cc/5P5D-Q88J].

90. Unlike the LSI-R's simple, manual scoring formula, COMPAS scoring is a black box. *See* State v. Loomis, 881 N.W.2d 749, 761 (Wis. 2016) (explaining that the makers of COMPAS "consider[] COMPAS a proprietary instrument and a trade secret" and therefore the company "does not disclose how the risk scores are determined or how the factors are weighed"). It appears likely, though not certain, that the ideological testing components of COMPAS instruments inform need scores rather than risk scores. Karp, *supra* note 13, at 1492–93.

91. *See generally* Karp, *supra* note 13, at 1469 (discussing the influence, on risk assessment instruments, of the claim that criminal thinking is one of the major risk factors for recidivism).

92. *See* Kevin R. Reitz & Edward E. Rhine, *Parole Release and Supervision: Critical Drivers of American Prison Policy*, 3 ANN. REV. CRIMINOLOGY 281, 283 (2020) (describing the release powers of parole boards). The precise legal structure of parole-eligible sentences varies from state to state, but a typical model is that a defendant becomes eligible for release on parole after they have served a specific portion of their overall prison sentence (for example, twenty-five percent). *See id.* at 284. Once the defendant reaches their initial parole eligibility date, they typically appear before the parole board for a hearing. *See id.* The parole board decides whether to release them or to keep them incarcerated. *See id.* If the parole board denies release, the board typically decides at what point in the future they can come back before the board, for their next parole hearing. *See id.* This cycle—of hearing, denial, hearing, denial—can go on for decades. *See id.* at 285–87.

many people are in prison and for how long.[93] In over two-thirds of states, the parole board holds "the lion's share of legal authority" over the question of how long someone serves in prison.[94]

In several states, the parole board is required, by statute or regulation, to engage in ideological testing as part of the parole hearing process. The most explicit ideological testing requirement is that the parole board consider the defendant's "attitude toward society, toward the judge who sentenced him, toward the district attorney who convicted him, toward the policeman who arrested him, and toward his criminal past."[95] Massachusetts, Oregon, and West Virginia all have versions of this requirement.[96] At least five additional states—Kentucky, Maryland, Montana, South Carolina, and Vermont—require the parole board to consider the defendant's "[a]ttitude toward authority."[97]

In other states, parole boards engage in ideological testing even though it is not required by statute or regulation. For example, while New York does not require that parole commissioners assess parole applicants' attitudes towards the judge, prosecutor, or arresting officer in their case, New York parole commissioners sometimes ask questions such as,[98] "Do you feel you have been treated fairly by the system?,"[99] "Do you feel that you deserved the sentence that you were given?,"[100] and "Do you think justice has been served?"[101]

93. Kevin R. Reitz, *Prison-Release Reform and American Decarceration*, 104 MINN. L. REV. 2741, 2745 (2020).

94. *Id.* at 2742.

95. MASS. GEN. LAWS ANN. ch. 127, § 136 (2024).

96. *See id.*; OR. REV. STAT. § 144.228(2)(b)(B) (2024); W. VA. PAROLE BD., RULES OF THE WEST VIRGINIA PAROLE BOARD 13 (2006), https://paroleboard.wv.gov/SiteCollectionDocuments/West%20Virginia%20Parole%20Board%20Procedural%20Rules.pdf [https://perma.cc/CE8J-EJXU].

97. KY. PAROLE BD., POLICIES AND PROCEDURES: PAROLE RELEASE HEARINGS (2015), https://justice.ky.gov/Boards-Commissions/pb/Documents/statutes%20and%20regs/KYPB%2010-01%20ParoleReleaseHearings%20eff%2012-4-15.pdf [https://perma.cc/R8QQ-DMFM]; MD. CODE REGS. § 12.08.01.18A(5)(d) (2024); MONT. CODE ANN. § 46-23-208(4)(n) (2024); S.C. DEP'T OF PROB., PAROLE & PARDON SERVS., CRITERIA FOR PAROLE CONSIDERATION, https://ppp.sc.gov/sites/dppps/files/Documents/Parole%20Pardon%20Release/Criteria_for_Parole_Consideration.pdf [https://perma.cc/D4TR-F3GY]; VT. PAROLE BD., THE VERMONT PAROLE BOARD MANUAL 21 (2021), https://humanservices.vermont.gov/sites/ahsnew/files/documents/ParoleBoard/The%20Vermont%20Parole%20Board%20Manual%20%28Revised%2003-01-2021%29.pdf [https://perma.cc/23QX-7KKL].

98. All of these examples are drawn from transcripts of parole hearings made publicly available by the Parole Information Project at Fordham Law School.

99. *See, e.g.*, *Parole Interview Transcript/Decision—FUSL000010 (2006-01-16)*, PAROLE INFO. PROJECT, FORDHAM L. SCH. 8 (Sept. 2021), https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=1066&context=trans [https://perma.cc/L3SR-8QZ5 (staff-uploaded archive)].

100. *See, e.g.*, *Parole Interview Transcript/Decision—FUSL000061 (2016-06-29)*, PAROLE INFO. PROJECT, FORDHAM L. SCH. 13 (Sept. 2021), https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=1087&context=trans [https://perma.cc/KQ67-QVRB (staff-uploaded archive)].

101. *See, e.g.*, *Parole Interview Transcript/Decision—FUSL000007 (2015-07-28)*, PAROLE INFO. PROJECT, FORDHAM L. SCH. 7 (Dec. 2019), https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=1051&context=trans [https://perma.cc/FWJ5-R2UK (staff-uploaded archive)]; *Parole Interview*

A significant topic of questioning in parole hearings is the defendant's experience of incarceration and their participation in prison programming. Kathryne Young and Hannah Chimowitz found that in talking about their experiences in prison, parole candidates are "rewarded for crediting the carceral state with their redemption."[102] Similarly, Victor Shammas observed that defendants seeking parole release were expected to "talk about how they have been transformed by rehabilitative interventions" and to praise the prison system for the quality and availability of its programming.[103] The favored narrative about the prison system in parole hearings is that *prison works*: through incarceration in general, and through participation in prison programs in particular, the morally defective defendant has achieved personal transformation.[104] In contrast, criticizing prison programs as not valuable—or even noting that certain prison programs are not available—may harm a defendant's chances at winning parole release.[105]

* * *

For clarity, I have discussed separately the ideological testing that occurs in presentence investigations, risk assessments, and parole hearings. But the three sites of ideological testing I have described are often closely connected in practice. For example, presentence reports in some jurisdictions include the results of a risk assessment instrument.[106] The presentence interview may simultaneously serve as the risk assessment interview, combining two sites of ideological testing into one.[107]

Transcript/Decision—FUSL000007 (2016-09-27), PAROLE INFO. PROJECT, FORDHAM L. SCH. 11 (Dec. 2019), https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=1052&context=trans [https://perma.cc/RT9F-LSJ4 (staff-uploaded archive)]; *Parole Interview Transcript/Decision—FUSL000017 (2015-11-18)*, PAROLE INFO. PROJECT, FORDHAM L. SCH. 20 (Dec. 2019), https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=1055&context=trans [https://perma.cc/N64G-LVQF (staff-uploaded archive)]; *Parole Interview Transcript/Decision—FUSL000019 (2020-06-29)*, PAROLE INFO. PROJECT, FORDHAM L. SCH. 69 (Feb. 2022), https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=1150&context=trans [https://perma.cc/64B9-NANQ (staff-uploaded archive)]; *Parole Interview Transcript/Decision—FUSL000051 (2019-08-27)*, PAROLE INFO. PROJECT, FORDHAM L. SCH. 21, https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=1157&context=trans [https://perma.cc/EBV5-K4UM (staff-uploaded archive)].

102. Young & Chimowitz, *supra* note 13, at 248.

103. Victor L. Shammas, *The Perils of Parole Hearings: California Lifers, Performative Disadvantage, and the Ideology of Insight*, 42 POL. & LEGAL ANTHROPOLOGY REV. 142, 151 (2019).

104. *See* Young & Chimowitz, *supra* note 13, at 248–49.

105. Shammas, *supra* note 103, at 149–51.

106. *See, e.g.*, State v. Loomis, 881 N.W.2d 749, 754 (Wis. 2016) ("The Presentence Investigation Report ('PSI') included an attached COMPAS risk assessment.").

107. For example, in Maricopa County, Arizona, the questions from the OST risk assessment are included in the presentence questionnaire. *See supra* note 82 and accompanying text. The defendant's responses to ideological testing in the presentence interview, therefore, may be double counted at sentencing. First, their responses will contribute to their overall risk score on the risk assessment instrument. *Id.* Second, their responses may appear in, or otherwise inform, the narrative sections of

Similarly, an individual defendant may experience ideological testing at each of the three sites I have described—and one instance of ideological testing may form the foundation for subsequent ideological testing. For example, the presentence report prepared before the original sentencing hearing follows the defendant to prison.[108] When the defendant becomes eligible for parole, the parole board will review the presentence report.[109] And if the parole board requires the defendant to complete an LSI-R assessment before their parole hearing, the LSI-R evaluator will review the presentence report and consider its contents when scoring the LSI-R items.[110] Where a defendant expressed critical views of the criminal legal system during their original presentence interview, those views may follow them years later.

B. *Frameworks for Ideological Testing*

There are two primary frameworks supporting ideological testing. The first is rooted in criminological theories about criminal thinking as a risk factor for recidivism; the second is rooted in lay notions about remorse and acceptance of responsibility. Both frameworks serve two functions. First, they justify ideological testing. Second, they provide a structure that state actors conducting ideological testing can use to interpret a defendant's responses to ideological testing.[111] The following sections discuss each framework in more detail.

1. Criminal Thinking

One justification for the practice I describe as ideological testing is that it helps state actors identify defendants who exhibit "criminal thinking,"[112] which is ostensibly a major risk factor for recidivism (commonly defined as future

the presentence report. *See* MARICOPA CO. ADULT PROB. DEP'T, POLICY NO. 5-101: PRESENTENCE INVESTIGATION REPORT 7 (2018) (on file with the North Carolina Law Review) (instructing probation officers that the "Discussion and Evaluation" section of the presentence report should include their analysis of "all pertinent information gathered during the investigation").

108. LAFAVE ET AL., *supra* note 36, § 26.5(b).

109. *Id.*

110. *See, e.g.*, W. VA. PAROLE BD., *supra* note 96, at 12–13.

111. My account here does not answer the question of how state actors, in practice, interpret a defendant's response to ideological testing. This is an important question for future research.

112. Researchers and practitioners use a variety of names to describe criminal thinking. Raymond Chip Tafrate & Damon Mitchell, *Criminogenic Thinking Among Justice-Involved Persons: Practice Guidelines for Probation Staff*, 86 FED. PROB. 4, 4 (2022) ("Many terms are used to describe the thinking that underlies criminal behavior: procriminal attitudes, antisocial cognitions, criminal thinking, and criminal thought process, just to name a few."); Karp, *supra* note 13, at 1500 ("Risk assessment literature variously refers to cognition and opinions correlated with crime as 'criminal attitudes,' 'procriminal attitudes,' 'criminal thinking,' 'attitudes supportive of an antisocial lifestyle,' and 'antisocial attitudes.'"). I use the label of criminal thinking throughout this Article for consistency and clarity.

arrest).[113] The basic idea underlying theories of criminal thinking is that criminal behavior is caused (at least in part) by someone's thoughts and beliefs. Criminal thinking refers to "distorted thought patterns that support offending behavior by rationalizing and justifying how an individual acts."[114] James Bonta and D.A. Andrews have identified criminal thinking as one of the "Big Four," or (more recently) "Central Eight," risk factors for recidivism.[115]

Theories of criminal thinking are rooted in the work of Samuel Yochelson and Stanton Samenow,[116] who introduced the concept of criminal thinking patterns in the late 1970s.[117] Yochelson and Samenow conducted interviews with 240 "criminals,"[118] an unspecified number of whom were receiving treatment in a psychiatric hospital after being found not guilty by reason of insanity.[119] Based on these interviews, Yochelson and Samenow argued that "the criminal population [was] a different breed—a group of humans with the same physical needs as the rest of us but with an entirely different view of life and an entirely different set of thinking patterns."[120] Yochelson and Samenow identified fifty-two criminal thinking errors that, they claimed, "pervade all the criminal's thinking, no matter what the issue."[121] These thinking patterns or errors ranged from "concrete thinking" and "perfectionism" to "victim stance" and

113. *See* Jessica M. Eaglin, *Constructing Recidivism Risk*, 67 EMORY L.J. 59, 75–78 (2017) (describing how risk assessment developers define recidivism and noting that most risk assessment tools use arrest as the measure of recidivism).

114. Faye S. Taxman, Anne Giuranna Rhodes & Levent Dumenci, *Construct and Predictive Validity of Criminal Thinking Scales*, 38 CRIM. JUST. & BEHAV. 174, 174 (2011).

115. Bonta and Andrews originally identified the "Big Four" risk factors as "antisocial attitudes, antisocial associates, antisocial personalities, and criminal history"; recently, they have rejected the "Big Four" characterization in favor of a broader focus on the "Central Eight" risk factors: the original "Big Four" plus "substance abuse, family characteristics, education and employment, and lack of prosocial leisure or recreation." JAMES BONTA & D.A. ANDREWS, THE PSYCHOLOGY OF CRIMINAL CONDUCT 10–11 (7th ed. 2024) [hereinafter BONTA & ANDREWS, PSYCHOLOGY].

116. Taxman et al., *supra* note 114, at 176 ("Yochelson and Samenow provided the theoretical basis for much of the instrumentation work done in the arena of psychopathy and criminal thinking.").

117. *See* 1 SAMUEL YOCHELSON & STANTON E. SAMENOW, THE CRIMINAL PERSONALITY: A PROFILE FOR CHANGE 251 (1976) [hereinafter YOCHELSON & SAMENOW, A PROFILE FOR CHANGE]; 2 SAMUEL YOCHELSON & STANTON E. SAMENOW, THE CRIMINAL PERSONALITY: THE CHANGE PROCESS 13 (1977) [hereinafter YOCHELSON & SAMENOW, THE CHANGE PROCESS]. Yochelson and Samenow later published a third volume in the series that focused on drug use. *See* 3 SAMUEL YOCHELSON & STANTON E. SAMENOW, THE CRIMINAL PERSONALITY: THE DRUG USER 1 (1986).

118. YOCHELSON & SAMENOW, A PROFILE FOR CHANGE, *supra* note 117, at 118. As Craig Haney notes, Yochelson and Samenow did not define what they mean by "criminal" and provided no information about how participants were selected for inclusion or about the representativeness of the sample. Craig Haney, *Demonizing the "Enemy": The Role of "Science" in Declaring the "War on Prisoners*," 9 CONN. PUB. INT. L.J. 185, 220 & n.125 (2010). Moreover, their claims about time spent interviewing subjects are highly implausible. *Id.*

119. YOCHELSON & SAMENOW, A PROFILE FOR CHANGE, *supra* note 117, at 3.

120. YOCHELSON & SAMENOW, THE CHANGE PROCESS, *supra* note 117, at 5.

121. *Id.* at x.

"pretentiousness."[122] Craig Haney has described Yochelson and Samenow's work as "an extremely unsystematic collection of gross generalizations" that were "among the most extraordinary and extreme set of claims ever made about the nature of criminality."[123]

Almost fifty years after Yochelson and Samenow first introduced the idea of criminal thinking, it remains a broad, slippery, and ill-defined concept.[124] It encompasses a wide array of "attitudes, values, beliefs, and rationalizations" that ostensibly support criminal behavior.[125] But even among the small cohort of researchers whose work focuses on criminal thinking, there is no agreement on which specific "attitudes, values, beliefs, and rationalizations" constitute criminal thinking.[126]

Amidst this definitional disagreement, several leading accounts and measures of criminal thinking treat critical views of the criminal legal system as an indicator of criminal thinking. For example, James Bonta and D.A. Andrews identify "negative attitudes toward the law and justice system," "perceptions of injustice," and attitudes that "devalue the institutions of law and order, e.g., police and the courts," as "specific indicators" of criminal thinking.[127] Similarly,

122. YOCHELSON & SAMENOW, A PROFILE FOR CHANGE, *supra* note 117, at 52.

123. Haney, *supra* note 118, at 220–21.

124. *See, e.g.*, Taxman et al., *supra* note 114, at 175 ("The major issue confronting the field is how to define the concept of criminal thinking.").

125. David J. Simourd & Mark E. Olver, *The Future of Criminal Attitudes Research and Practice*, 29 CRIM. JUST. & BEHAV. 427, 428 (2002); *see also* Glenn D. Walters, *Criminal Thinking: Theory and Practice*, *in* THE WILEY INTERNATIONAL HANDBOOK OF CORRECTIONAL PSYCHOLOGY TREATMENT 637, 637 (Devon L.L. Polaschek, Andrew Day & Clive R. Hollin eds., 2019) (defining criminal thinking as "a set of attitudes or beliefs connected to criminal behavior that support and maintain a criminal lifestyle"). As critics have pointed out, definitions of criminal thinking are fundamentally circular: "Criminal behavior is assumed to be evidence of criminal thinking, which then supposedly causes criminal behavior." D.J. Williams & Andrew Mike Hanley, *Thinking About Thinking (Errors)*, 5 J. FORENSIC PSYCH. PRAC. 51, 53 (2005).

126. *See* Taxman et al., *supra* note 114, at 175; *see also* EQUIVANT SUPERVISION, *supra* note 66, at 39–40 ("[T]here is no agreement on the particular attitudinal dimensions or cognitions that are the most useful for predictive purposes. Various studies focus on aspects of thinking style, attitudes toward criminal justice, neutralization and excuses, tolerance for law violation, cognitive justifications, etc.").

127. BONTA & ANDREWS, PSYCHOLOGY, *supra* note 115, at 45–46. Bonta and Andrews's account draws on Graham Sykes and David Matza's "neutralization theory" of criminal offending. In a highly influential 1957 article about criminal offending by youth, Gresham M. Sykes and David Matza argued that youth who engage in criminal behavior must find ways to preemptively "neutralize" the feelings of guilt and shame that normally accompany criminal behavior. *See* Gresham M. Sykes & David Matza, *Techniques of Neutralization: A Theory of Delinquency*, 22 AM. SOCIO. REV. 664, 664 (1957). One of the five "techniques of neutralization" that they identified was "condemnation of the condemner." *Id.* at 668. As Sykes and Matza described this technique, "[t]he delinquent shifts the focus of attention from his own deviant acts" by criticizing the "motives and behavior of those who disapprove of his violations." *Id.* Of particular importance to Sykes and Matza was an attitude of "bitter cynicism directed against those assigned the task of enforcing or expressing the norms of the dominant society," such as police. *Id.* For a critical assessment of Sykes and Matza's neutralization theory, see Shadd Maruna & Heith Copes, *What Have We Learned from Five Decades of Neutralization Research?*, 32 CRIME & JUST. 221, 221 (2005) (arguing that "the theory's central premises need to be substantially

the Criminal Sentiments Scale-Modified ("CSS-M"), a self-report measure used to assess criminal thinking,[128] treats as evidence of criminal thinking disagreement with statements such as: "A cop is a friend to people in need," "Judges are honest and kind," "Court decisions are fair," "Law and justice are the same," and "The police should be paid more."[129] The CSS-M also treats as evidence of criminal thinking *agreement* with the statements, "Life would be better with fewer cops" and "You cannot get justice in court."[130]

Until its most recent revisions in 2023,[131] the Texas Christian University Criminal Thinking Scale, another widely used self-report measure of criminal thinking, tested agreement with the following propositions: "The country's criminal justice system was designed to treat everyone equally" and "The real reason you are locked up is because of your race."[132] Disagreeing with the first, and agreeing with the second, led to a higher criminal thinking score.[133]

The criminal thinking framework for ideological testing encompasses two ideas: that criminal thinking (broadly defined) is a risk factor for recidivism, and that critical views of the criminal legal system are one indicator of criminal thinking.[134] The connection between theories of criminal thinking and

complicated"). Other "specific indicators" of criminal thinking that Bonta and Andrews identify include: "identification with criminals, a belief that crime will yield rewards, and rationalizations that specify a broad range of conditions under which crime is justified (e.g. the victim deserved it, the victim is worthless)." BONTA & ANDREWS, PSYCHOLOGY, *supra* note 115, at 45.

128. The Criminal Sentiments Scale-Modified ("CSS-M") is used both by researchers and practitioners. State actors within the criminal legal system may administer the CSS-M for a variety of reasons, such as assessing someone's eligibility for programming within prison. *See, e.g.*, COMMONWEALTH OF PENN., DEP'T OF CORR., POLICY NO. 11.2.1: RECEPTION AND CLASSIFICATION (June 19, 2023), https://www.pa.gov/content/dam/copapwp-pagov/en/cor/documents/about-us/doc-policies/11.02.01%20Reception%20and%20Classification.pdf [https://perma.cc/7GG8-XMFH] (noting that people admitted to Pennsylvania prisons are given the CSS-M as part of the intake assessment progress). I do not include the CSS-M in my discussion of risk assessment instruments, because the CSS-M does not purport to predict recidivism risk; rather, it purports to measure "antisocial attitudes, values, and beliefs directly related to criminal activity." Simourd & Olver, *supra* note 125, at 431.

129. Simourd & Olver, *supra* note 125, at 430.

130. *Id.*

131. These revisions came in response to criticism by social workers familiar with the assessment. *See* Eric Griffey, *TCU Is Re-evaluating a Controversial Survey*, SPECTRUM NEWS (July 20, 2020, 4:18 PM), https://spectrumlocalnews.com/tx/south-texas-el-paso/news/2020/07/20/tcu-is-reevaluating-a-controversial-survey- [https://perma.cc/3LNH-ZQZB]. For the current, revised version, see *TCU Criminal Thinking Scales*, TEX. CHRISTIAN UNIV. INST. BEHAV. RSCH., https://ibr.tcu.edu/forms/tcu-criminal-thinking-scales/ [https://perma.cc/B7SD-EL6B].

132. Tex. Christian Univ. Inst. of Behav. Rsch., Criminal Thinking Scale: Scales and Item Scoring Guide 52 (2012) (on file with the North Carolina Law Review).

133. *Id.*

134. The claim that critical or negative views of the criminal legal system are an indicator of criminal thinking might seem closely connected to the large body of research on perceptions of the legitimacy of legal authority and compliance with the law. *See, e.g.*, TOM R. TYLER, WHY PEOPLE OBEY THE LAW 4 (2006) ("[I]f [citizens] regard legal authorities as more legitimate, they are less likely to break any laws, for they believe that they ought to follow them, regardless of potential for

ideological testing practices is most obvious in risk assessment instruments.[135] But the criminal thinking framework also shapes presentence investigations, at least in some jurisdictions. In Indiana, for example, presentence reports include a section captioned "Attitudes and Behavioral Orientation."[136] Indiana's policy on presentence reports instructs officers, "The purpose of this section is to address the criminal attitudes of the defendant, as well as some personality traits that can often lead to criminal behavior."[137] According to the Indiana policy, "system bashing" and "negative expressions about the law" "may indicate attitudes associated with criminal behavior."[138] The criminal thinking framework sometimes also influences parole hearings, where parole board

punishment."); Daniel S. Nagin & Cody W. Telep, *Procedural Justice and Legal Compliance*, 13 ANN. REV. L. & SOC. SCI. 5, 6 (2017) ("Studies consistently find . . . that with only a few exceptions, perceptions of legitimacy are strongly associated with legal compliance."). But theories of criminal thinking are not rooted in this body of research, and criminal thinking researchers rarely even cite it. For example, Bonta and Andrews do not cite Tom Tyler or other legitimacy researchers in their discussion of criminal thinking; indeed, the word "legitimacy" does not appear anywhere in their book, The Psychology of Criminal Conduct. *See generally* BONTA & ANDREWS, PSYCHOLOGY, *supra* note 115 (discussing criminal thinking and not citing Tyler or other legitimacy authors); *see also generally* Taxman et al., *supra* note 114 (tracing the origins of criminal thinking theories to Yochelson and Samenow and not citing Tyler or other legitimacy researchers). Unsurprisingly, given this disconnect, the indicators of criminal thinking identified by Bonta and Andrews—such as perceptions of injustice and "negative attitudes" about the law and criminal justice system—do not map on to accepted measures of perceptions of legitimacy. *See* Nagin & Telep, *supra* note 134, at 8 ("[L]egitimacy . . . has typically been measured through questions about obligation to obey the law (or directives from authorities) and trust in the law and legal authorities . . . ."); Katherine Ginsburg Kempany & Kimberly A. Kaiser, *Incorporating Procedural Justice and Legitimacy into the RNR Model to Improve Risk-Need Assessment*, *in* HANDBOOK ON RISK AND NEED ASSESSMENT: THEORY AND PRACTICE 269, 281 (Faye Taxman ed., 2016) (noting that items on the LSI-R's attitude/orientation subscale, "while perhaps hinting at issues of fairness, do not adequately capture legitimacy perceptions"). Moreover, as Monica Bell has pointed out in her work on legal estrangement, negative or critical views of the criminal legal system and state actors within it can and do co-exist alongside perceptions of legal authorities as legitimate. Monica C. Bell, *Police Reform and the Dismantling of Legal Estrangement*, 126 YALE L.J. 2054, 2086–87 (2017) ("A person could simultaneously see the police as a legitimate authority (believing that individuals should obey officer commands in the abstract) and feel estranged from the police (believing that the legal system and law enforcement, as the individual's group experiences these institutions, are fundamentally flawed and chaotic, and therefore send negative messages about the group's societal belonging). . . . [M]any poor African Americans might see police as a legitimate authority in the ideal, and might even empathize with some police officers' plight, but . . . find the police as a whole too corrupt, unpredictable, or biased to deem them trustworthy. Even as they accept the ideal vision of the police as the state-authorized securers of public safety, their nonideal working theory might be, as earlier research suggests, that the police are 'just another gang.'").

135. The designers of the LSI-R and COMPAS have both cited theories of criminal thinking in explaining the design of their instruments. Wormith & Bonta, *supra* note 69, at 119–21; Brennan & Dietrich, *supra* note 88, at 57–58.

136. Ind. Off. of Ct. Servs., *supra* note 55, at 9.

137. *Id.*

138. *Id.*

members' perception that the defendant demonstrates criminal thinking can be a basis for denying parole release.[139]

2. Remorse and Responsibility

While criminological theories about criminal thinking as a risk factor for recidivism provide one framework for ideological testing, lay notions about remorse and acceptance of responsibility provide another. The remorse/responsibility framework overlaps somewhat with the criminal thinking framework, but I treat it as distinct because it sounds in a different register. It relies not on criminological concepts about quantifiable risk factors, but rather on deeply rooted beliefs and assumptions about morality, character, and redemption.

The concept of remorse resists both precise definition and accurate assessment.[140] Despite the slipperiness of remorse as a concept, however, remorse assessments are highly significant in a range of criminal legal contexts, including sentencing and parole hearings.[141] Legal decisionmakers see remorse as evidence of the defendant's basic good character, demonstrating that they are "morally-intact," despite their crime.[142] Decisionmakers also see remorse as predictive, indicating the defendant's ability to lead a law-abiding life in the future.[143]

139. *See, e.g.*, Young & Chimowitz, *supra* note 13, at 251 ("Parole candidates were also deemed unsuitable if commissioners believed that they demonstrated . . . a tendency toward a thought pattern that commissioners called 'criminal thinking.' Criminal thinking was a telltale sign that a person was not ready to rejoin society."); *In re* Chan, No. B324031, 2023 WL 5946080, at *4 (Cal. Ct. App. Sept. 13, 2023) ("In November 2018 the [California Parole] Board denied parole for three years, in part due to Chan's 'criminal thinking.'"); Acoli v. N.J. State Parole Bd., 224 A.3d 269, 273 (N.J. Super. Ct. App. Div. 2019), *rev'd*, 273 A.3d 426 (N.J. Sup. Ct. 2022) (quoting a New Jersey State Parole Board decision denying parole release based in part on the defendant's failure to demonstrate an understanding of "how his criminal thinking pattern has changed").

140. Nicole Bronnimann, *Remorse in Parole Hearings: An Elusive Concept with Concrete Consequences*, 85 MO. L. REV. 321, 326 (2020) ("The concept of remorse blurs as we interrogate it. . . . [T]here is no legal consensus as to the definition or indicia of remorse.").

141. Susan A. Bandes, *Remorse and Criminal Justice*, 8 EMOTION REV. 14, 14 (2016) ("Evaluations of remorse play a crucial role in a wide range of criminal justice determinations. They influence sentencing hearings; parole, probation, and clemency determinations; forensic evaluations; decisions on whether to try a juvenile as an adult; and even (counterintuitively) determinations of guilt or innocence.").

142. M. Eve Hanan, *Remorse Bias*, 83 MO. L. REV. 301, 321 (2018) [hereinafter Hanan, *Remorse Bias*].

143. Rocksheng Zhong, *Judging Remorse*, 39 N.Y.U. REV. L. & SOC. CHANGE 133, 164 (2015) (finding that judges "shared the common intuition that remorse or its absence predicts future behavior, so that a remorseful defendant would be less dangerous, less likely to recidivate, and more amenable to rehabilitation"); United States v. Bessera, 967 F.2d 254, 256 (7th Cir. 1992) ("A person who is conscious of having done wrong, and who feels genuine remorse for his wrong, . . . is on the way to developing those internal checks that would keep many people from committing crimes even if the expected costs of criminal punishment were lower than they are.").

Scholarship on remorse assessment within the criminal legal system has identified a fairly consistent set of expectations for how a sincerely remorseful defendant will behave. To effectively demonstrate remorse, the defendant must display an attitude of "self-condemnation."[144] Criminal legal decisionmakers expect that the sincerely remorseful defendant will focus narrowly and insistently on their own culpability and the harm they have caused, with little context or complexity.[145] They also expect the sincerely remorseful defendant to accept their punishment as entirely deserved.[146]

Acceptance of responsibility is a necessary (though not sufficient) element of remorse.[147] Acceptance of responsibility requires more than simply admitting guilt. As a precondition for remorse, acceptance of responsibility requires not just "accepting personal responsibility, but accepting it at the exclusion of other causes."[148] On this view, the sincerely remorseful defendant will demonstrate acceptance of responsibility by explaining their crime, conviction, and sentence exclusively in terms of their own bad choices and personal character deficits.[149]

Qualitative research on parole hearings finds that parole board members evaluate the defendant's views of the criminal legal system as part of their inquiry into whether the defendant is sincerely remorseful for their crime—a central consideration in parole release decisions.[150] In their study of how California parole commissioners assess remorse, Kathryne Young and Hannah Chimowitz found that commissioners placed heavy emphasis on the defendant's views about the criminal legal system, in general, and the prison system, in

144. Hanan, *Remorse Bias*, *supra* note 142, at 324.

145. Young & Chimowitz, *supra* note 13, at 240–41.

146. Hanan, *Remorse Bias*, *supra* note 142, at 326 ("[T]he defendant fairs best when he condemns himself and aligns himself with the prosecution by agreeing that he deserves whatever punishment the court metes out.").

147. For people who have been convicted despite their factual innocence, this expectation means that if they continue to claim their innocence, decisionmakers will see them as unremorseful. *See* Daniel S. Medwed, *The Innocent Prisoner's Dilemma: Consequences of Failing to Admit Guilt at Parole Hearings*, 93 IOWA L. REV. 491, 493 (2008) ("[A] prisoner's willingness to 'own up' to his misdeeds . . . is a vital part of the parole decision-making calculus.").

148. Young & Chimowitz, *supra* note 13, at 255.

149. *See* Richard Weisman, *Being and Doing: The Judicial Use of Remorse to Construct Character and Community*, 18 SOC. & LEGAL STUD. 47, 55 (2009) ("Acceptance of responsibility as a criterion for the attribution of remorse entails a full agreement with exactly how the crime or the wrongdoing has been conceived by the court or tribunal."); Austin Sarat, *Remorse, Responsibility, and Criminal Punishment*, *in* THE PASSIONS OF THE LAW 168, 184 (Susan Bandes ed., 1999) ("The remorseful criminal relies neither on structural factors nor on a narrative of his own victimization."); Young & Chimowitz, *supra* note 13, at 247 ("[T]he stated causes [of the crime] need to be individual, not systemic. Parole candidates are not rewarded for suggesting that crime is rooted in social or structural causes, only for explaining it as the product of individual deficits—deficits that were, and continue to be, within the person's control.").

150. Bronnimann, *supra* note 140, at 325; *see also* HADAR AVIRAM, YESTERDAY'S MONSTERS: THE MANSON FAMILY CASES AND THE ILLUSION OF PAROLE 168–70 (2020).

particular.[151] Commissioners expected a sincerely remorseful defendant to "articulate[] an understanding of the criminal justice system that echoes the way the criminal justice system understands itself."[152]

Expressing critical views of the criminal legal system is in tension with these expectations about how a sincerely remorseful defendant will behave. For example, Robert Dennison, the former chair of the New York parole board, has described his approach to assessing remorse: "[Y]ou try to see if [the person seeking parole is] really sorry for what they did, or if they just think they're a victim being caught up in the system."[153] As Dennison's quote highlights, parole board members may interpret criticism of the criminal legal system as the defendant attempting to deflect attention away from their own transgressions, toward the failings or injustices of the system that has prosecuted, convicted, and punished them.[154]

II. WHAT'S WRONG WITH IDEOLOGICAL TESTING?

In this part, I turn from describing ideological testing to critiquing it. I identify three primary harms of ideological testing within the criminal thinking and remorse/responsibility frameworks. First, ideological testing contravenes the First Amendment value of governmental respect for dissent. Second, ideological testing denies the reality of pervasive injustice within the criminal legal system. Third, ideological testing deepens racial injustice within the criminal legal system.

Defendants subjected to ideological testing will (like the American public, more broadly[155]) hold a wide range of views about the criminal legal system. Contrary to some common assumptions, people who have been convicted and punished do not uniformly believe that the criminal legal system is unfair to defendants or excessively punitive.[156] For example, in their survey of men

151. Young & Chimowitz, *supra* note 13, at 244–53.

152. *Id.* at 254.

153. Jennifer Gonnerman, *Prepping for Parole*, NEW YORKER (Nov. 25, 2019), https://newyorker.com/magazine/2019/12/02/prepping-for-parole [https://perma.cc/74GX-AEDY (staff-uploaded, dark archive)].

154. Young & Chimowitz, *supra* note 13, at 245–46.

155. Among the general public, recent public opinion polls find that that half of all U.S. adults believe that people accused of crimes are treated "somewhat unfairly" or "very unfairly." Megan Brenan, *Americans More Critical of U.S. Criminal Justice System*, GALLUP (Nov. 16, 2023), https://news.gallup.com/poll/544439/americans-critical-criminal-justice-system.aspx [https://perma.cc/57PN-N4EF].

156. The assumption that people with felony convictions have critical views of the criminal legal system is one rationale for excluding them from jury service. *See* James M. Binnall, *A Field Study of the Presumptively Biased: Is There Empirical Support for Excluding Convicted Felons from Jury Service?*, 36 LAW & POL'Y 1, 1 (2014) (describing the "inherent bias rationale" for the exclusion from jury service of people with felony convictions, which holds "that convicted felons harbor a prodefense/antiprosecution pretrial bias that would jeopardize the impartiality of the jury process").

incarcerated in a California prison, Kitty Calavita and Valerie Jenness found that almost half of their respondents said they had been treated fairly by the criminal justice system.[157] My discussion here focuses on defendants subjected to ideological testing who hold at least some critical views of the criminal legal system because they are the group who will be affected most negatively by ideological testing.

A. *Undermining First Amendment Values*

The Supreme Court has famously observed, "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion . . . ."[158] In ideological testing, however, state actors elicit defendants' views about other state actors and institutions for the purpose of evaluating whether those views align with the state's preferred perspective. Ideological testing is a form of thought-policing that undermines the core First Amendment value of governmental respect for dissent.[159]

Governmental respect for dissent—especially dissent that is critical of the government—helps to ensure the free and open exchange of views about public affairs, a central purpose of the First Amendment.[160] Governmental respect for dissent also recognizes the human dignity and individual autonomy of the dissenter.[161] For the individual who holds dissenting views, dissent is a means of self-expression and "individual self-fulfillment."[162]

157. KITTY CALAVITA & VALERIE JENNESS, APPEALING TO JUSTICE: PRISONER GRIEVANCES, RIGHTS, AND CARCERAL LOGIC 80–82 (2015) (reporting responses to the question, "Looking back over your experiences in life and things you've done, do you think you've been treated fairly by the criminal justice system?").

158. W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943).

159. My argument here is normative and focused on First Amendment values, rather than First Amendment doctrine. I address the constitutionality of ideological testing in Section III.B. Governmental respect for dissent is one of many First Amendment values. *See* Frederick Schauer, *The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience*, 117 HARV. L. REV. 1765, 1786 (2004) (listing the range of normative theories of the First Amendment, including "self-expression, individual autonomy, dissent, democratic deliberation, the search for truth, tolerance, checking governmental abuse, and others").

160. *See* Mills v. Alabama, 384 U.S. 214, 218 (1966) ("[T]here is practically universal agreement that a major purpose of [the First] Amendment was to protect the free discussion of governmental affairs."); N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270 (1963) (identifying "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials"). Respecting dissent is also essential to a well-functioning marketplace of ideas. If, as Oliver Wendell Holmes famously observed, "the best test of truth is the power of the thought to get itself accepted in the competition of the market," then stifling dissent impedes the quest for truth. Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

161. *See* Thomas I. Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877, 879–81 (1963).

162. *Id.*

Dissent, as First Amendment scholar Steve Shiffrin has defined it, is an expansive category that includes any "speech that criticizes existing customs, habits, traditions, institutions, or authorities."[163] More narrowly, Ronald Collins and David Skrover have defined dissent as speech that is (1) intentional, (2) critical of a "law, policy, practice, or position established by an authority structure," and (3) public, in that it is "not confined to the private realm, but instead meaningfully exposed to an authority structure, to members of a group or community, or in a venue open to others."[164]

When a defendant expresses critical views of the criminal legal system in response to ideological testing, they are engaging in a form of dissent, under either the Shiffrin or the Collins and Skrover definition. First, they are expressing views critical of state institutions and authorities. Their responses involve the kind of speech at the very heart of the First Amendment's concern: criticism of the government.[165]

Second, defendants' criticism of the government is public, as required by the Collins and Skrover definition of dissent. They are expressing their critical views directly to the state actor conducting ideological testing. Their critical views are therefore "meaningfully exposed to an authority structure"[166]—not only the individual state actor conducting the ideological testing, but also other state actors who learn of their views secondhand (such as a judge or prosecutor reviewing a presentence report that discusses the defendant's responses to ideological testing).

As I have described, ideological testing may evaluate the defendant's views about the criminal legal system in general (for example, whether the system is fair) or about their individual experiences within it (for example, whether they as an individual received fair treatment). Where a defendant expresses critical views about the criminal system writ large ("The system is unfair"), or broad categories of state actors ("The police are corrupt"), it is clear that they are criticizing the government.

But what about where defendants express critical views only about their own individual experiences within the criminal legal system—where the critical view is not "The police treat people unfairly," but rather "The police officer

163. STEVEN H. SHIFFRIN, DISSENT, INJUSTICE, AND THE MEANINGS OF AMERICA, at xi (1999). For criticism of Shiffrin's approach to defining dissent, see Lawrence B. Solum, *The Value of Dissent*, 85 CORNELL L. REV. 859, 871–75 (2000) (criticizing Shiffrin for offering multiple, inconsistent definitions of dissent); Ronald J. Krotoszynski, Jr., *Dissent, Free Speech, and the Continuing Search for the "Central Meaning" of the First Amendment*, 98 MICH. L. REV. 1613, 1619 (2000) ("[D]efinitional issues abound with this definition of 'dissent' because the concept is largely relational.").

164. RONALD K.L. COLLINS & DAVID M. SKOVER, ON DISSENT: ITS MEANING IN AMERICA 3–4 (2013).

165. Rosenblatt v. Baer, 383 U.S. 75, 85 (1966) ("Criticism of government is at the very center of the constitutionally protected area of free discussion.").

166. COLLINS & SKOVER, *supra* note 164, at 4.

who arrested me treated me unfairly"? It may be tempting to dismiss such narrower critiques as petty, personal grievances—too small-bore and specific to *really* qualify as dissent, with its evocation of principled argumentation on politically charged issues of the day. But such narrower criticism, too, is criticism of how the state exercises its criminal enforcement and punishment power. As the Supreme Court has recognized, there is little daylight between criticism of "the government" and criticism of "those responsible for government operations."[167] Although an individual, patrol-level police officer, for example, is "the lowest in rank of police officials and would have slight voice in setting departmental policies, his duties are peculiarly 'governmental' in character and highly charged with the public interest."[168]

At first blush, the questions state actors ask when conducting ideological testing—for example, "Do you think the criminal justice system is fair?"[169] or "How do you feel about the police that arrested you?"[170]—might seem to *welcome* dissent. But these questions are not sincere invitations for defendants to share their views. Rather, such questions are a test, and a high-stakes one. Through ideological testing, state actors assess whether defendants hold the state's preferred views about other state actors and institutions. Defendants who express the wrong views (that is, critical views) about criminal legal system actors and institutions may be tagged as exhibiting criminal thinking, lacking remorse, or failing to accept responsibility—labels that can negatively affect a range of outcomes. The criminal thinking and remorse/responsibility frameworks for ideological testing pathologize defendants' expression of dissent, rather than respecting it.[171]

Of course, not all defendants who sincerely hold critical views of the criminal legal system will engage in dissent by expressing those views in response to ideological testing. Some defendants will express insincere positive or anodyne views of the criminal legal system. Some defendants will remain silent and decline to respond to ideological testing questions at all (though their

167. *Rosenblatt*, 383 U.S. at 85 ("Criticism of those responsible for government operations must be free, lest criticism of government itself be penalized.").

168. Coursey v. Greater Niles Twp. Publ'g Corp., 239 N.E.2d 837, 841 (Ill. 1968) (internal quotation marks omitted).

169. N.D. Dep't of Corr., Sex Offense Presentence Investigation Questionnaire Form 20 (2015) (on file with the North Carolina Law Review).

170. W. Va. Dep't of Corr., Interview Packet for Pre-Sentence Investigation Report 30 (2017) (on file with the North Carolina Law Review).

171. This dynamic is similar to Lisa Washington's observations about the family regulation system's treatment of mothers who have survived domestic violence. *See* Washington, *supra* note 9, at 1142, 1159–60. Survivors seeking to regain custody of their children face coercive pressures to demonstrate insight by adopting a victimhood narrative in which they are grateful for the "help" they have received from the state authorities that removed their children. *Id.* Where a survivor departs from this narrative, state actors will interpret this departure as demonstrating a "lack of insight"—a strike against the survivor in their efforts to regain custody of their children from the state. *Id.*

silence may have its own negative repercussions).[172] That defendants subjected to ideological testing face strong incentives to bite their tongue and refrain from expressing their sincere, dissenting views to the state actors questioning them only highlights how ideological testing functions as a form of thought-policing at odds with First Amendment values.

Ideological testing fits into what Amy Lerman and Vesla Weaver have described as a broad pattern of laws, policies, and practices within the criminal legal system that undermine democratic norms of citizen voice, governmental accountability, and governmental responsiveness.[173] As Lerman and Weaver argue, these antidemocratic practices have far-reaching consequences. Because interactions with criminal legal system actors and institutions "prominently feature visible state power," they are a particularly powerful site of political socialization.[174] Antidemocratic practices send a message to people involved with the criminal legal system about "the nature of American democracy and citizenship"—that "government [is] a closed, hierarchical system that minimizes their voice and allows authorities to act on them with relative impunity."[175]

Ideological testing sends similar messages. The first is that the state does not respect criticism of the criminal legal system from defendants—the people who experience the state's exercise of its criminal enforcement and punishment power most directly.[176] Within the criminal thinking and remorse/responsibility frameworks for ideological testing, defendants' critical views of the criminal legal system are not even seen as critiques. Rather, the frameworks treat defendants' expression of critical views as evidence of a cognitive distortion or character defect.

The second message is that the state has little interest in remedying any injustices defendants have experienced. To illustrate this second point, recall some of the standard presentence investigation interview questions from Part I: "How did officers handle your case?"[177] and "How do you feel about the police that arrested you?"[178] Some defendants may respond to these questions by

172. Where a defendant declines to respond to questions as part of a presentence investigation, the sentencing court may hold their silence against them. *See, e.g.*, State v. Muscari, 807 A.2d 407, 416 (Vt. 2002) (holding that the sentencing court appropriately "considered defendant's silence at the [presentence investigation interview] as one factor in determining whether defendant had accepted responsibility and expressed remorse for his violent criminal behavior"). *See generally* 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 (2012) (providing an overview of the relevant case law).

173. *See generally* AMY E. LERMAN & VESLA M. WEAVER, ARRESTING CITIZENSHIP: THE DEMOCRATIC CONSEQUENCES OF AMERICAN CRIME CONTROL (2014) (assessing how the growth of the carceral state has reshaped the citizen-state relationship).

174. *Id.* at 93–94.

175. *Id.* at 10, 17.

176. *See* Hanan, *Invisible Prisons*, *supra* note 9, at 1190–91.

177. S.D. Dep't of Corr., *supra* note 53, at 23.

178. W. Va. Dep't of Corr., Pre-Sentence Investigation Report, *supra* note 4, at 313.

providing information about abuses of authority by the police officers they interacted with—such as excessive force, coercive interrogation techniques, or false statements by the officer in the police report or on the witness stand. State actors could, in theory, systematically record and review such complaints by defendants about the officers involved in their cases to identify patterns of complaints against particular officers, precincts, or specialized units. This information could, in turn, be the basis for a disciplinary investigation or the inclusion of individual officers on a prosecutor's "do not call" list of police officers they won't use as witnesses at trial.[179] At a minimum, state actors could refer defendants who report abusive behavior by officers to the civilian oversight board or similar body so that they could pursue further redress on their own. But the criminal thinking and remorse/responsibility frameworks for ideological testing do not encourage state actors to take defendants' reports of injustice seriously and to seek out opportunities for redress.

B. *Denying Reality*

The two dominant frameworks for ideological testing dismiss defendants' critical views of the criminal legal system as symptoms of the defendant's criminal thinking, lack of remorse, or failure to accept responsibility.[180] The frameworks assume that critical views of the criminal legal system reflect the defendant's "thinking errors" or moral deficiency, rather than the reality of the defendant's experience.[181] In this way, ideological testing denies the reality of pervasive injustice within the criminal legal system.

To illustrate this point, consider two of the most common subjects of ideological testing: the defendant's views about (1) the fairness of their conviction, and (2) the fairness of their sentence. There are many potential reasons a defendant might reasonably criticize their conviction or sentence as unfair. The most obvious is that the defendant is not guilty of the crime they were convicted of—in other words, the defendant is factually innocent. But factual guilt or innocence is hardly the only metric of a conviction or sentence's fairness. Perhaps the strongest evidence against the defendant should have been

179. *See, e.g.*, *Cook County Prosecutors Reveal "Do Not Call" List of Police Officers Who Won't Be Called to Testify*, CBS NEWS (July 17, 2023, 5:05 PM), https://www.cbsnews.com/chicago/news/cook-county-states-attorney-do-not-call-list-police-officers/ [https://perma.cc/AK7Q-RSE2] (noting that Cook County prosecutors utilize a "do not call" list of police officers for trial); *see also* Andrew Guthrie Ferguson, *Big Data Prosecution and* Brady, 67 UCLA L. REV. 180, 231 (2020) ("Many prosecution offices maintain a 'do not call' list of police officers whose testimony cannot be trusted under oath . . . ."); Rachel Moran, Brady *Lists*, 107 MINN. L. REV. 657, 658 (2022) ("*Brady* lists, named after the Supreme Court decision *Brady v. Maryland*, are lists some prosecutors maintain of law enforcement officers with histories of misconduct that could impact the officers' credibility in criminal cases." (footnote omitted)).

180. *See supra* Section I.B.

181. Shadd Maruna & Ruth E. Mann, *A Fundamental Attribution Error? Rethinking Cognitive Distortions*, 11 LEGAL & CRIMINOLOGICAL PSYCH. 155, 165–66 (2006); Karp, *supra* note 13, at 1502.

suppressed, but the police officer who arrested them lied about key details in the suppression hearing. Perhaps the state had a very weak case against them, but the defendant nonetheless pled guilty because they couldn't afford to pay their bail and couldn't bear waiting in jail until their trial date. Perhaps the sentencing judge imposed a harsher sentence based on mere allegations of other criminal acts, of which they've never been convicted. Perhaps they were penalized at sentencing because they exercised their constitutional right to a jury trial.

None of these examples are outlandish. Rather, each tracks a real and well-documented phenomenon: wrongful convictions,[182] police officer "testilying,"[183] pretrial detention producing coerced guilty pleas,[184] acquitted conduct sentencing,[185] and the trial penalty.[186] And these scattershot examples of potential reasons a defendant might reasonably describe their conviction or sentence as unfair are merely the tip of the iceberg. The challenge in demonstrating that ideological testing is rooted in a denial of the reality of pervasive injustice is not in coming up with examples of why a defendant might reasonably criticize their conviction or sentence as unfair, but rather in choosing which of the myriad, plausible reasons to highlight. I focus in this section on two: the permanent crisis of public defense and Black/white racial inequity within the criminal legal system.

Consider first the state of public defense. The vast majority of criminal defendants—around eighty percent nationally—are indigent and represented by public defenders or other court-appointed counsel.[187] The public defense delivery systems that provide these lawyers are, on the whole, in a state of

182. *See* Anna Roberts, *Convictions as Guilt*, 88 FORDHAM L. REV. 2501, 2535 (2020) (arguing that the prevalence of wrongful convictions may be far higher than typically recognized). *See generally* DANIEL MEDWED, BARRED: WHY THE INNOCENT CAN'T GET OUT OF PRISON (2022) (describing causes and prevalence of known wrongful convictions).

183. *See, e.g.*, Charles M. Sevilla, *The Exclusionary Rule and Police Perjury*, 11 SAN DIEGO L. REV. 839, 863–64 (1974); Christopher Slobogin, *Testilying: Police Perjury and What to Do About It*, 67 U. COLO. L. REV. 1037, 1040 (1996); I. Bennett Capers, *Crime, Legitimacy, and Testilying*, 83 IND. L.J. 835, 836–38 (2008); Steven Zeidman, *From Dropsy to Testilying: Prosecutorial Apathy, Ennui, or Complicity*, 16 OHIO ST. J. CRIM. L. 423, 427–28 (2019).

184. *See* Lucian Dervan, Vanessa Edkins & Thea Johnson, *Victims of Coercive Plea Bargaining: Defendants Who Gave False Testimony for False Pleas*, 72 AM. U. L. REV. 1919, 1938–40 (2023).

185. *See generally* Eang Ngov, *Judicial Nullification of Juries: Use of Acquitted Conduct at Sentencing*, 76 TENN. L. REV. 235 (2009) (examining the use of acquitted conduct in sentencing and attacking its constitutionality).

186. *See The Trial Penalty: The Sixth Amendment Right to Trial on the Verge of Extinction and How to Save It*, NAT'L ASSOC. CRIM. DEF. LAWS. (July 10, 2018), https://www.nacdl.org/Document/TrialPenaltySixthAmendmentRighttoTrialNearExtinct [https://perma.cc/JVE6-F3MP].

187. Richard A. Oppel, Jr. & Jugal K. Patel, *One Lawyer, 194 Felony Cases, and No Time*, N.Y. TIMES (Jan. 31, 2019), https://www.nytimes.com/interactive/2019/01/31/us/public-defender-case-loads.html [https://perma.cc/6WVM-CS5Y (staff-uploaded, dark archive)] ("Roughly four out of five criminal defendants are too poor to hire a lawyer and use public defenders or court-appointed lawyers.").

permanent crisis.[188] Most notably, public defense delivery systems are consistently plagued by excessive caseloads.[189] But they are also affected by inadequate resources (such as a lack of staff investigators or money to hire defense experts[190]), inadequate training and supervision, and what Eve Brensike Primus has described as a "culture of indifference."[191] And due to the almost impossibly demanding legal standards for establishing a violation of the Sixth Amendment right to counsel, even the most egregious examples of inadequate defense lawyering—such as the lawyer who sleeps through trial, or shows up drunk to court—are unlikely to be a successful basis for challenging a conviction or sentence on appeal.[192]

Or consider just a few of the multiple dimensions of Black/white racial inequity within the criminal legal system.[193] A large body of research documents differential treatment of similarly situated Black and white people within the criminal legal system. Black people fare worse than similarly situated white people at a variety of decision points in the criminal legal system—from police

188. SARA MAYEUX, FREE JUSTICE: A HISTORY OF THE PUBLIC DEFENDER IN TWENTIETH-CENTURY AMERICA 18 (2020).

189. Irene Oritseweyinmi Joe, *Systematizing Public Defender Rationing*, 93 DENV. L. REV. 389, 391 (2016); Eve Brensike Primus, *Defense Counsel and Public Defense*, *in* 3 REFORMING CRIMINAL JUSTICE: PRETRIAL AND TRIAL PROCESSES 121, 127 (Erik Luna ed., 2017).

190. While police investigate crimes on behalf of the prosecution, a large proportion of public defender offices don't have even a single investigator on staff. DONALD J. FAROLE, JR. & LYNN LANGTON, BUREAU OF JUST. STAT., COUNTY-BASED AND LOCAL PUBLIC DEFENDER OFFICES, 2007, at 1 (2010), https://bjs.ojp.gov/content/pub/pdf/clpdo07.pdf [https://perma.cc/KWV8-RQZJ] ("In 2007, 40% of all county-based public defender offices had no investigators on staff.").

191. Eve Brensike Primus, *Culture as a Structural Problem in Indigent Defense*, 100 MINN. L. REV. 1769, 1783 (2016) [hereinafter Primus, *Culture as a Structural Problem*].

192. *See* Stephanos Bibas, *The Psychology of Hindsight and After-the-Fact Review of Ineffective Assistance of Counsel*, 2004 UTAH L. REV. 1, 1 ("Courts rarely reverse convictions for ineffective assistance of counsel, even if the defendant's lawyer was asleep, drunk, unprepared, or unknowledgeable. In short, any lawyer with a pulse will be deemed effective.").

193. I am mindful of the compelling arguments against framing discussions of race in the criminal legal system around a Black/white binary. *See, e.g.*, María B. Vélez & Anthony A. Peguero, *LatCrit and Criminology: Toward a Theoretical Understanding of Latino/a/x Crime and Criminal Legal System Involvement*, 6 ANN. REV. CRIMINOLOGY 307, 309 (2023). I nonetheless adopt that focus here, for two reasons. First, these are the two racial groups for which we have the best data on both views of the criminal legal system and treatment within the criminal legal system. *See* Ramiro Martínez, Jr., *Incorporating Latinos and Immigrants into Policing Research*, 6 CRIMINOLOGY & PUB. POL'Y 57, 57 (2007) (noting "lack of research on Latino/as and Latino groups" within the criminal legal system). Second, given the central role of white supremacy and anti-Black racism in shaping the development of the U.S. criminal legal system, the criminal legal system's treatment of Black versus white defendants is particularly significant in considering racial injustice within the criminal legal system. *See* Elizabeth Hinton & DeAnza Cook, *The Mass Criminalization of Black Americans: A Historical Overview*, 4 ANN. REV. CRIMINOLOGY 261, 265 (2021) (arguing that "the antiblack punitive tradition [i]s central to understanding the development of policing and punishment, from the top down and the ground up, throughout American history").

decisions about whom to stop, search, and arrest,[194] to prosecutors' decisions about what to charge[195] and how to plea bargain,[196] to jurors' decisions about whether to convict or acquit,[197] to judges' decisions about what sentence to impose,[198] to prison guards' decisions about when to issue disciplinary tickets,[199] to parole boards' decisions about whom to release.[200] And as other commentators have pointed out, such differential treatment of similarly situated Black and white people is the narrowest possible evidence of racial inequity within the criminal legal system.[201] From what conduct is criminalized to how surveillance and enforcement resources are allocated, race and racism shape who is "similarly situated" in the first place.[202] More sweeping, structural, and historical critiques that situate contemporary criminal legal system laws, policies, and practices within the long history of racial subordination provide a more expansive way of conceptualizing racial inequity and injustice within the criminal legal system.[203]

194. *See, e.g.*, Andrew Gelman, Jeffrey Fagan & Alex Kiss, *An Analysis of the New York City Police Department's "Stop-and-Frisk" Policy in the Context of Claims of Racial Bias*, 102 J. AM. STAT. ASS'N. 813, 813–14 (2007); Michael Tonry & Michael Melewski, *The Malign Effects of Drug and Crime Control Policies on Black Americans*, 37 CRIME & JUST. 1, 6 (2008).

195. Prosecutors are more likely to charge Black defendants than white defendants accused of similar conduct with offenses carrying a mandatory minimum penalty. Sonja B. Starr & M. Marit Rehavi, *Mandatory Sentencing and Racial Disparity: Assessing the Role of Prosecutors and the Effects of Booker*, 123 YALE L.J. 2, 7 (2013); Charles Crawford, Ted Chiricos & Gary Kleck, *Race, Racial Threat, and Sentencing of Habitual Offenders*, 36 CRIMINOLOGY 481, 482 (1998).

196. *See, e.g.*, Carlos Berdejó, *Criminalizing Race: Racial Disparities in Plea-Bargaining*, 59 B.C. L. REV. 1187, 1191 (2018); Robert J. Smith & Justin D. Levinson, *The Impact of Implicit Racial Bias on the Exercise of Prosecutorial Discretion*, 35 SEATTLE U. L. REV. 795, 797 (2012); Jawjeong Wu, *Racial/Ethnic Discrimination and Prosecution: A Meta-Analysis*, 43 CRIM. JUST. & BEHAV. 437, 451 (2016).

197. *See generally* Jennifer S. Hunt, *Race, Culture, and Jury Decision Making*, 11 ANN. REV. L. & SOC. SCI. 269 (2015) (reviewing the literature on race and jury decision-making).

198. *See, e.g.*, Stephen Demuth & Darrell Steffensmeier, *Ethnicity Effects on Sentence Outcomes in Large Urban Courts: Comparisons Among White, Black, and Hispanic Defendants*, 85 SOC. SCI. Q. 994, 1006 (2004); David S. Abrams, Marianne Bertrand & Sendhil Mullainathan, *Do Judges Vary in Their Treatment of Race?*, 41 J. LEGAL STUDIES 347, 347 (2012).

199. Andrea C. Armstrong, *Race, Prison Discipline, and the Law*, 5 U.C. IRVINE L. REV. 759, 782 (2015); Grace Ashford, *Widespread Racial Disparities in Discipline Found at N.Y. Prisons*, N.Y. TIMES (Dec. 1, 2022), https://www.nytimes.com/2022/12/01/nyregion/prisons-racial-bias-ny.html [https://perma.cc/4CFX-CHGC (dark archive)].

200. Kathryne M. Young & Jessica Pearlman, *Racial Disparities in Lifer Parole Outcomes: The Hidden Role of Professional Evaluations*, 47 LAW & SOC. INQUIRY 783, 783 (2022).

201. Naomi Murakawa & Katharine Beckett, *The Penology of Racial Innocence: The Erasure of Racism in the Study and Practice of Punishment*, 44 LAW & SOC'Y REV. 695, 697 (2010).

202. Megan C. Kurlychek & Brian D. Johnson, *Cumulative Disadvantage in the American Criminal Justice System*, 2 ANN. REV. CRIMINOLOGY 291, 303 (2019) ("If police disproportionately arrest, prosecutors dissimilarly charge, or magistrates unequally detain certain classes of criminal defendants, statistically controlling for prior records, current charges, and pretrial detention obviates rather than illuminates the aggregated impacts of these factors in final sentencing estimates.").

203. *See* Dorothy E. Roberts, *Foreword: Abolition Constitutionalism*, 133 HARV. L. REV. 1, 4 (2019) [hereinafter Roberts, *Foreword: Abolition Constitutionalism*] ("[C]riminal procedure and punishment in the United States still function to maintain forms of racial subordination that originated in the institution of slavery—despite the dominant constitutional narrative that those forms of subordination

The seemingly permanent public defense crisis and Black/white racial inequity affect defendants' convictions and sentences in varied (and interconnected) ways.[204] But here are a few possibilities.[205] Perhaps the defendant had a viable trial defense but pled guilty anyway because they had observed their lawyer's incompetence,[206] indifference toward their case,[207] or their failure to see, hear, and understand them across racial lines.[208] Perhaps the defendant could never even form an opinion about the strength of the state's case or the viability of any potential defense because their attorney never visited them in jail to discuss their case, didn't let them see their discovery, and never tried to talk to any witnesses.[209] Perhaps their attorney dismissed their account of what really happened during their stop and arrest as outlandish, leaving a viable trial defense or suppression issue unlitigated, or perhaps the defense attorney showed up to the suppression hearing or trial wholly unprepared.[210] Perhaps they were convicted at trial by an all-white jury, or perhaps they pled guilty in order to avoid facing trial by such a jury in the first place.[211] Perhaps their sentencing range was enhanced because of prior criminal convictions for crimes that go largely undetected and unpunished when committed by white people,[212] or because of a sentencing provision rooted in racism.[213] In each of these circumstances, I argue, it would be, at minimum, *reasonable* for a defendant to criticize their conviction or sentence as unfair.

To be sure, it's impossible to know what proportion of convictions or sentences are potentially unfair in any of the ways I have listed above. But none

were abolished."); Paul Butler, *The System Is Working the Way It Is Supposed to: The Limits of Criminal Justice Reform*, 104 GEO. L.J. 1419, 1469 (2016) ("[T]he system is working the way it is supposed to, as a means to control African-Americans and devalue their lives.").

204. For example, resource constraints and excessive caseloads within public defense likely affect Black defendants more adversely than white defendants. *See* L. Song Richardson & Phillip Atiba Goff, *Implicit Racial Bias in Public Defender Triage*, 122 YALE L.J. 2626, 2638–41 (2013).

205. To illustrate the connections between the public defense crisis and Black/white racial inequity, my examples here imagine a hypothetical Black defendant represented by a public defender or other court-appointed counsel.

206. Joe, *supra* note 189, at 414.

207. Primus, *Culture as a Structural Problem*, *supra* note 191, at 1770.

208. Alexis Hoag, *Black on Black Representation*, 96 N.Y.U. L. REV. 1493, 1539 (2021).

209. *See* Christopher Campbell, Janet Moore, Wesley Maier & Mike Gaffney, *Unnoticed, Untapped, and Underappreciated: Clients' Perceptions of Their Public Defenders*, 33 BEHAV. SCIS. & L. 751, 763 (2015); Alma Magaña, *Public Defenders as Gatekeepers of Freedom*, 70 UCLA L. REV. 978, 980 (2023).

210. David Cole, Gideon v. Wainwright *and* Strickland v. Washington*: Broken Promises*, *in* CRIMINAL PROCEDURE STORIES 107, 109 (Carol S. Steiker ed., 2006).

211. Daniel Harawa, *Trials Without Justice*, INQUEST (Sept. 21, 2021), https://inquest.org/trials-without-justice/ [https://perma.cc/59SQ-5TPH].

212. Ion Meyn, *Race-Based Remedies in Criminal Law*, 63 WM. & MARY L. REV. 219, 230 (2021).

213. The most notorious example of such a provision is the differential treatment of identical quantities of crack and powder cocaine for sentencing purposes. *See* Briton K. Nelson, *Adding Fuel to the Fire:* United States v. Booker *and the Crack versus Powder Cocaine Sentencing Disparity*, 40 U. RICH. L. REV. 1161, 1172 (2006).

of these examples is far-fetched. To the contrary, each merely illustrates how two widely-recognized pathologies of the criminal legal system as a whole—the permanent crisis of public defense and Black/white racial inequity—might manifest at the level of individual cases.

The criminal thinking and remorse/responsibility frameworks for ideological testing assume that a defendant's critical views of the criminal legal system reflect a problem *within the defendant*, rather than a problem within the system itself. This assumption is indefensible in light of the abundant evidence of pervasive injustice within the criminal legal system. When defendants subjected to ideological testing criticize their conviction or sentence as unfair, they will often have good reason to do so.

C. *Deepening Racial Injustice*

Ideological testing deepens racial injustice in the criminal legal system in at least three ways. While some of my discussion here is closely related to my arguments in the previous sections, I treat the question of racial injustice separately to underscore its significance. That ideological testing deepens racial injustice should be understood not as a derivative harm of those I have already identified, but as an independent ground for objecting to ideological testing. As in my prior discussion, I focus here on Black/white racial dynamics.[214]

I begin by identifying two reasons why ideological testing likely disproportionately harms Black defendants relative to white defendants: (1) racial polarization in views about the criminal legal system, and (2) the significant potential for racial bias to influence ideological testing in practice. I then consider, more broadly, how ideological testing trivializes issues of racial injustice within the criminal legal system.

1. Racial Polarization

The ideological testing I described in Section I.A covers a wide range of topics, but a major theme is *fairness*. State actors assess defendants' views of the system's fairness, in general; whether they were treated fairly by specific state actors (such as the police who arrested them or the judge who sentenced them); and whether their conviction or sentence is fair.

Of course, people of all races can and do hold critical views of the criminal legal system. But a large body of public opinion research finds significant and long-standing Black/white racial polarization in views about the criminal legal

214. For why I focus on Black/white racial dynamics, see *supra* note 193 and accompanying text.

system.[215] Black Americans are more likely than white Americans to view the criminal legal system as unfair and racially biased.[216]

Jon Hurwitz and Mark Peffley have succinctly summarized the topline finding of public opinion research on racial variation in views of the criminal legal system: "Quite simply, most whites believe the [criminal justice system] is fundamentally fair, and most African Americans do not."[217] Black Americans are much more likely than white Americans to believe that state actors within the criminal legal system treat Black people differently than white people[218] and to believe that racial bias and discrimination is a significant contributor to racial disparities in incarceration rates.[219] While some polling data suggests that white Americans' views on the criminal legal system shifted (at least temporarily) in the wake of George Floyd's murder,[220] major racial differences remain.[221]

215. *See, e.g.*, Karen Hanhee Lee, Carmen Gutierrez & Becky Pettit, *Racial Polarization in Attitudes Toward the Criminal Legal System*, 1 SOC. PROBS. 1, 17 (2023) (reviewing forty years of data from the General Social Survey and concluding that white and Black Americans "differ in their confidence that the system will be fair and in their approval of the use of the harshest of punishments," and that racial polarization has increased over the last forty years); James D. Unnever, *Race, Crime, and Public Opinion*, *in* THE OXFORD HANDBOOK OF ETHNICITY, CRIME, AND IMMIGRATION 70, 88 (Sandra M. Bucerius & Michael Tonry eds., 2014) ("Opinions about the fairness of the criminal justice system are racially polarized.").

216. Jon Hurwitz & Mark Peffley, *Explaining the Great Racial Divide: Perceptions of Fairness in the U.S. Criminal Justice System*, 67 J. POLS. 762, 763 (2005). A 2019 survey found that two-thirds of U.S. adults—of all races—think the criminal legal system treats Black people less fairly than white people; among Black adults, nearly nine in ten report this belief. JULIANA MENASCE HOROWITZ, ANNA BROWN & KIANA COX, PEW RSCH. CTR. RACE IN AMERICA 2019, at 11 (2019), https://www.pewresearch.org/social-trends/wp-content/uploads/sites/3/2019/04/Race-report_updated-4.29.19.pdf [https://perma.cc/SV2Q-QYXX].

217. Hurwitz & Peffley, *supra* note 216, at 763; *see also* James D. Unnever, *Two Worlds Far Apart: Black-White Differences in Beliefs About Why African-American Men Are Disproportionately Imprisoned*, 46 CRIMINOLOGY 511, 512 (2008) [hereinafter Unnever, *Two Worlds*].

218. Lawrence D. Bobo & Victor Thompson, *Unfair by Design: The War on Drugs, Race, and the Legitimacy of the Criminal Justice System*, 73 SOC. RSCH. 445, 456 (2006) (finding that sixty-eight percent of white respondents and eighteen percent of Black respondents expressed "some" or "a lot" of confidence in the police); Hurwitz & Peffley, *supra* note 216, at 769 (finding that white Americans are twice as likely as Black Americans to believe that the "justice system treats people fairly and equally" and that "courts give all a fair trial").

219. Unnever, *Two Worlds*, *supra* note 217, at 515.

220. *See* Angela Onwuachi-Willig, *The Trauma of Awakening to Racism: Did the Tragic Killing of George Floyd Result in Cultural Trauma for Whites?*, 58 HOUS. L. REV. 817, 843 (2021) ("[R]ecent polling data suggests that the shifts that occurred in the perspectives and thinking by Whites on issues of racism and policing after the killing of George Floyd were not lasting."); Lee et al., *supra* note 215, at 19 ("[T]he BLM movement may have influenced public opinion around the criminal legal system among Black and White Americans in different ways.").

221. For example, a 2023 ABC News/Washington Post poll found that nearly half of white people (forty-eight percent) think the police treat Black and white people equally, compared to only twelve percent of Black people. *See* Gary Langer, *Confidence in Police Practices Drops to a New Low*, ABC NEWS (Feb. 3, 2023, 6:09 AM), https://abcnews.go.com/Politics/confidence-police-practices-drops-new-low-poll/story?id=96858308 [https://perma.cc/4YCK-HM5C]. Notably, this was an all-time low for prevalence of this belief among white people. *Id.*

Black Americans' widely-held view that the criminal legal system is unfair and racially biased aligns with well-documented realities of racially disparate treatment within the criminal legal system.[222] And as Elizabeth Hinton and DeAnza Cook have observed, the prevalence among Black Americans of the view that the criminal legal system is unfair reflects not just contemporary realities but also the United States' long "antiblack punitive tradition, which has historically targeted people of color with discriminatory legal statutes, brutal police force, and heavy-handed punishment."[223]

Of course, Black Americans are not a monolithic group when it comes to views of the criminal legal system.[224] And the belief that the criminal legal system is unfair and racially based is just one facet of views about the criminal legal system.[225] My point here is a narrow one: public opinion research consistently finds that Black Americans are more likely than white Americans to hold some of the beliefs that are penalized in the ideological testing context. This suggests that—like other facially race-neutral factors that are, in practice, strongly correlated with race—views of the criminal legal system may function as a racial proxy.[226]

Of course, this public opinion research doesn't tell us whether Black Americans—even if they are more likely than white Americans to *hold* these critical views of the criminal legal system—are more likely to *express* those views in the context of ideological testing. To the contrary, as Eve Hanan has pointed out in her work on defendants' courtroom speech, Black defendants who are

222. *See supra* notes 193–203 and accompanying text.

223. Hinton & Cook, *supra* note 193, at 280.

224. As one example, Black Americans who have personally experienced incarceration, or who have a family member or close friend who has been incarcerated, are more likely than other Black Americans to attribute racial disparities in the criminal legal system to racial bias among police and judges. Christopher Muller & Daniel Schrage, *Mass Imprisonment and Trust in the Law*, 651 ANNALS AM. ACAD. POL. & SOC. SCI. 139, 150 (2014).

225. *See, e.g.*, Lee et al., *supra* note 215, at 3 ("[T]he proportion of Black Americans who are simultaneously concerned about crime and a punitive criminal legal system rose from [fourteen] percent in 1994 to [fifty-six] percent in 2018."). There is a rich body of literature exploring the multidimensionality of Black Americans' views about the criminal legal system. *See, e.g.*, Tracey Meares, *Charting Race and Class Differences in Attitudes Toward Drug Legalization and Law Enforcement: Lessons for Federal Criminal Law*, 1 BUFF. CRIM. L. REV. 137, 144–45 (1997) (proposing "dual frustration" as a model for understanding Black Americans' attitudes toward crime and law enforcement); Bell, *supra* note 134, at 2100–26 (defining the concept of legal estrangement and applying it as a framework for understanding the relationship between police and residents of poor and predominantly Black communities).

226. *See* Crystal S. Yang & Will Dobbie, *Equal Protection Under Algorithms: A New Statistical and Legal Framework*, 119 MICH. L. REV. 291, 332 (2020) ("[S]ome of the predictive algorithms [used in the criminal legal system] use many input factors that are likely to generate racial proxy effects, including employment, education, and other measures of socioeconomic status. As one example, COMPAS uses information regarding family and peers, residential stability, education, employment, and traits such as anger and criminal attitudes, all of which are likely to be correlated with race."); Karp, *supra* note 13, at 1503–06 (arguing that attitude factors in risk assessments may serve as racial proxies).

"attuned to stereotype threat . . . may curtail their anger, resistance, frustration, and agitation in order to reduce the chance that they are perceived in stereotypical ways."[227] But the fact that Black defendants face unique pressures to refrain from dissenting and expressing critical views only adds an additional layer of racial injustice.

2. Interpretive Issues

Ideological testing involves a significant discretionary, interpretive component. The state actor typically has broad discretion in deciding (1) how to construe the defendant's statements about the criminal legal system, and (2) what weight to give them, relative to other factors. Research on similar discretionary processes suggests that anti-Black racial biases and stereotypes likely infect both aspects of the interpretive process.

While some defendants' expressed views of the criminal legal system will be straightforwardly positive or negative, others will be multi-faceted or ambiguous, and compatible with multiple interpretations. To illustrate this point, consider an example from Kitty Calavita and Valerie Jenness's interviews of men incarcerated in California prisons.[228] The interviewer asked participants, "Looking back over your experiences in life and things you've done, do you think you've been treated fairly by the criminal justice system?"[229]—a question that is strikingly similar to some of the questions asked in the ideological testing context. One interviewee, Reginald Thompson, who was serving a prison sentence for a drug crime, responded:

> The law is the law. They go by the law. These people have been doing this [imposing harsh sentences for drug crimes] for years, before I was even born. Their laws are laws that we have to abide by. They use the same laws on me they use on anybody else out there.[230]

The interviewer then asked a follow-up question: "So the criminal justice system's pretty fair?"[231] Mr. Thompson replied:

> Yeah, they're fair, but I still have problems with how they've added all these other laws to enhance a person; like, for instance, how they take my past, prior convictions, and use them against me. . . . They do these things for a reason, to keep the prisons full. I'm not perfect, but fair is

227. Hanan, *Talking Back*, *supra* note 9, at 534.

228. *See* CALAVITA & JENNESS, *supra* note 157, at 80–82 (discussing how men incarcerated in a California prison perceived the fairness of the criminal legal system).

229. *Id.* at 81.

230. *Id.*

231. *Id.*

> fair. . . . Convict me on the crime that I come here for. Don't convict me again on my past. . . . It's not fair at all.[232]

Imagine that this exchange had occurred during the interview component of the LSI-R risk assessment. Recall that for the attitude/orientation item titled "poor toward sentence/conviction," the state actor administering the LSI-R is supposed to score the item as 1 (yes, a risk factor is present) if the defendant "denies the fairness or appropriateness of the sentence" or "view[s] themselves as the victims of circumstances, misunderstandings, other people, or an unfair system."[233] Aspects of Mr. Thompson's statement—his view that increasing his sentence based on his prior conviction is "not fair at all" and his belief in state actors' nefarious intentions ("They do these things for a reason, to keep the prisons full")—support a score of 1. But alternatively, the state actor could choose to focus on his expressed respect for the law ("Their laws are laws that we have to abide by") and his belief in its fair application ("They use the same laws on me they use on anybody else out there"). Either scoring choice—0 or 1—is defensible given Mr. Thompson's statements.[234]

In addition to deciding how to construe defendants' statements, state actors also have discretion in deciding how much weight to assign to the defendants' views of the criminal legal system. When writing a presentence report, for example, a probation or parole officer can decide how extensively to discuss the defendant's views of the criminal legal system and which aspects of the defendant's views to emphasize.[235] Similarly, given the typical "all things considered" structure of parole boards' decision-making, parole board members can decide how much emphasis to place on the defendant's views of the criminal legal system relative to other factors.[236] Even when administering risk assessments—in which the tool's designer has decided how much weight to assign to particular items—state actors nonetheless have discretion in deciding how much weight to assign to any individual piece of evidence relevant to a particular item. For example, in assessing the defendant's "attitude toward supervision," the state actor administering the risk assessment instrument can decide to weigh the required "file review" more heavily than the defendant's statements in the interview itself, or vice versa.[237]

In other criminal legal contexts, scholars have described how anti-Black racial bias warps state actors' subjective, discretionary assessments of

232. *Id.*

233. *See supra* Section I.A.2.

234. Yet another possibility is that the state actor could choose to break the tie, as it were, by considering evidence other than his statements, as the LSI-R Interview and Scoring Guide suggests. *See supra* note 78 and accompanying text.

235. O'Leary, *supra* note 5, at 1937.

236. Reitz & Rhine, *supra* note 92, at 286–87.

237. *See supra* Section I.A.2.

defendants.[238] This research suggests racial biases likely influence state actors' exercise of their interpretive power in the context of ideological testing. Deeply rooted stereotypes linking Blackness with criminality may prime state actors to find evidence of criminal thinking more readily if the defendant is Black rather than white.[239] Similarly, where a state actor is skeptical that a Black defendant's remorse display is genuine, they may be more likely to interpret ambiguous or multi-faceted statements like Mr. Thompson's as indicating the defendant's lack of remorse or failure to accept responsibility.[240]

3. Racial Critiques

Many of the most compelling and influential critiques of the criminal legal system today are *racial critiques*: critiques centered on issues of racial injustice within the criminal legal system.[241] Michelle Alexander articulated one highly influential racial critique in her bestselling book *The New Jim Crow*,[242] where she argued that mass incarceration in the United States is "a stunningly comprehensive and well-disguised system of racialized social control that functions in a manner strikingly similar to Jim Crow."[243] The Black Lives Matter movement—by some metrics, the largest protest movement in U.S. history[244]—has focused public attention on police brutality and violence against

238. *See, e.g.*, George S. Bridges & Sara Steen, *Racial Disparities in Official Assessments of Juvenile Offenders: Attributional Stereotypes as Mediating Mechanisms*, 63 AM. SOCIO. REV. 554, 555 (1998) (finding that juvenile probation officers preparing presentence investigations tend to attribute Black children's behavior to internal characteristics rather than external circumstances, while the opposite is true in their evaluations of white children).

239. Jamelia N. Morgan, *Rethinking Disorderly Conduct*, 109 CALIF. L. REV. 1637, 1658–63 (2021) (describing "deeply rooted norms that serve to link racial minorities or negatively racialized groups to criminality").

240. Hanan, *Remorse Bias*, *supra* note 142, at 321.

241. *See, e.g.*, James Forman, Jr., *Racial Critiques of Mass Incarceration: Beyond the New Jim Crow*, 87 N.Y.U. L. REV. 21, 22–23 (2012).

242. Trevor George Gardner, *The Conflict Among African American Penal Interests: Rethinking Racial Equity in Criminal Procedure*, 171 U. PA. L. REV. 1699, 1713 (2023) (describing The New Jim Crow as "paradigm-shifting"); Hinton & Cook, *supra* note 193, at 262 ("Michelle Alexander's bestselling book . . . is the most widely read text on the American criminal justice system ever published.").

243. MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS 2 (2010) ("Rather than rely on race, we use our criminal justice system to label people of color 'criminals' and then engage in all the practices we supposedly left behind. . . . Once you're labelled a felon, the old forms of discrimination—employment discrimination, housing discrimination, denial of the right to vote, denial of educational opportunity, denial of food stamps and other public benefits, and exclusion from jury service—are suddenly legal. As a criminal, you have scarcely more rights, and arguably less respect, than a black man living in Alabama at the height of Jim Crow. We have not ended racial caste in America; we have merely redesigned it.").

244. Larry Buchanan, Quoctrung Bui & Jugal K. Patel, *Black Lives Matter May Be the Largest Movement in U.S. History*, N.Y. TIMES (July 3, 2020), https://www.nytimes.com/interactive/2020/07/03/us/george-floyd-protests-crowd-size.html [https://perma.cc/Y9UT-Q349 (dark archive)].

Black people.[245] Racial critiques also provide the foundation for contemporary prison and police abolitionist movements, which "trace the roots of today's carceral state to the racial order established by slavery."[246]

The category of "racial critiques" is a broad one, encompassing both sweeping accounts of how mass incarceration functions as a "new racial caste system"[247] and more narrowly focused concerns about racial disparities and the influence of racial bias (both conscious and unconscious) on decision-making. A range of criminal legal system institution leaders have recently articulated racial critiques of this second, narrower variety. For example, in the wake of George Floyd's murder, supreme courts in several states issued open letters acknowledging and condemning racial discrimination against Black people within the criminal legal system.[248] In Massachusetts, all seven justices acknowledged that "too often, our criminal justice system fails to treat African-Americans the same as white Americans."[249] All nine justices on the Washington Supreme Court stated that "[w]e continue to see racialized policing and the overrepresentation of black Americans in every stage of our criminal and juvenile justice systems."[250]

Racial critiques of the criminal legal system should carry particularly heavy moral weight, given both the historical and contemporary role of criminal legal system institutions in producing and maintaining racial stratification.[251] Ideological testing within the criminal thinking and remorse/responsibility

245. *See, e.g.*, KEEANGA-YAMAHTTA TAYLOR, FROM #BLACKLIVESMATTER TO BLACK LIBERATION 2 (2016) ("What began as a local struggle of ordinary Black people in Ferguson . . . has grown into a national movement against police brutality and daily police killings of unarmed African Americans.").

246. Roberts, *Foreword: Abolition Constitutionalism*, *supra* note 203, at 19; *see also* Allegra M. McLeod, *Prison Abolition and Grounded Justice*, 62 UCLA L. REV. 1156, 1199 (2015) (describing contemporary criminal legal administration as "part of the afterlife of slavery and Jim Crow" and arguing that "this legacy is deeply implicated in criminal law's persistent practices of racialized degradation").

247. ALEXANDER, *supra* note 243, at 19.

248. *See State Courts Statements on Racial Justice*, NAT'L CTR. FOR STATE CTS., https://www.ncsc.org/consulting-and-research/areas-of-expertise/racial-justice/state-activities/state-court-statements-on-racial-justice [https://perma.cc/JM25-MDBA] (collecting statements).

249. Letter from Ralph D. Gants, Barbara A. Lenk, Frank M. Gaziano, David A. Lowy, Kimberly S. Budd, Elspeth B. Cypher & Scott L. Kafker, Justs. of the Mass. Sup. Ct., to Members of the Judiciary and the Bar (June 3, 2020), https://www.mass.gov/news/letter-from-the-seven-justices-of-the-supreme-judicial-court-to-members-of-the-judiciary-and-the-bar-june-3-2020 [https://perma.cc/Q3UD-EQVC (staff-uploaded archive)].

250. Letter from Debra L. Stephens, Charles W. Johnson, Barbara A. Madsen, Susan Owens, Steven C. González, Sheryl Gordon McCloud, Mary I. Yu, Raquel Montoya-Lewis & G. Helen Whitener, Justs. of the Wash. Sup. Ct., to Members of the Judiciary and the Legal Community (June 4, 2020), https://www.courts.wa.gov/content/publicUpload/Supreme%20Court%20News/Judiciary%20Legal%20Community%20SIGNED%20060420.pdf [https://perma.cc/J9W2-2H9W].

251. *See* Aziz H. Huq, *Racial Equity in Algorithmic Criminal Justice*, 68 DUKE L.J. 1043, 1104–11 (2019).

frameworks, however, trivializes racial critiques by treating them as a cognitive distortion and a problematic attitude. Racial critiques, like other critical views, indicate criminal thinking, lack of remorse, and failure to accept responsibility. That is, the dominant frameworks for ideological testing penalize critical views broadly; there is no carve-out for critical views of the criminal legal system rooted in concerns about racism, racial discrimination, and racial disparity. To the contrary, sometimes ideological testing explicitly tests defendants' agreement with racial critiques of the criminal legal system. Recall, for example, that until 2023, the Texas Christian University Criminal Thinking Scale treated as evidence of criminal thinking disagreement with the claim that "[t]he country's criminal justice system was designed to treat everyone equally" and agreement with the claim "[t]he real reason you are locked up is because of your race."[252]

III. ADVOCACY AND POLICY IMPLICATIONS

I have argued that ideological testing contravenes the core First Amendment value of governmental respect for dissent, denies the reality of pervasive injustice within the criminal legal system, and deepens racial injustice within the criminal legal system. In this part, I discuss two implications of my critiques. First, advocates should challenge ideological testing on First Amendment grounds. Second, policymakers should eliminate ideological testing at all sites where it occurs.

A. *Challenging Ideological Testing*

In Part II, I argued that ideological testing contravenes the First Amendment value of governmental respect for dissent. Here, I turn from First Amendment values to First Amendment doctrine, and offer a roadmap for how defendants can challenge ideological testing as unconstitutional.

Sentencing hearings are the most promising site for raising First Amendment challenges to ideological testing evidence.[253] By "ideological testing evidence," I mean evidence about the defendant's views of the criminal legal system, elicited through ideological testing. At sentencing, ideological testing evidence may come before the judge through the narrative portions of a presentence report or through the results of a risk assessment.

252. *See supra* notes 131–33 and accompanying text.

253. Successful First Amendment challenges in the parole context will be far more difficult, due to the highly deferential standards for judicial review of parole decisions and restrictions on the scope of judicial review (or, in some states, the outright prohibition on judicial review of parole decisions). Alexandra Harrington, *The Constitutionalization of Parole: Fulfilling the Promise of Meaningful Review*, 106 CORNELL L. REV. 1173, 1196–98 (2021) (describing standards of review). Indeed, "[t]wenty-seven states exempt parole determinations from judicial review or severely limit the scope of review. Of that number, eight states appear to entirely prohibit review." *Id.* at 1195.

Two lines of First Amendment caselaw are relevant in challenging ideological testing. The first, as Beth Karp has highlighted in her work on risk assessments, is about when sentencing courts can consider evidence of a defendant's abstract beliefs.[254] Because ideological testing evidence concerns the defendant's views about state actors and institutions, a second line of First Amendment caselaw is also relevant in challenging ideological testing evidence: caselaw about the special protection afforded to speech on matters of public concern. In this section, I provide a primer on both lines of caselaw and argue that together, they compel the conclusion that the consideration of ideological testing evidence at sentencing violates the First Amendment.

The First Amendment arguments against the consideration of ideological testing evidence at sentencing are strong. But litigating such challenges will be an uphill battle, to put it mildly. Sentencing caselaw embraces what Carissa Byrne Hessick and F. Andrew Hessick have described as an "information maximization" view of sentencing: that courts should be able to consider a broad range of information, from a wide variety of sources, because doing so will improve the court's ability to impose a fair sentence.[255] And as Hessick and Hessick also point out, sentencing courts routinely consider constitutionally suspect factors in making sentencing decisions.[256] Moreover, when defendants bring constitutional challenges to the consideration of such sentencing factors, courts often reject those challenges without meaningful constitutional analysis—instead resorting to "the ungrounded conclusion that the sentencing process is somehow unique and thus shielded from constitutional review."[257]

Given these obstacles, strong First Amendment challenges to the consideration of ideological testing evidence at sentencing may well fail. But even so, First Amendment challenges to ideological testing may benefit individual defendants by persuading judges to discount ideological testing's significance and reliability. Where a probation or parole officer writes in the presentence report that the defendant exhibits criminal thinking and lacks

254. *See* Karp, *supra* note 13, at 1498 (arguing that the First Amendment's prohibition on the consideration of a defendant's abstract beliefs at sentencing "should pose a formidable barrier to the use of attitude factors at sentencing that are not tailored to the specific defendant and crime"). My discussion of this line of caselaw expands on Karp's argument by analyzing the distinct First Amendment issues raised when a sentencing court considers ideological testing evidence.

255. Carissa Byrne Hessick & F. Andrew Hessick, *Recognizing Constitutional Rights at Sentencing*, 99 CALIF. L. REV. 47, 83 (2011); *see also* Williams v. New York, 337 U.S. 241, 247 (1949) ("[M]odern concepts individualizing punishment have made it all the more necessary that a sentencing judge not be denied an opportunity to obtain pertinent information by a requirement of rigid adherence to restrictive rules of evidence properly applicable to the trial.").

256. Hessick & Hessick, *supra* note 255, at 57.

257. *Id.* Sentencing courts' resistance to meaningful constitutional analysis also reflects a broader dynamic: what Kate Weisburd has described as "a categorical chasm—and mismatch—between the fields of criminal procedure and constitutional law." Kate Weisburd, *Rights Violations as Punishment*, 111 CALIF. L. REV. 1305, 1312 (2023).

remorse for their crime, many judges will find these allegations serious and troubling (although—or perhaps *because*—many judges would be hard-pressed to define what "criminal thinking" even means[258]). Highlighting, through a First Amendment challenge, the ideological testing processes underlying these conclusions may blunt their force.

1. Abstract Beliefs and Speech on Matters of Public Concern

The First Amendment's Free Speech Clause generally protects individuals against punishment based on their speech and beliefs.[259] Under the First Amendment, "a defendant's abstract beliefs, however obnoxious to most people, may not be taken into consideration by a sentencing judge."[260]

The leading case on the consideration of a defendant's beliefs at sentencing is *Dawson v. Delaware*.[261] In *Dawson*, the Court considered the admission at a capital sentencing proceeding of evidence that the defendant, David Dawson, was a member of a white supremacist prison gang, the Aryan Brotherhood.[262] The defendant's white supremacist beliefs were not "tied in any way" to his crime of conviction: a homicide of a white victim that involved no "elements of racial hatred."[263] The State also failed to introduce any evidence that "the Aryan Brotherhood had committed any unlawful or violent acts, or had even endorsed such acts."[264] Under these circumstances, the Court concluded, "Dawson's First Amendment rights were violated by the admission of the Aryan Brotherhood evidence in this case, because the evidence proved nothing more than Dawson's abstract beliefs."[265]

258. Recall that even criminal thinking researchers struggle to agree on a definition of criminal thinking. *See* Taxman et al., *supra* note 114, at 175.

259. *See* U.S. CONST. amend. I; Hartman v. Moore, 547 U.S. 250, 256 (2006).

260. Wisconsin v. Mitchell, 508 U.S. 476, 485 (1993) (citing Dawson v. Delaware, 503 U.S. 159, 163–65 (1992)).

261. 503 U.S. 159 (1992).

262. The Aryan Brotherhood evidence at issue in Dawson was (1) evidence that Dawson had the words "Aryan Brotherhood" tattooed on his hand; (2) evidence that Dawson referred to himself as "Abaddon"—a name he believed to mean "one of Satan's disciples"—and had the name "tattooed in red letters across his stomach"; and (3) a stipulation that read, in its entirety, "The Aryan Brotherhood refers to a white racist prison gang that began in the 1960's in California in response to other gangs of racial minorities. Separate gangs calling themselves the Aryan Brotherhood now exist in many state prisons including Delaware." *Id.* at 161–62.

263. *Id.* at 166 (quoting Barclay v. Florida, 463 U.S. 939, 949 (1983)).

264. *Id.*

265. *Id.* at 167.

The *Dawson* opinion is hardly a model of clarity.[266] It toggles confusingly between emphasizing the "abstract" nature of the defendant's racist beliefs,[267] emphasizing their irrelevance to sentencing,[268] and emphasizing the interplay of both factors.[269] But the best reading of *Dawson*—and the one endorsed by the Court in the subsequent case of *Wisconsin v. Mitchell*—is that the First Amendment outright prohibits sentencing courts from considering a defendant's merely abstract beliefs.[270]

Unfortunately, *Dawson* provides no clear definition or test for lower courts to use in determining whether a particular belief is merely abstract. Certainly, a sentencing court may properly consider the defendant's beliefs where they motivated the defendant's crime.[271] For example, where someone is convicted of tax evasion, the sentencing court may consider their belief that tax laws are invalid.[272] In such a case, the defendant's beliefs are not abstract because they are directly linked to the defendant's *actions* in committing their crime of conviction.[273]

266. Robert P. Faulkner, *Evidence of First Amendment Activity at Trial: The Articulation of a Higher Evidentiary Standard*, 42 UCLA L. REV. 1, 9 (1994) (noting "the difficulty the Court had in articulating its rationale" in *Dawson*).

267. *Dawson*, 503 U.S. at 167 ("Dawson's First Amendment rights were violated by the admission of the Aryan Brotherhood evidence in this case, because the evidence proved nothing more than Dawson's abstract beliefs.").

268. *Id.* at 160 ("The question presented in this case is whether the First and Fourteenth Amendments prohibit the introduction in a capital sentencing proceeding of the fact that the defendant was a member of an organization called the Aryan Brotherhood, where the evidence has no relevance to the issues being decided in the proceeding. We hold that they do."); *id.* at 165 (describing the Aryan Brotherhood evidence as "totally without relevance to Dawson's sentencing proceeding").

269. *Id.* at 168 ("[The First Amendment] . . . prevents Delaware here from employing evidence of a defendant's abstract beliefs at a sentencing hearing when those beliefs have no bearing on the issue being tried.").

270. Wisconsin v. Mitchell, 508 U.S. 476, 485 (1993) ("[A] defendant's abstract beliefs, however obnoxious to most people, may not be taken into consideration by a sentencing judge. In *Dawson*, the State introduced evidence at a capital sentencing hearing that the defendant was a member of a white supremacist prison gang. Because 'the evidence proved nothing more than [the defendant's] abstract beliefs,' we held that its admission violated the defendant's First Amendment rights." (quoting *Dawson*, 503 U.S. at 167)); *see also* Nat'l Endowment for the Arts v. Finley, 524 U.S. 569, 610 (1998) (Souter, J., dissenting) (describing *Dawson* as "holding that the First Amendment forbids reliance on a defendant's abstract beliefs at sentencing, even if they are considered as one factor among many").

271. *Dawson*, 503 U.S. at 166 (discussing Barclay v. Mitchell, 463 U.S. 939 (1983)); s*ee also Mitchell*, 508 U.S. at 489 ("The First Amendment, moreover, does not prohibit the evidentiary use of speech to establish the elements of a crime or to prove motive or intent.").

272. United States v. Simkanin, 420 F.3d 397, 417 (5th Cir. 2005) (holding that defendant's "specific beliefs that the tax laws are invalid and do not require him to withhold taxes or file returns . . . [were] directly related to" his tax crimes).

273. Recent Case, United States v. Schmidt*, 930 F.3d 858 (7th Cir. 2019)*, 133 HARV. L. REV. 1452, 1455 (2020) ("[B]elief and association are relevant to sentencing when linked in some robust way to *action*."); *see also* Karp, *supra* note 13, at 1497 (arguing that a nexus to the defendant's crime of conviction "is the key ingredient in *Dawson*-admissible evidence").

There is a similar, though more attenuated, link between beliefs and criminal action where a defendant's beliefs provided the motive for a prior crime,[274] or where their beliefs led them to join an organization that commits criminal activity.[275] Without evidence of such a link between beliefs and criminal action, however, the defendant's beliefs are merely abstract, and the First Amendment bars the sentencing court from considering them.

Because ideological testing concerns the defendant's beliefs about the criminal legal system, *Dawson* will be the foundation for any constitutional analysis of ideological testing evidence at sentencing. But defendants challenging ideological testing should also draw on the "long and strong line of modern decisions" in which the Supreme Court has held that the First Amendment affords "special protection" to speech on "matters of public concern."[276]

The Court has defined speech on matters of public concern broadly, to include all speech that can "be fairly considered as relating to any matter of political, social, or other concern to the community"—even if its "contribution to public discourse" is "negligible."[277] In deciding whether speech is on a matter of public concern, courts examine its "content, form, and context": "what was said, where it was said, and how it was said."[278]

A defendant's responses to ideological testing will typically qualify as speech on a matter of public concern. As discussed earlier, ideological testing probes defendants' views about the government: state actors and institutions within the criminal legal system.[279] Where the defendant expresses broad views of the criminal legal system, the courts, or the police, the content of their speech clearly addresses a matter of public, rather than merely private, concern.[280]

274. *Cf.* United States v. Schmidt, 930 F.3d 858, 867 (7th Cir. 2019). In *Schmidt*, the defendant was convicted of possessing a firearm unlawfully, due to his prior felony convictions. *Id.* The court noted that the beliefs at issue (the defendant's white supremacist beliefs) had not motivated either his current crime of conviction, or any of his prior convictions. *Id.* ("None of the felonies subjecting him to this restriction, nor his purpose in carrying a handgun into the forest on this specific occasion, involved or was otherwise motivated by his white supremacist beliefs.").

275. *See* Fuller v. Johnson, 114 F.3d 491, 497 (5th Cir. 1997) (finding that evidence of the defendant's membership in Aryan Brotherhood was properly considered at sentencing, when the prosecution also introduced evidence that that the Aryan Brotherhood was "a white supremacist, neo-nazi-type gang that routinely dealt in violence, drug dealing, protection rackets, prostitution, and fear"). The evidence in *Fuller*, like the evidence in *Dawson*, implicated First Amendment protections for both beliefs and association; I focus only on the beliefs aspect here.

276. Dan T. Coenen, *Free Speech and the Law of Evidence*, 68 DUKE L.J. 639, 655 (2019) (quoting Snyder v. Phelps, 562 U.S. 443, 453, 458 (2011)).

277. *Snyder*, 562 U.S. at 453, 460.

278. *Id.* at 453–54 (quoting Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 761 (1985)).

279. *See supra* notes 165–68 and accompanying text.

280. *Cf. Dun & Bradstreet*, 472 U.S. at 762 (holding that information about an individual's credit report "concerns no public issue").

Some responses to ideological testing will focus on the performance of individual, rank-and-file state actors within the criminal legal system (for example, an individual police officer, prosecutor, or judge). The content of these responses, while narrower, also addresses a matter of public concern, given the unique dimensions of state power in the criminal law context. Consider a defendant's criticism of the individual police officer who arrested them.[281] Relative to other rank-and-file government employees who are not in law enforcement roles, patrol-level police officers "occupy a unique governmental position" because they have the "ability to apply the force of government in enforcing the law and the authority to compel members of the public to comply with the law."[282] For these reasons, courts have almost universally found that even individual, patrol-level police officers qualify as "public officials" for purposes of defamation law.[283] Applying the *Rosenblatt v. Baer*[284] test for who counts as a public official, courts have found that a police officer's "position in government has such apparent importance that the public has an independent interest in the qualifications and performance of the person who holds it, beyond the general public interest in the qualifications and performance of all government employees . . . ."[285]

The form and context of ideological testing also support the conclusion that a defendant's responses to ideological testing are speech on matters of public concern. Defendants are not expressing their views in a private conversation with a friend or family member;[286] rather, they are speaking directly to a representative of the state—such as a probation officer, a prison employee, or a parole commissioner—and doing so in a formal interview setting, in response to questioning by state actors.[287]

281. Some presentence questionnaires ask about the defendant's views of the police officers they interacted with. *See, e.g.*, S.D. Dep't of Corr., *supra* note 53, at 23 (asking: "How did officers handle your case?").

282. Hildebrant v. Meredith Corp., 63 F. Supp. 3d 732, 744 (E.D. Mich. 2014); *see also* Gray v. Udevitz, 656 F.2d 588, 591 (10th Cir. 1981) ("The cop on the beat is the member of the department who is most visible to the public. He possesses both the authority and the ability to exercise force. Misuse of his authority can result in significant deprivation of constitutional rights and personal freedoms, not to mention bodily injury and financial loss.").

283. *See* DAVID A. ELDER, DEFAMATION: A LAWYER'S GUIDE § 5:1 n.128 (noting that the "overwhelming majority" of cases addressing the issue concluded that police officers are public officials for the purposes of defamation law); Henry v. Media Gen. Operations, Inc., 254 A.3d 822, 835–37 (R.I. 2021) (noting the "voluminous precedent" and "vast weight of authority" treating police officers as public officials).

284. 383 U.S. 75 (1966).

285. *Id.* at 86.

286. *Cf.* Adams v. Cnty. of Sacramento, 116 F.4th 1004, 1013 (9th Cir. 2024) (noting that where the speech at issue was "private social texts to a co-worker," the "form and context" weigh against a finding that the speech addressed a matter of public concern).

287. *See* Robert C. Post, *The Constitutional Concept of Public Discourse: Outrageous Opinion, Democratic Deliberation, and* Hustler Magazine v. Falwell, 103 HARV. L. REV. 601, 678 (1990) ("[W]here speech is specifically addressed to a few designated persons . . . the Court has implied that

2. Litigation Strategies

Ideological testing evidence concerns the defendant's beliefs about the criminal legal system. Under *Dawson*, First Amendment challenges to the consideration of ideological testing evidence at sentencing should turn on the question of whether the defendant's beliefs are merely abstract. For a defendant's beliefs to qualify as non-abstract under *Dawson*, there must be evidence of a link between the beliefs at issue (for example, that the criminal legal system is unfair, or that the defendant was treated unfairly by the police officer who arrested them) and some criminal action stemming from those beliefs.

Certainly, such a link will be present in some cases—for example, where the defendant is (or has been previously) convicted of threatening a judge because they disagreed with their decisions in a criminal case.[288] If the defendant in such a case expressed critical views of the criminal legal system in response to ideological testing, a sentencing judge may properly consider those beliefs under *Dawson* because they are closely linked to the defendant's crime of conviction. But these cases will be the exception, rather than the rule. Absent such unusual circumstances, ideological testing evidence will typically involve nothing more than the expression of mere abstract beliefs.

One likely response to this argument is that, where a convicted defendant expresses critical views of the criminal legal system, those beliefs are non-abstract because they contributed to the defendant's crime of conviction. This argument resonates with the criminal thinking justification for ideological testing: that critical views of the criminal legal system are an indicator of criminal thinking, which, in turn, is one of the causes of criminal offending.[289] On this theory, a convicted defendant's critical views of the criminal legal system will *always* qualify as non-abstract beliefs, because the criminal conviction itself links those beliefs to some criminal action, bringing the beliefs out of the realm of the merely abstract.

Accepting such a tenuous, speculative connection as sufficient evidence that the defendant's beliefs were non-abstract would dilute *Dawson*'s protections to the point of meaninglessness. For beliefs to be non-abstract, there must be

the very same speech can be public discourse when communicated to one audience, but be constitutionally unprotected if communicated to another. Even speech 'communicate[d] privately' to one person can be public discourse, if that person is, for example, a government official, rather than someone merely in contractual privity with the speaker." (alteration in original) (internal citations omitted)).

288. According to the U.S. Marshals Service, threats against federal judges and prosecutors have increased in recent years. Holmes Lybrand, *US Marshals Director Calls Increase in Threats to Judges and Prosecutors "A Substantial Risk to Our Democracy*," CNN (Feb. 14, 2024, 10:59 AM), https://www.cnn.com/2024/02/14/politics/threats-to-judges-increase/index.html [https://perma.cc/E8N8-XAQD].

289. *See supra* Section I.B.1 (discussing the criminal thinking framework for ideological testing).

evidence, not mere conjecture, of a link between the beliefs and some resulting criminal action. In *Dawson* itself, the Court noted that the State could have avoided the First Amendment problem "if it had presented evidence showing more than mere abstract beliefs on Dawson's part," such as evidence that the Aryan Brotherhood "committed any unlawful or violent acts."[290] Such evidence was, presumably, readily available.[291] But because the State failed to put forward any such evidence, they established "nothing more than Dawson's abstract beliefs."[292] Under *Dawson*, any link between the defendant's beliefs and some resulting criminal action sufficient to render the beliefs non-abstract "must be established, not merely assumed, in the context of the particular case."[293]

Moreover, the argument that a defendant's criminal conviction automatically renders their beliefs about the criminal legal system non-abstract turns First Amendment doctrine on its head. Speech on matters of public concern "occupies the highest rung of the hierarchy of First Amendment values"[294] and is entitled to "special protection."[295] But under this argument, defendants who express critical views of the criminal legal system in response to ideological testing—that is, defendants who speak on a matter of public concern—would be categorically exempt from the First Amendment protection *Dawson* provides. Rather than receiving special protection, their speech on matters of public concern would be especially vulnerable to misuse at sentencing.[296]

So far, I have been discussing the best reading of *Dawson*: that it prohibits sentencing courts from considering a defendant's merely abstract beliefs. But defendants challenging the consideration of ideological testing evidence at sentencing may confront a (mis)reading of *Dawson* that grounds the First Amendment analysis in the question of whether the defendant's beliefs are relevant to a legitimate sentencing factor, rather than the question of whether those beliefs are merely abstract.[297]

290. Dawson v. Delaware, 503 U.S. 159, 166 (1992).

291. *Id.* at 173 n.1 (Thomas, J., dissenting) (citing cases, reports, and news articles describing the Aryan Brotherhood as notoriously violent).

292. *Id.* at 167.

293. United States v. Alvarez-Núñez, 828 F.3d 52, 56 (1st Cir. 2016) (describing *Dawson* as "illustrat[ing] this point").

294. Connick v. Myers, 461 U.S. 138, 145 (1983) (quoting NAACP v. Claiborne Hardware Co., 458 U.S. 886, 913 (1982)).

295. Snyder v. Phelps, 562 U.S. 443, 452 (2011) (quoting *Connick*, 461 U.S. at 145).

296. By misuse, I mean the risk that the sentencing decisionmaker will consider a defendant's abstract beliefs as "morally reprehensible" or otherwise objectionable. *See Dawson*, 503 U.S. at 167.

297. *See, e.g.*, United States v. Smith, 967 F.3d 1196, 1205 (11th Cir. 2020) ("[T]he First Amendment prohibits introduction of 'a defendant's abstract beliefs . . . when those beliefs have no bearing on the issue being tried.'" (quoting *Dawson*, 503 U.S. at 168)); Kapadia v. Tally, 229 F.3d 641, 648 (7th Cir. 2000) ("Nothing in the Constitution prevents the sentencing court from factoring a defendant's statements into sentencing when those statements are relevant to the crime or to legitimate sentencing considerations."); *see also* Coenen, *supra* note 276, at 653 (critiquing the "misguided" view

Defendants should challenge this inaccurate, yet prevalent, interpretation of *Dawson*. While there is language in *Dawson* to support the focus on relevance,[298] the Court re-affirmed in *Wisconsin v. Mitchell*[299] that the First Amendment outright bars the consideration of a defendant's abstract beliefs.[300] Defendants who confront this misreading should also consider arguing, in the alternative, for the application of a heightened relevance standard on the grounds that ideological testing evidence involves both abstract beliefs and speech on a matter of public concern.

First, a bit of background: The rules of evidence do not apply at sentencing; rather, the general rule is that the courts may consider any evidence so long as it is relevant and minimally reliable.[301] Ordinary relevance is a very low bar—evidence is relevant so long as it has *any* tendency, however slight, to make a fact of consequence to the proceeding more or less probable than it would be without the evidence.[302]

In *Dawson*, the State argued that even if the Aryan Brotherhood evidence only established Dawson's abstract beliefs, "these abstract beliefs constitute a portion of Dawson's 'character,'" a sentencing factor the jury was required to consider under Delaware law.[303] The Court rejected this argument, describing the Aryan Brotherhood evidence as "totally without relevance to Dawson's

among courts that the "First Amendment never forecloses the use of past-speech evidence so long as it is relevant").

298. *Dawson*, 503 U.S. at 160 ("The question presented in this case is whether the First and Fourteenth Amendments prohibit the introduction in a capital sentencing proceeding of the fact that the defendant was a member of an organization called the Aryan Brotherhood, where the evidence has no relevance to the issues being decided in the proceeding. We hold that they do.").

299. 508 U.S. 476 (1993).

300. *Id.* at 485 ("[A] defendant's abstract beliefs, however obnoxious to most people, may not be taken into consideration by a sentencing judge.").

301. *See* Roberts v. United States, 445 U.S. 552, 556 (1980) (noting that it is a "fundamental sentencing principle" that "a judge may appropriately conduct an inquiry broad in scope, largely unlimited either as to the kind of information he may consider, or the source from which it may come"); Maneka Sinha, *Junk Science at Sentencing*, 89 GEO. WASH. L. REV. 52, 87–88 (2021) ("In federal cases, the federal Sentencing Guidelines allow sentencing courts to consider any 'relevant information without regard to its admissibility under the rules of evidence applicable at trial,' so long as the information has only 'sufficient indicia of reliability to support its probable accuracy.' The standard is similar in federal capital cases and most state courts. That standard is derived from the extremely low constitutional due process standard, which requires only that information be 'minimally reliable' in order to be considered at sentencing hearings." (quoting U.S. SENT'G GUIDELINES MANUAL § 6A1.3 (U.S. SENT'G COMM'N 2018))).

302. FED. R. EVID. 401.

303. *Dawson*, 503 U.S. at 166–67. For this reason, the Delaware Supreme Court upheld the admission of the Aryan Brotherhood evidence. Dawson v. State, 581 A.2d 1078, 1103–04 (Del. 1990). Under Delaware's capital sentencing law, if the jury found at least one statutory aggravating factor, the jury was then "required to make an *individualized* determination of whether Dawson should be executed or incarcerated for life, based upon Dawson's character, his record and the circumstances of the crime." *Id.* at 1102.

sentencing proceeding."[304] But this conclusion strains credulity.[305] "Character" is a broad category, and a defendant's morally abhorrent, racist beliefs would seem obviously relevant to the evaluation of their character under an ordinary relevance standard.[306]

If ordinary relevance were the standard for considering a defendant's abstract beliefs at sentencing, then the State's relevant-to-character argument in *Dawson* would have succeeded. As other commentators have argued, the Court's implausible conclusion of irrelevance suggests that they were applying a heightened relevance standard—a "constitutionally sensitive relevance inquiry"—to the Aryan Brotherhood evidence, because it established only the defendant's abstract beliefs.[307]

Ideological testing evidence will—like the Aryan Brotherhood evidence in *Dawson* itself—typically concern only a defendant's abstract beliefs. Even if courts doubt that *Dawson* outright prohibits the consideration of abstract beliefs under any circumstances, the opinion provides support for the argument that courts should require something more than ordinary relevance before considering ideological testing evidence at sentencing.

The matters of public concern doctrine provides an independent justification for applying a heightened relevance standard to ideological testing evidence. As discussed above, ideological testing evidence will typically qualify as speech about a matter of public concern. Allowing courts to consider ideological testing evidence so long as it is relevant to a legitimate sentencing consideration simply applies the general evidentiary standard for sentencing, contradicting the First Amendment's promise of special protection for speech on matters of public concern.[308]

How might courts apply a heightened relevance standard to considering ideological testing evidence at sentencing? Dan Coenen's work on past-speech evidence at criminal trials offers a useful framework.[309] Coenen has proposed that when the prosecution seeks to admit a defendant's past speech on a matter of public concern against them, the court should apply a specialized balancing test that weighs "the relevance of the evidence against the threatened burden

304. *Dawson*, 503 U.S. at 165.

305. Faulkner, *supra* note 266, at 42 (criticizing "the implausibility of the majority's strained assertion that the evidence in question was totally irrelevant").

306. *Id.*

307. *Id.*; *see also* Coenen, *supra* note 276, at 686 ("[T]he [*Dawson*] Court required something more than ordinary evidentiary relevance.").

308. *See* Connick v. Myers, 461 U.S. 138, 145 (1983) ("[T]he Court has frequently reaffirmed that speech on public issues occupies the 'highest rung of the hierarchy of First Amendment values,' and is entitled to special protection." (quoting NAACP v. Claiborne Hardware Co., 458 U.S. 886, 913 (1982))); Engquist v. Oregon Dep't Agric., 553 U.S. 591, 600 (2008) (describing speech on matters of public concern as falling within "the core of First Amendment protection").

309. Coenen, *supra* note 276, at 693–708.

on First Amendment rights."[310] In doing so, Coenen urges, courts should "take full account of the constitutional centrality of those rights" and "the burdens imposed on free-speech values by the use of such evidence."[311]

Ideological testing evidence will likely clear the low bar of ordinary relevance to a legitimate sentencing consideration. After all, the very premise of ideological testing is that it elicits information relevant to the defendant's recidivism risk, remorse, and acceptance of responsibility—all of which are legitimate sentencing considerations. But defendants can make a strong argument that ideological testing evidence is minimally relevant to those factors, and that its relevance is outweighed by the burden it places on First Amendment rights and values.[312]

B. *Eliminating Ideological Testing*

If my critiques of ideological testing have been persuasive, then the policy implications are straightforward: state actors should stop engaging in the ideological testing of criminal defendants.

The most likely objection to eliminating ideological testing is that doing so will lead to worse criminal legal decision-making by depriving decisionmakers of information that informs their assessments of the defendant's recidivism risk or their remorse and acceptance of responsibility. In this section, I respond to these objections and then consider what specific policy changes would be necessary to end ideological testing.

1. Responding to Likely Objections

In theory, ideological testing contributes to the accurate assessment of recidivism risk by detecting criminal thinking, a risk factor for recidivism.[313] The first likely objection to eliminating ideological testing is that doing so will lead to less accurate predictions about an individual defendant's risk of recidivism. While this objection could apply to all sites of ideological testing, risk assessments are the site of ideological testing where this objection will be the most forceful.

The defendant's views of the criminal legal system are one of many different attitude factors assessed in the risk assessment instruments I have described. But, as Beth Karp has pointed out, existing evidence suggests that including attitude factors in risk assessments does not actually improve their

310. *Id.* at 703.
311. *Id.*
312. *See supra* Section II.A.
313. *See supra* Section I.B.1.

predictive accuracy.[314] Indeed, some research suggests that *eliminating* attitude factors from risk assessment instruments would improve their predictive accuracy.[315] For example, a 2003 validation study of the LSI-R risk assessment instrument commissioned by the Pennsylvania Commission on Crime and Delinquency[316] concluded that reducing the LSI-R from fifty-four down to eight items—none of which related to the defendant's views of the criminal legal system or the other attitude factors assessed in the LSI-R—would increase its predictive accuracy.[317]

For readers concerned about maximizing the predictive accuracy of risk assessment instruments,[318] one reason to be wary of ideological testing items is that they are "soft variables," meaning that they are "subject to many interpretations."[319] In other words, different evaluators score them differently. Unlike the scoring process for variables such as the defendant's age or their number of prior adult convictions, scoring the ideological testing elements of risk assessment instruments is highly discretionary, in multiple respects.

Consider again the LSI-R as an example.[320] First, and most significantly, evaluators administering the LSI-R have broad discretion in how they interpret the defendant's response (recall the example of Reginald Thompson's statements about his treatment in the criminal legal system[321]). Second, evaluators have discretion in how they approach the interview portion of the risk assessment and which questions they ask. The LSI-R Interview and Scoring Guide suggests a list of questions that interviewers can use to assess the defendant's criminal thinking,[322] but they are merely suggestions. Finally, evaluators have broad discretion in how they weigh the defendant's response to

314. *See* Karp, *supra* note 13, at 1489–92; *see also id.* at 1484–87 (arguing that attitude and associational risk factors are not strongly correlated with recidivism). My brief discussion here highlights just a few points from Karp's extensive argument on this point.

315. *Id.* at 1491 (citing studies that reach this conclusion).

316. JAMES AUSTIN, DANA COLEMAN, JOHNETTE PEYTON & KELLY DEDEL JOHNSON, INST. ON CRIME, JUST. & CORR., GEORGE WASHINGTON UNIV., RELIABILITY AND VALIDITY STUDY OF THE LSI-R RISK ASSESSMENT INSTRUMENT, at i (2003) (cited in Karp, *supra* note 13, at 1450).

317. *Id.* at 18–22. The eight items of the 54 on the LSI-R were: (1) any prior convictions, (2) two or more prior convictions, (3) arrested under age 16, (4) prior probation/parole suspension, (5) three or more address changes last year, (6) current drug problem, (7) school/work, and (8) past mental health treatment. *Id.* at 20.

318. This is a contested goal, to say the least. *See infra* note 341 and accompanying text.

319. SLOBOGIN, *supra* note 60, at 15.

320. *See* James Austin, *How Much Risk Can We Take? The Misuse of Risk Assessment in Corrections*, FED. PROB., Sept. 2006, at 58, 60 ("[I]t is difficult to achieve a sufficient level of inter-rater reliability on many [LSI-R] items.").

321. *See supra* Section II.C.2.

322. *See supra* note 73 and accompanying text.

a particular ideological testing question relative to other factors, such as the defendant's "affect" and information from the "file review."[323]

Unsurprisingly, different evaluators come to different conclusions about the ideological testing elements of the LSI-R, such as the LSI-R item about whether a particular defendant exhibits an "[attitude] supportive of crime."[324] Where evaluators score an item inconsistently (that is, where there is low inter-rater reliability), the item will be a poor predictor of recidivism.[325]

A second objection to eliminating ideological testing is that doing so will lead to less accurate assessments of remorse and acceptance of responsibility.[326] The claim that a defendant's views of the criminal legal system tell us something about these factors is unfalsifiable: remorse and acceptance of responsibility are internal emotional states, ultimately unknowable to anyone other than the defendant.[327] But the claim is nevertheless implausible.

The assumption underlying the remorse/responsibility justification for ideological testing is that sincere remorse and acceptance of responsibility are totalizing emotional states. That is, those feelings must define the entirety of the defendant's thoughts and feelings about their crime and their treatment by the criminal legal system, leaving no room for the defendant to perceive injustice (even where it exists) or feel frustration with their treatment by criminal legal system actors (even if they were treated unfairly).

To illustrate this point, consider again the permanent crisis of public defense. Of course, a sincerely remorseful defendant is no less likely than an unremorseful defendant to be assigned an overworked and under-resourced public defender. And even if the sincerely remorseful defendant wants to plead guilty to each and every crime with which they've been charged, this does not eliminate the harms of deficient legal representation. There is still the question of what sentence they deserve—a decision that will be shaped, in large part, by the quality of the defense attorney's sentencing advocacy.[328]

323. *See supra* notes 77–78 and accompanying text; *see also* Hannah-Moffat, *supra* note 65, at 284–85.

324. *See, e.g.*, AUSTIN ET AL., *supra* note 316, at 14 (finding inter-rater reliability of sixty-three percent agreement among evaluators on the "supportive of crime" item of the LSI-R, which fell below the "minimally acceptable performance standard" of eighty percent) (cited in Karp, *supra* note 13, at 1450). As discussed in Section I.A.2, the "[attitude] supportive of crime" item on the LSI-R is one of three items that requires ideological testing. *See supra* notes 73–76 and accompanying text.

325. Austin, *supra* note 320, at 60; GRANT DUWE & MICHAEL ROCQUE, PUB. SAFETY RISK ASSESSMENT CLEARINGHOUSE, WHY INTER-RATER RELIABILITY MATTERS FOR RECIDIVISM RISK ASSESSMENT 4 (2017), https://bja.ojp.gov/sites/g/files/xyckuh186/files/media/document/pb-interrater-reliability.pdf [https://perma.cc/3YEG-JN63].

326. *See supra* Section I.B.2.

327. Young & Chimowitz, *supra* note 13, at 237–38 ("[N]o matter how much information you take in . . . you cannot read another person's heart and mind.").

328. *See* Hoag, *supra* note 208, at 1541–42.

Imagine a sentencing hearing where an overworked, under-resourced public defender fails to present even the most minimal mitigating evidence,[329] or makes a sentencing argument that relies on racist stereotypes about the defendant and their family.[330] Does sincere remorse for the crime truly require the defendant to accept such treatment without complaint or resentment—and to report, when later subjected to ideological testing, that they were treated fairly? If so, then what we mean by sincere remorse is more accurately described as self-abnegation—a willingness to accept *any* punishment, and *any* treatment, as fair and deserved.

This understanding of remorse may well be the dominant one within criminal legal settings.[331] But it is one that decisionmakers should reject. Remorse must be grounded in a truthful, honest accounting.[332] This conception of remorse allows for only partial truth-telling—about the harm the defendant caused in committing their crime, but not about the injustice they have experienced within the criminal legal system.[333]

2. Policy Recommendations

What policy changes would be necessary to end ideological testing? The answers vary depending on the site of ideological testing. Consider, first, ideological testing as part of the presentence investigation process. The statutes governing presentence reports typically do not require probation/parole officers to report on the defendant's views of the criminal legal system;[334] rather, probation and parole agencies choose to require, through their own internal policies, that officers include this information in their presentence reports.[335] Probation and parole agencies could change this requirement without legislative action.[336] Legislatures could also bar the consideration of ideological testing evidence at sentencing.[337]

329. *See, e.g.*, Alexis Hoag-Fordjour, *White Is Right: The Racial Construction of Effective Assistance of Counsel*, 98 N.Y.U. L. REV. 770, 772–73 (2023).

330. *See, e.g.*, Steven B. Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer*, 103 YALE L.J. 1835, 1843 n.51 (1994) (collecting examples of defense attorneys using racial slurs to refer to their clients at trial).

331. *See, e.g.*, Young & Chimowitz, *supra* note 13, at 246.

332. *See* DANIELLE SERED, UNTIL WE RECKON: VIOLENCE, MASS INCARCERATION, AND A ROAD TO REPAIR 14–15 (2019).

333. Terrell Carter, Rachel López & Kempis Songster, *Redeeming Justice*, 116 NW. U. L. REV. 315, 330 n.32 (2021) ("We contend that it is possible to recognize, as we profoundly do, that the criminal legal system is often racist and fundamentally flawed, while at the same time to wish that we were not shedders of anyone's blood. We must hold space for this complexity too.").

334. *See* O'Leary, *supra* note 5, at 1957–60.

335. *Id.* at 1938–39.

336. *Id.* at 1993–94.

337. *See* MODEL PENAL CODE: SENTENCING § 6B.07 (AM. L. INST., Proposed Final Draft 2017) (collecting examples of state statutes that prohibit the use of certain information at sentencing).

Risk assessment instruments that include ideological testing elements are used to inform a range of decisions within the criminal legal system, including decisions about sentencing and parole release.[338] States that want to eliminate ideological testing, while continuing to use risk assessments in these settings, will need to adopt a risk assessment instrument that doesn't include ideological testing elements or modify existing instruments to eliminate the ideological testing elements.[339] To be clear, this approach would address the specific normative concerns I have raised about the inclusion of ideological testing elements in risk assessment instruments—but it would not address the many other significant normative concerns scholars have raised about the design and use of risk assessment instruments.[340] The broader questions of what role, if any, risk assessment instruments should play in criminal legal decision-making, and what factors they should consider, are outside the scope of this Article.

In some states, statutes or parole board policies require ideological testing as part of parole hearings.[341] These requirements should be repealed. But explicit requirements that parole boards engage in ideological testing are the exception, rather than the rule. Ideological testing in parole hearings also occurs even when it is not statutorily required, because it is part of the norms for parole hearings and the evaluation of parole candidates.

Changes to the composition of parole boards may help to challenge these norms. For example, some states have considered legislation requiring that at least one member of the parole board be a formerly incarcerated person.[342] But truly eliminating ideological testing will likely also require a broader change in

338. *See supra* notes 60–64 and accompanying text.

339. *See supra* Section I.A.2.

340. *See, e.g.*, Jessica M. Eaglin, *Technologically Distorted Conceptions of Punishment*, 97 WASH. U. L. REV. 483, 527 (2019) ("The presumption that social conditions are natural is a necessary precondition to the advance of actuarial risk tools to distribute punishment. It suggests that all defendants are formally equal, but some are more likely to commit crime in the future. This is contrary to reality, and can function to 'launder in' structural racism. . . . [T]he 'objective' factors that culminate to produce 'risk' reflect the realities of social neglect and susceptibility to police surveillance."); Starr, *supra* note 62, at 803 (criticizing the inclusion of demographic and socioeconomic variables in leading risk assessment instruments); Erin Collins, *Punishing Risk*, 107 GEO. L.J. 57, 107 (2018) (describing how the use of risk assessment instruments at sentencing benefits defendants who "come from a background of relative privilege and were afforded access to educational and employment opportunities, a low-crime zip code, and perhaps even the privilege of committing low-level, quality-of-life violations that were brought to the attention of law enforcement authorities").

341. *See supra* notes 95–97 and accompanying text.

342. *See, e.g.*, Paul Hammel, *Omaha Senator Seeks More Expertise, Accountability on State Parole Board*, NEB. EXAM'R (Mar. 3, 2023), https://nebraskaexaminer.com/2023/03/02/omaha-senator-seeks-more-expertise-accountability-on-state-parole-board/ [https://perma.cc/VR6Q-9K2M] (discussing proposed legislation in Nebraska); SPECIAL COMMISSION ON STRUCTURAL RACISM IN THE MASSACHUSETTS PAROLE PROCESS, FINAL REPORT 31 (Dec. 2021), https://www.cjreformma.com/s/FINALREPORT-CommissiononStructuralRacismintheMassachusettsParoleProcess1.pdf [https://perma.cc/D4W4-AJ4F] (recommending that the Massachusetts Parole Board have at least one member who is a "formerly incarcerated individual who has completed the parole process").

the culture of criminal legal system institutions: abandoning the deeply entrenched expectation that defendants should affirm the fundamental fairness of the system that has arrested, convicted, and punished them.[343]

CONCLUSION

This Article has introduced the concept of ideological testing. Ideological testing, as I define it, occurs when state actors within the criminal legal system elicit and evaluate the defendant's views of the criminal legal system. This Article has described how ideological testing occurs as part of presentence investigations, risk assessments, and parole hearings.

Ideological testing within the criminal thinking and remorse/responsibility frameworks undermines the First Amendment value of governmental respect for dissent, denies the reality of pervasive injustice within the criminal legal system, and deepens racial injustice. For these reasons, I have called for advocates to challenge ideological testing through First Amendment litigation and for policymakers to eliminate ideological testing.

My account of ideological testing points toward several questions for future research. Beyond presentence investigations, risk assessments, and parole hearings, are there other sites where ideological testing occurs? In practice, how do defendants respond to ideological testing, and how do state actors interpret defendants' responses? How does ideological testing affect ultimate case outcomes? There is much more to learn about ideological testing, and these questions deserve further study.

343. *See, e.g.*, Hanan, *Talking Back*, *supra* note 9, at 503 (describing how defendants who speak at sentencing face pressures to speak in ways that "validate the proceedings through . . . acceptance of the judgment and punishment").