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The Use of Risk Assessment at Sentencing: Implications for Research and Policy

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THE USE OF RISK ASSESSMENT AT SENTENCING: IMPLICATIONS FOR RESEARCH AND POLICY

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EXECUTIVE SUMMARY

At-sentencing risk assessments are predications of an individual's statistically likely future criminal conduct. These assessments can be derived from a number of methodologies ranging from unstructured clinical judgment to advanced statistical and actuarial processes. Some assessments consider only correlates of criminal recidivism, while others also take into account criminogenic needs. Assessments of this nature have long been used to classify defendants for treatment and supervision within prisons and on community supervision, but they have only relatively recently begun to be used – or considered for use – during the sentencing process. This shift in application has raised substantial practical and policy challenges and questions.

There is significant variation in how at-sentencing risk assessment has been implemented to date. A small number of states have a fully implemented standardized, jurisdiction-wide risk-assessment policy. These assessments may be integrated into sentencing guidelines. Many jurisdictions have not implemented at-sentencing risk assessment because of structural opposition or disinterest, while others employ these assessments for limited purposes or cases, or on an ad hoc basis.

The response to at-sentencing risk assessments among stakeholders, including judges and sentencing commission leaders is important. As judges are the primary “consumers” of at-sentencing risk assessments, their perspective is particularly relevant to understanding the current – and potential – sentencing policy landscape. An examination of the experiences and perceptions of policy makers in jurisdictions that have – and have not – embraced at-sentencing risk assessment provides a valuable framework. At the same time, a recognition of the limited development of the case law that squarely addresses these questions is also necessary to provide a contextualization of this topic.

This white paper directly addresses these issues and provides information and examples from a range of jurisdictions, including some which have integrated at-sentencing risk assessment programs in place or are in the process of doing so. Derived from survey of judges, as well as a series of interviews with stakeholders from across the nation, opportunities for future research and planning to guide the cautious engagement with at-sentencing risk assessment are identified.

VOICES FROM THE FIELD

“[Judges] are doing their own risk assessments presumably, but it is not discussed in the courtroom. Do most judges assess risk appropriately? Who knows? ... We certainly don't have much data on that. ... [There are] huge potential dangers on either side.”

–Policy advocate

INTRODUCTION

Background

The use of risk assessment in criminal sentencing has been described as experiencing a “remarkable resurgence,”¹ and in many ways this is true. It does, however, depend on how the risk concept is defined because the informal use of risk in some fashion is long-standing and ubiquitous. As commentators have properly acknowledged, “[s]ince shortly after the Civil War, American states have relied on some inchoate notion of risk assessment in applying the criminal sanction.”² Actuarial risk forecasting has been a component of decision-making in certain aspects of the criminal justice system, including in areas such as discretionary parole release, for more than 85 years.³ A growing number of jurisdictions have considered or begun explicitly implementing actuarial risk assessment tools during the sentencing process.⁴ As such, understanding the response to – and perspective on – at-sentencing risk assessment within courts and sentencing agencies across the country is increasingly important.

Defining At-Sentencing Risk Assessment.

The use of risk assessment during the sentencing process can be a complex and difficult concept to define. The working definition of “at-sentencing risk assessment” deployed in this white paper focuses on the explicit consideration and use of second-generation and later risk assessment tools. Thus, a quick examination of the different approaches to risk assessment is warranted.

Four Generations of Risk Assessments

Risk assessment, in one form or another, has long had an influence on the exercise of discretion – across multiple decision points – in the criminal justice system.⁵ As additional sources of data and statistical tools have become available,⁶ these methods have become more accurate in their assessments and more expansive in their applications.

Often conceptualized as “generations” of tools,⁷ assessment instruments of all types are present within criminal justice today. First generation risk assessment is clinical. This approach relies only on the subjective judgment and experience of the decision-maker. Second generation risk instruments employ static risk factors (e.g., age of first offense, criminal history) that cannot change over time. Although instruments of this nature can be effective prediction tools, they provide limited information as to what can or needs to be done to reduce individual risk. Additionally, the immutable nature of many of these predictors often does not capture changes in an individual’s profile that may happen over time. Third generation risk instruments, often referred to as risk and needs instruments, have static and dynamic risk factors. Dynamic risk factors generally reflect criminogenic needs that an individual has, including their current status of education, addiction or employment, that are known to correlate with criminal recidivism. Fourth generation instruments, the most recent class of assessment tools, builds upon previous tools by integrating both risk and needs assessment into an individualized management plan.

Every jurisdiction, whether explicitly acknowledged or not, relies on the use of an at-sentencing risk assessment in almost every single criminal sentencing. The generally unexplained exercise of discretionary judicial sentencing authority is a prime example of a first-generation, clinical risk assessment. Judges rely on their own subjective experience – and a largely unknown mix of factors specific to that defendant and the nature of the crime – to set a sentence within the parameters allowed by law. The use of criminal history also serves as a commonly relied upon indicator of future dangerousness. This is, in essence, a form of second-generation risk assessment. The

introduction of these data into guidelines serves as an additional, frequently unacknowledged, example of an actuarial assessment of risk.⁸ The degree and extent of validation can vary between jurisdictions. In contrast, the recent developments have been overt and intentional in their use of risk assessment tools, many of which incorporate features of later generation instruments.

Thus, the working definition of “at-sentencing risk assessment” focuses on the explicit consideration and use of second-generation and higher risk assessment tools.

VOICES FROM THE FIELD

“I am offended by the idea to use heightened risk assessment scores to incarcerate people for longer periods of time. I don’t claim that high-risk is irrelevant. It just should not be a stand-alone factor.”

–Policy advocate

Key Concepts

Significant variation in baseline sentencing and adjudication practices between, and sometimes within, states results in a wide range of circumstances through which an assessment of a defendant’s future likely conduct can be made. Despite this, there are common characteristics:

What: An at-sentencing risk assessment is any attempt to systematically synthesize actuarial information about individual defendants with the express goal of determining the likelihood and nature of their future criminal conduct. At-sentencing risk assessments may include generally applicable attempts to identify either high-risk individuals for incapacitation and low-risk individuals for diversion away from custody,⁹ as well as specialized instruments for sexual offenders.¹⁰ Therefore, at-sentencing risk assessments can be employed to aid in several decisions, including the in/out determination to incarcerate or put a defendant on community supervision, the total length of a sentence (regardless of custody status or location), and the selection of appropriate and effective conditions of supervision in the community. The assessment of criminogenic needs, those factors associated with an individual’s need for treatment, can be assessed separately or in conjunction with risk, which focuses predominantly on recidivism in this context.¹¹ Some assessment instruments (e.g., LS/RNR) incorporate both dimensions, while others treat the two potential aspects of at-sentencing assessment as distinct.¹²

When: At-sentencing risk assessments are typically conducted in the time period between a plea or determination of guilt and the imposition of sentence, although some may be completed earlier. These assessments are considered to fall within the “front-end” of the criminal justice system.¹³ The assessments need not take place in the courtroom and may be conducted by court or correctional staff. For example, a qualifying risk assessment could include one completed as part of a presentence investigation (“PSI”),¹⁴ integrated directly into sentencing guidelines¹⁵ and generated in real time using administrative data systems. By comparison, “back-end” risk assessments can be conducted after sentencing to determine when an inmate may be ready for discretionary parole release.¹⁶ Though sentencing-related and potentially employing parallel methodologies, these later decisions focus primarily on adjusting the length of the already imposed sentence and fall outside the scope of at-sentencing assessments.

By & For Whom: Risk assessments for sentencing can be made by almost any party within the adjudication and correctional processes who has access to the data needed to make the assessment. In jurisdictions relying on instruments that employ a face-to-face interview process, this may be pre-trial, probation or correctional staff. In jurisdictions like Virginia assessments can be generated automatically as they are reliant only on court-held administrative data.

In light of the essential role of judicial discretion in most sentencing incidences, at-sentencing assessments are those that are intended, at least in part if not primarily, for use by the judicial sentencing authority. The provision of these data can be direct, where the judge is directly given the results of the screening (e.g., Virginia, Pennsylvania) or secondary, generally as the result of a process through which a probation or pre-trial officer conducts the assessment which guides the crafting of a PSI that does not include the risk assessment result itself.¹⁷ It may be the case that, in some instances such as plea bargains, results of at-sentencing assessments can be reviewed by (and may influence) prosecuting or defending attorneys as well, although these parties are not likely to be the primary audience.

How: At-sentencing risk assessments are not limited in the manner in which the results are generated. A wide range of “off the shelf” or widely available instruments have or could be used to conduct at-sentencing risk assessments.¹⁸ Qualifying assessments may be purely actuarial or a hybrid relying on structured clinical decision-making within an actuarial framework. Regardless of the methodology, the results of these assessments can be used to provide judges with additional information, which may – but need not – be used to inform the discretionary use of their judicial sentencing power. There are an increasing number of instruments that have been developed and validated specially for this purpose. Other tools, created for the assessment of risk at other junctures in the criminal justice system (e.g., pretrial release, probation supervision) have also been used to inform sentencing (e.g., COMPAS). This may be viewed as an “off-label” use of those risk assessment instruments. Although the off-label use of risk assessment instruments presents confounding challenges because the instruments were not designed or validated for this use, it still falls within the scope of at-sentencing risk assessments.

Examples: A variety of assessment instruments are or have been used to assess risk of recidivism within the last few years. Although not an exhaustive list, commonly employed or considered tools include:

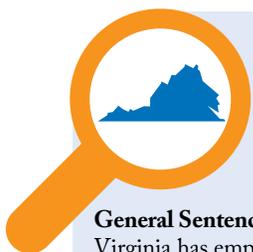
- COMPAS- Correctional Offender Management Profiling for Alternative Sanctions
- LSI-R – Level of Service Inventory - Revised
- LSI/CMI - Level of Service/Case Management Inventory
- LS/RNR - Level of Service/Risk, Need, Responsivity
- ORAS - Ohio Risk Assessment System
- Static-99 (for sex offenders/ offenses only)
- STRONG - Static Risk and Offender Needs Guide
- Wisconsin State Risk Assessment Instrument

The majority of these and other instruments were developed for the assessment of – and validated on – post-sentencing correctional populations. While some jurisdictions have employed or are considering later generation risk-needs assessments, limited fiscal and temporal resources have resulted in most at-sentencing policies relying only on assessments of risk, reserving needs or hybrid assessments for cases in which a significant criminogenic need is believed to be present.

The Ongoing Debate

There is a vigorous debate over the wisdom and propriety of at-sentencing risk assessment. These, at times heated, arguments are taking place in various fora, including legislatures, sentencing commissions, academic journals and the popular press.¹⁹ Exploring the full contours of this conversation is beyond the scope of this white paper. As context for the information gleaned from stakeholders for this project, it is nevertheless important to be aware of some of the main topics of disagreement, including these three:

- The purpose(s) of sentencing itself. Should sentencing focus more – or exclusively – on deontological or consequentialist goals? Two leading scholars have noted, risk matters “ [a]s long as a sanction is not set solely by retrospective moral considerations and some meaningful role is reserved in sanctioning for prospectively distinguishing among offenders at higher or lower risk of recidivism....”²⁰ Within the debate over risk assessments used during sentencing, those critics who advocate for an individualized, retributivist approach based only on the offense committed strongly disdain the use of at-sentencing risk assessments.²¹ On the other hand, those commentators who accept incapacitation, within legal and moral limitations, as a means to protect the general public from potential victimization, have been more willing to incorporate at-sentencing risk assessment practices.²²
- Individual decisions based on group characteristics. Even accepting the explicit sentencing use of risk in some fashion, there are critics of at-sentencing risk assessment who argue that the basic function of actuarial forecasting is inappropriate for application during sentencing. In sum, they claim that the use of group-level historical data to predict how a single individual is likely to perform in the future cannot provide results accurate enough to provide actionable information.²³ Recognizing that there is error inherent in any forecast, for example, these scholars have challenged the utility that any forecast of risk or dangerousness can provide.²⁴ This assumption has been challenged repeatedly, however, with several researchers noting that this type of actuarial assessment is neither statistically problematic nor rare; these are the decisions that underlie the operation of many probabilistic decision-making strategies in insurance, medicine and elsewhere.²⁵ Still others have noted that at-sentencing risk assessment mirrors the traditional, clinical sentencing process while also providing a higher degree of transparency and consistency.²⁶
- Data and variables relied upon. Finally, others have objected to the actuarial use of particular variables that are perceived as promoting unfair stereotypes and systematically disadvantaging certain groups, especially racial minorities. Topics prompting especially sharp legal and policy conflicts include gender, socioeconomic status and lawful attributes such as marital status, employment and education, which are also often functionally beyond the control of an individual to change quickly.²⁷ A disparate impact is argued to occur because the forecasts are based upon previous events that have been influenced by social or systematic bias and their use in risk assessment perpetuates this disadvantage.²⁸ At least one critic has prompted a lively series of exchanges by arguing against the use of criminal history on grounds of racial equity.²⁹



STATE SPOTLIGHT

State: Commonwealth of Virginia

Status of At-Sentencing Risk Assessment:
Deployed and actively maintained.

General Sentencing Structure: General Sentencing Structure: Virginia has employed a determinate sentencing system since January 1, 1995.¹ As part of its transition from an indeterminate system with discretionary parole release, Virginia established the Virginia Criminal Sentencing Commission (VCSC) and charged it with creating a set of voluntary sentencing guidelines. Virginia's guidelines consider information about both the offense(s) of conviction and the individual's criminal history. If prison incarceration is recommended, the guidelines provide a low, midpoint, and high recommendation. As a truly voluntary system, there is no appellate review of a judicial determination to follow or not to follow the guidelines. Judges must, however, provide a written explanation for any deviations from the recommended guideline range.

Context: Virginia was the first jurisdiction to systematically adopt at-sentencing risk assessment statewide. Pursuant to the legislation abolishing discretionary parole release and creating the VCSC, the Virginia legislature initially required the VCSC to explore the viability of using an at-sentencing risk assessment designed to identify "25 percent of the lowest risk, incarceration-bound, drug and property offenders for placement in alternative (non-prison) sanctions."² Given the success of this initial work identifying nonviolent cases for diversion, which the VCSC implemented statewide in 2002, the legislature, in 2004, directed the VCSC to expand the scope of its recommendation.³ A later evaluation prompted the VCSC to evaluate this population through two different at-sentencing risk assessment instruments – one for use for larceny/fraud convictions and one for drug convictions – effective July 1, 2013.

In addition to actuarial-based efforts to divert nonviolent individuals from prison, the legislature charged the VCSC with crafting an at-sentencing risk assessment tool designed to identify sex offenders "who, as a group, represent the greatest risk for committing a new offense once released back into the community," in 1999.⁴ In 2001, the VCSC incorporated its sex offender risk assessment instrument into its guidelines by increasing the high-end recommendation by either 50 percent, 100 percent or 300 percent depending on the individual's score.⁵ The low and midpoint recommendations remained the same, although no sex offender with a comparatively high risk score is recommended for probation or a short jail term.⁶ Significantly, "[i]n the application of the sex offender risk assessment, the Commission strongly encourages judges to order pre-sentence reports for all felony sex offenders" because they provide "a judge a more thorough and comprehensive picture of the offender and establishes a context for the proper consideration and role of risk assessment."⁷

Methodology: The VCSC risk assessment model for diverting nonviolent individuals was developed using a logistic regression and survival analysis analytical approaches.⁸ For initial risk tool, the Commission utilized data from a cohort of individuals sentenced in 1991 and identified eleven factors as predictive of general felony reconviction. The VCSC model was revised in 2002 and 2013 and threshold scores were adjusted in accordance with the subsequent evaluations. For the sex offender at-sentencing risk assessment instrument, the VCSC used logistic regression, survival analysis, and classification tree analysis to construct the instrument based on five years of outcome data.⁹

Factors considered: The VCSC's current approach to determining which nonviolent cases to recommend for diversion is comprised of two at-sentencing risk assessment instruments, one for larceny and fraud cases and one for drug cases. The factors considered in the larceny and fraud instruments are: age at the time of offense, gender, prior adult felony convictions, prior adult incarcerations, and whether the individual was legally restrained at the time of the offense.¹⁰ The factors considered for the drug instrument are: age at the time of the offense, gender, prior juvenile adjudication, prior adult felony convictions, prior adult incarcerations, and arrest or confinement within 12 months prior to the offense.¹¹

The factors considered for sex offenders are: age at time of offense, whether the subject has less than a 9th grade education by the date of conviction, whether the subject was regularly employed during the two years prior to the date of arrest, the nature of the individual's relationship with the victim (with different weighting depending on whether the victim was less than ten years old), location of the crime, number of prior adult felony/misdemeanor arrests for crimes against a person, prior incarcerations/commitments, and prior mental health or alcohol or drug treatment.¹²

Outcomes: For the nonviolent risk assessment instrument, the VCSC defines recidivism as an arrest within three years after release from prison which resulted in a conviction for another felony.¹³ For purposes of the sex offender risk assessment instrument, the VCSC defines recidivism as a "new arrest for a sex offense or any other crime against the person."¹⁴

Logistics: The VCSC has created a series of worksheets that guide the user through the at-sentencing risk assessment process. The presence of a relevant risk factor corresponds to a certain number of points. The total number of points is then compared to a threshold printed on the worksheet. If the individual meets the threshold – either for recommending diversion or an increased high-end sentence – that information is transferred to the main sentencing guidelines worksheet for judicial consideration.

Evaluative Results: The National Center for State Courts published an evaluation of the VCSC's efforts to use at-sentencing risk assessment to divert otherwise incarceration-bound defendants in 2002.¹⁵ This evaluation generally viewed the VCSC at-sentencing risk assessment tool as effective in predicting recidivism and providing a meaningful cost savings to the Commonwealth, although it made various recommendations to the VCSC going forward.¹⁶ The VCSC itself has evaluated this instrument at least twice.¹⁷ Based on its 2010-2012 assessment, the Commission replaced its single at-sentencing risk assessment for nonviolent diversion with two instruments, one for larceny and fraud convictions and one for drug convictions.¹⁸ This revised instrument reflected changes in the factors used; for example, employment and marital status are no longer considered.¹⁹

The VCSC evaluated its sex offender instrument internally before adopting it and concluded that "offenders who score in the low end of the scale are the least likely to recidivate, while individuals who score at the upper end of the scale are the most likely to recidivate."²⁰

Reaction: Given that Virginia was the first state to formally integrate at-sentencing risk assessment into its guidelines, it has received a significant amount of attention in both the academic literature and the popular press. Relying largely on the advisory nature of the guidelines, the Virginia courts have not been receptive to legal challenges. Judges imposed an alternative sanction on 41% of nonviolent individuals recommended for diversion in 2015.²¹ A far lower percentage of sex offenders identified as having an elevated risk for reoffending were sentenced in the extended sentencing range, but the number of affected cases was also far lower.²²

CURRENT PRACTICES IN AT-SENTENCING RISK ASSESSMENT: A TYPOLOGY OF JURISDICTIONAL STATUS

No single description can fully capture the diversity of approaches to at-sentencing risk assessment. Only a few states have pursued unified strategies and even those jurisdictions may not have consistent implementation. An unknown number of local courts¹ and individual judges employ some form of at-sentencing risk assessment. It is clear, however, that at-sentencing risk assessments are being considered, in one form or another, in many courts nationwide.² Stakeholders within these jurisdictions hold a variety of concerns and goals, which are important to understand if rational more easily studied at-sentencing risk assessment policies are to develop.

Completely synthesizing these various viewpoints concisely may not be achievable because of the different tactics employed to address the range of statistical methods relied upon and policy goals to be served within myriad state and local judicial systems. However, some general observations are nevertheless possible despite this variation, with the caveat that they reflect categorizations that may be both over and under inclusive with respect to any particular jurisdiction or courtroom. Drawn in part from an analysis of a series of sixteen semi-structured interviews conducted with judges, court staff, sentencing commission leaders and policy advocates in a variety of jurisdictions, the following taxonomy and thematic observations emerge.

Jurisdictions with Structural Opposition, Disinterest or Investigation.

Certain jurisdictions have consciously chosen not to pursue at-sentencing risk assessment either because of structural opposition or disinterest. Although it is not viable to prove the negative concerning those states or local courts which have not implemented at-sentencing risk assessment, some trends have emerged from the interviews. Some of these jurisdictions decided not to implement at-sentencing risk assessment based on a combination of concerns about accuracy (especially false positive findings of elevated risk of recidivism), fairness, cost, constitutionality (especially in a presumptive guidelines jurisdiction),³ and political viability (often related to fears of inappropriately diminishing judicial discretion).

In some places, no clear champion for at-sentencing risk assessment emerged and/or the proponents rotated out of positions of policy influence. Thus, it is reasonable to conclude that there was a lack of broad-based interest and support. Some members of the judiciary from these jurisdictions have expressed frustration at the lack of a generally accepted at-sentencing risk assessment policy, while other stakeholders see this status quo as representative of an environment that is not ready – or may never be willing – to permit the wholesale adoption of actuarial at-sentencing risk assessment.

Finally, there are several jurisdictions that are actively evaluating whether – and if so, how – to embrace an at-sentencing risk assessment tool. Though not reflected in current in statutory or regulatory authority, agencies that could, in time, be tasked with overseeing at-sentencing risk assessment policies have conducted internal analyses or various levels of intensity and transparency. According to a survey of the sentencing commissions responding to an inquiry by the National Association of Sentencing Commissions (“NASC”), twelve jurisdictions were actively working on at-sentencing risk assessment issues in some capacity in 2016.⁴ Just one year earlier, in 2015, only seven jurisdictions reported to NASC that they were actively working on risk assessment issues. Despite evidence of increased interest in this issue, stakeholders in some of

those jurisdictions do not anticipate a rapid change in sentencing practices. Investigating the use of at-sentencing risk assessment can be a long process; the development of a jurisdiction-specific statistical tool (or choosing and validating a pre-existing instrument) can take even longer. Pennsylvania, which is about to implement a statewide systemic approach to risk assessment, has been working on that project for six years. Maryland has been evaluating whether it wants to move forward with a statewide effort for more than two years. Fortunately, both of those jurisdictions have published reports chronicling the nature of their progress.⁵

Jurisdictions with Statewide Systemic Full Engagement.

Some legislatures and commentators support statewide, systemic full engagement with at-sentencing risk assessment. Full engagement in this context means the comprehensive use of dedicated actuarial risk assessment tools by the sentencing judge. This type of approach is reflected in the American Law Institute’s Model Penal Code: Sentencing project’s draft which “encourages the use of actuarial-risk-assessment instruments as a regular part of the felony sentencing process.”⁶ Section §6B.09, in part, directs state sentencing commissions to “develop actuarial instruments or processes...that will estimate the relative risks that individual offenders pose to public safety through their future criminal conduct,” and permits the commissions to incorporate them into the sentencing guidelines if reliable.⁷ The commentary to this provision articulates a policy framework which articulates “an attitude of skepticism and restraint concerning the use of high-risk predictions as a basis of elongated prison terms, while advocating the use of low-risk predictions as grounds for diverting otherwise prison-bound offenders to less onerous penalties.”⁸ This statewide, systemic full-engagement approach to at-sentencing risk assessment, despite being the focal point of much of the philosophical debate surrounding risk forecasting, remains a significant minority within the current landscape.

Legislatures have been prime drivers of change in these jurisdictions. Statutory mandates pushed both Virginia, the first state to fold at-sentencing risk assessment into its guidelines,⁹ and Pennsylvania, the next state that appears poised to do so, to act. Virginia has incorporated risk into its guidelines for almost 15 years. Virginia specifically recommends less severe sanctions for low-risk defendants through diversion from incarceration and authorizes more severe sanctions for high-risk sex offenders through increases in the maximum guidelines ranges. At this point, risk assessment appears to be uncontroversially integrated in Virginia; it has been described as “ingrained” into the system and accepted as “part of the sentencing process.” Pennsylvania currently anticipates using its at-sentencing risk assessment as a tool to identify individuals with extraordinarily high or low risk scores and who thus merit closer study through a presentence investigation (“PSI”) focused on the defendant’s individual risks and needs. The resulting PSIs, which are not routinely ordered or written with an in-depth focus on risk and needs in large part because of resources constraints, will then be used to inform the sentencing decision. Pennsylvania is about to start beta testing and explicitly recognizes the need for extensive education efforts.

Jurisdictions With Limited Use (Systemic or Not).

Some jurisdictions encourage the use of at-sentencing risk assessment, but only for limited purposes. This approach, which is often coupled with an at-sentencing needs assessment, is premised on the idea that actuarial predictions can help improve the effectiveness of noncustodial sanctions by tailoring the attendant conditions. These jurisdictions attempt to separate the punitive or other non-rehabilitative components of a sentence from the at-sentencing risk assessments by precluding the use of at-sentencing risk assessment for such things as determining the length of a prison sentence.¹⁰ Some states like Utah attempt to do this as part of a coordinated, statewide effort. Meanwhile, in other states, a comparable goal is being pursued through the decentralized development of a constellation of different approaches and risk assessment instruments chosen at the court level.

Several respondents, reflecting jurisdictions both with and without at-sentencing risk assessments in place, noted that limiting the use of the results to a particular sentencing phase or for a particular sentencing purpose can be challenging. It is difficult to ascertain how successful limited-use jurisdictions are at cabining the role of at-sentencing risk assessments to determining conditions of probation. This is, in part, because there are varying levels of separation between the sentencing judge and the at-sentencing risk assessments. In some jurisdictions, the judge sentences the defendant to probation and the probation department sets the level of supervision based on risk assessment information. In these situations, while the sentencing judges may be aware of the post-sentencing risk assessment policy, they observe neither the process nor the result of the assessment before deciding upon the major contours of the sentence. In other jurisdictions, the risk assessment information is provided to the judge before sentencing with the directive – which can be explicit and formal or informal – that it should not be used to alter the in/out decision or the length of a sentence. Even when the actual score from the actuarial risk assessment instrument is not directly provided to the sentencing judge, the probation officer who crafts the presentence report that is provided to the judge may, in some jurisdictions, know the results of the risk assessment. How, if at all, that risk assessment information influences the substance in and recommendations of the presentence report can vary significantly and can be unclear. Some presentence reports may include this at-sentencing risk assessment information with no limited-use instruction even if the probation office intended it solely as a probation case management tool. Nevertheless, in some jurisdictions, a culture of using at-sentencing risk assessment information solely for “the purpose of reducing the offender’s risk of future recidivism, not sanctioning the offender’s past conduct” may be taking hold.¹¹

Arizona is an example of a limited-use jurisdiction which now encourages statewide at-sentencing risk assessment based on an instrument initially developed in one county. The Arizona instrument is integrated into presentence investigation reports to varying degrees, and is available to judges before sentencing. Judges are explicitly informed that the instrument is not validated for use in making the in/out decision, and should only be used to help craft appropriate conditions for noncustodial sentences, where it has been

validated. In practice, the influence of this at-sentencing assessment may be more diffuse. Some believe, for example, that attorneys use this information as part of the plea bargaining process.¹² Furthermore, there is anecdotal information that some judges use the results of the actuarial assessment to justify imposing mitigated sentences, as reflected in shorter terms of incarceration or probation. Relatedly, some believe that Arizona judges do not use the actuarial risk information in the presentence report to impose more severe sentences. The actual impact remains unclear in this jurisdiction, as in many others, as it may not be possible to reliably evaluate those perceptions.

VOICES FROM THE FIELD

“When risk assessment is an accurate test for recidivism, it is obviously helpful to the court in determining whether incarceration, treatment and/or rehabilitation is indicated. When it is incorrect and/or suspected of potentially being unreliable, inappropriate punishments are likely to be meted out.”

– Circuit Court Judge, Maryland

Off-Label Use Situations.

A final approach to at-sentencing risk assessment may be characterized as “off-label” use of at-sentencing risk assessments. This situation is particularly challenging to quantify and may occur in any jurisdiction. In the medical world, “off-label” use means “using an FDA-approved drug for an unapproved use.”¹³ Off-label use is not necessarily bad, but there are additional dangers and possibilities for abuse. The FDA permits off-label use if “medically appropriate” with the caution that the “FDA has not determined that the drug is safe and effective for the unapproved use.”¹⁴ Indeed, “[i]f physicians use a product for an indication not in the approved labeling, they have the responsibility to be well informed about the product, to base its use on firm scientific rationale and on sound medical evidence, and to maintain records of the product’s use and effects.”¹⁵ One could argue that off-label use of at-sentencing risk assessments may fail a comparable test, and be unlikely to produce the desired results, in part because there is little evidence to support accuracy of the methodology in that context or for the unanticipated and unvalidated use. Furthermore, off-label use logically demands a level of knowledge on the part of the judges, lawyers, and court staff that is challenging to achieve even in the “on-label” use of risk assessment. Indeed, there is reason to be concerned that regardless of their good intentions off-label users of at-sentencing risk assessment instruments may not fully grasp the complexities involved.

Off-label use of at-sentencing risk assessments can occur in a variety of circumstances. First, limited use jurisdictions may be unable to prevent a judge from making off-label use of risk information – consciously or unconsciously – as part of an in/out or duration of incarceration decision. One could imagine this happening in Arizona because the instrument is only approved and validated for the limited purpose of setting terms of supervision, though the judge may have access to that information prior to these other sentencing decisions. Second, there is reason to believe, as articulated by several commentators, that individual courts are employing commercially available actuarial risk assessment tools on an ad hoc basis. Judges

in these circumstances may be using the instruments in an off-label way if, for example, the instrument in question was not designed to be used at sentencing or was not validated on the relevant population. For example, the probation office of one large suburban county includes the results of a nationally recognized, actuarial risk assessment tool in presentence reports provided to judges before sentencing. However, this instrument was designed for a correctional – not a sentencing – population, is presented without significant context or limiting instructions, and is not necessarily validated for that population. It is not possible to know precisely how judges in this county are using the risk assessment information, but it seems reasonable to believe that its mere inclusion in the presentence report results in some off-label use. In fact, it appears that at least one judge in this jurisdiction has commented on the presence of a high-risk score during a sentencing hearing, although it is not known how much weight – if any – the judge gave that information in crafting the nature and length of the resulting sentence.

Finally, off-label use is not confined to the level of a particular court system. Any individual judge in any particular case may engage in the off-label use of an at-sentencing risk assessment instrument. In one recent example, a judge ordered a defendant awaiting sentencing to participate in risk assessment pursuant an instrument designed for a different jurisdiction. The judge specifically allowed the defendant to decline to answer some of the questions posed by the instrument without addressing how the judge would then consider whatever results might flow from the incomplete – and thus likely invalid on its own terms – assessment.

VOICES FROM THE FIELD

“The reduction of having defendants being incarcerated for periods that could cause increased probability of recidivism is positive. However, the possibility of understating or under-addressing the length of incarceration as a reinforcement to deter criminal activity still exists.”

–District Court Judge, Louisiana

Selected Reasons Identified as Meaningful in Shaping Approaches to At-Sentencing Risk Assessment

Several themes emerged during the series of semi-structured interviews with judges, policymakers and other stakeholders. In order to more fully articulate the current state of at-sentencing risk assessment, as well as the prevailing concerns about and expectations for actuarial assessments in this context, these suppositions are summarized below.

Reasons leaning towards the use of at-sentencing risk assessment:

- There is a recognition that sentencing judges are considering risk information regardless and that it is better to bring that process out into the open.
- There is a concern that historical behavior, which often relies on first-generation clinical judgment, misunderstands the risk presented by particular defendants, resulting in less effective sentences.
- There is a desire for a “consistent framework” for considering risk.
- There is a concern that sentences without at-sentencing risk assessments are likely to be too harsh.
- There is a desire, especially by some in the defense bar, to keep more low-risk defendants out of prison.
- Diverting low-risk individuals from prison can save money and allow for the more expensive intervention of prison to be reserved for those people who present the greatest risk to public safety.
- There is a normative preference for treating defendants with different risk profiles differently to improve public safety in the short and long term.

Reasons leaning against the use of at-sentencing risk assessment:

- There is a concern, especially by some in the defense bar, of too much prosecutorial control of the risk assessment process.
- There is a concern by prosecutors that at-sentencing risk assessment will be used to undermine proportionate sentencing and divert too many defendants under the guise of being “low-risk” when that assessment may conflict with prosecutors’ clinical judgment.
- There is a lack of properly funded infrastructure to support the appropriate development and implementation of at-sentencing risk assessment. These concerns include insufficient research funding to validate and regularly update actuarial instruments on the target population, inadequate resources – especially staff resources – to conduct the assessments and prepare useful presentence reports for sentencing judges.
- Judges, lawyers and court staff lack the necessary education about at-sentencing risk assessment and what conclusions can fairly be drawn from the actuarial risk assessment instruments.
- The culture in certain legal communities is resistant to what some perceive to be an attack on judicial discretion and a loss of local control over sentencing.
- In an era of multiple reforms to the criminal justice system, including in the sentencing sphere, other efforts – some perceived to have more obvious and immediate impact – take priority.
- There is a normative preference – perhaps founded on concerns about the accuracy of predictions and/or fairness – for focusing primarily retrospectively on the offense(s) of conviction.
- A concern that actuarial assessment could exacerbate underlying biases based on racial or other characteristics persists. Although it was not articulated that the instruments themselves are intentionally biased, there was a concern that the use of data that includes or evidences such partiality within the prediction instrument may result in the exacerbation or reinforcement of current disparities.



STATE SPOTLIGHT

State: Commonwealth of Pennsylvania

Status of At-Sentencing Risk Assessment:
Under development

General Sentencing Structure: Pennsylvania employs an indeterminate sentencing system. For most incarcerative sanctions, a judge determines the minimum and maximum length of the sentence. Maximum sentences of less than two years are served in county jails; all other sentences are served in state prisons. After serving the announced minimum sentence (or less if good time credits are available), the offender is eligible for discretionary parole release. The sentencing judge is the paroling authority for county jail sentences and the state Parole Board is the paroling authority for state prison sentences. Regardless, the offender then serves the balance of the maximum term on parole supervision in the community. The Pennsylvania Commission on Sentencing (“PCS”), a legislative service agency first established in 1979, is responsible for promulgating sentencing and parole guidelines, conducting research and providing policy recommendations to the state legislature in matters relating to sentencing and parole. In particular, PCS was charged to create a system of sentencing guidelines to encourage uniformity and equity within the established statutory limits.¹ Currently in the Seventh edition, the Pennsylvania Sentencing Guidelines provide a recommended range for sentence length, a recommended location of confinement (e.g., county jail, state prison, intermediate punishment), as well as providing for aggravated ranges for serious and persistent offenders. In each case, the guideline’s recommended range is a function of the offense gravity score (“OGS”), a legislatively determined measure of the severity of the crime for which the offender is being sentenced and prior record score (“PRS”), a composite measure summarizing prior criminal record. Guideline recommendations in Pennsylvania are advisory though a judge must provide a contemporaneous justification for the departure when handing down a sentencing outside the recommended range.

Context: Beginning in 2010, the Pennsylvania legislature, recognizing that alternative sentencing programs for low risk offenders were underutilized and to protect public safety, sought to expand the relevant information available to judges at sentencing.² The resulting legislation requires that the PCS develop, test and implement a risk assessment instrument for judicial use at sentencing. Specifically, PCS was directed to (1) develop a risk assessment instrument for use specifically at sentencing, (2) which accounts for both risk of recidivism and threats to public safety and, using the resulting model, (3) provide empirical support for sentencing options, including alternative sentencing programs. PCS has conducted a series of studies to create and validate a risk assessment instrument specifically for use in Pennsylvania’s courts,³ including analyses of the impact of juvenile records⁴ and on the communication of risk information.⁵ Beta testing of the resulting model is set to begin in 2017.

Methodology: A set of eighteen unit-weighted logistic regression models, half of which address risk of harm against a person.

Factors considered: The PCS risk assessment system employs a series of models to predict risk at sentencing; there is a unique model for each OGS level under the guidelines. During preliminary analyses, PCS identified significant variation in the recidivism rates and types within each OGS group and developed a distinct model in response to these differences.⁶ Each version of the Pennsylvania model includes eight factors: (1) age, (2) number of prior arrests, (3) gender, (4) current offense type, (5) PRS, (6) prior offense type, (7) multiple current conviction and (8) number of prior juvenile adjudications.⁷

Predictive value of these factors varies by model. For example, prior arrests and age, account for between 57% and 82% of the model’s predictive ability, depending on the OGS. During the development phases, PCS examined the impact of including and removing specific demographic factors, including age and gender, from the risk assessment model. It found that removing gender resulted in the overestimation of risk for females, relative to the results produced by models that included gender. The removal of age-related variables resulted in older offenders scoring higher and younger offenders scoring lower than in models that included age. In both cases, the overall predictive accuracy of the risk forecasts were significantly reduced without these factors.⁸ Race and the county in which the offense took place were both identified as significant predictors of recidivism, but they were removed as predictors from all actualized risk assessment models and their impact is controlled for statistically.⁹ PCS continues to examine and consider the factors employed, including whether arrests or convictions should be used as measures of prior criminal activity and if domestic violence information can be reliably used for at-sentencing risk assessments.

Outcomes: Recidivism is defined as a composite of re-arrest, returns to state prison and re-incarceration on a technical violation of any type within three years.

Logistics: All at-sentencing risk assessments are made using only administrative data managed by or accessed by PCS through its proprietary web portal. The exact mechanism for and timing of, providing risk information during the sentencing process remains under consideration by the Commission. PCS has developed a unique method of providing judges with information through a bar graph showing the distribution of recidivism rates for each risk score within the OGS category and an indication if the subject individual is more (higher) or less (lower) than the typical range of risk scores for comparable individuals.¹⁰ Offenders receiving a high risk score would then be subject to a more comprehensive risk and needs assessment prior to sentencing.

Evaluative Results: PCS has conducted two internal validation studies. The most recent study involves a cohort of offenders sentenced between 2004 and 2006. The overall three-year recidivism rate among the sample was 44%. The rate varied by OGS with a low of 31% for OGS 13, which is the highest level for which state prison is recommended and a high of 56% for OGS 9, which the least serious level for which state incarceration is recommended. No peer-reviewed studies have been yet been published, though the PCS will seek an external validation once the development process is completed.

Reaction: The PCS approach to risk assessment at sentencing has garnered some attention within state and local media. Coverage has been both positive¹¹ and critical.¹² Pennsylvania’s approach has also been covered, again both supportively and critically, at the national level as representative of an actuarially and data-driven approach to sentencing.¹³

Notes: PCS model remains under development and has not yet been used during the sentencing of any criminal defendants. There are no pending legal challenges.

JUDICIAL ATTITUDES SURVEY

The potential judicial reaction to the provision of at-sentencing risk assessment information is crucial but largely unknown. Judicial perspectives matter, in part, because of the often-broad discretion that the judiciary enjoys as part of the sentencing process. While judges in some jurisdictions (e.g., Virginia) appear to have embraced the use of risk, few other jurisdictions have extensive practical experience with risk forecasting. Risk information, even when provided as a matter of policy or in guidelines, may be functionally ignored. Alternatively, these data may have a significant influence on judicial behavior. The current evidence is limited,¹ providing few clues as to how risk scores may influence sentencing patterns. Moreover, judicial attitudes and practices are likely evolving as more jurisdictions engage with at-sentencing risk assessment in some fashion.

To provide a snapshot of current attitudes and some contextualization for other observations about at-sentencing risk assessment, a nationally distributed survey was developed to allow for judges and others to articulate their perceptions on this issue. During the course of the survey, responses were obtained from 137 judges, representing 37 states, on how they and the other members of their bench consider the potential for – and problems associated with – actuarial assessment at sentencing. Just over half (59.1%) of the responding judges sit on state court benches, while the remainder were county-level judges (40.9%). Though a non-representative and small sample, these data provide some interesting insights into the issues surrounding at-sentencing risk assessment, as well as highlighting the wide range of perspectives held by judges across the country.

At-sentencing risk assessment is perceived to be relatively commonplace by this group of judges.

When asked if risk assessment of any type was employed by their jurisdiction for use during the sentencing process, 57% of respondents responded that they believed that there was at least one assessment tool in use in an organized and systematic manner (n=136). Comparing these results by the type of court, we find that there is a roughly even split between local-level judges that believe risk is employed and those that do not. At the state level, 62.5% of responding judges indicate their jurisdiction uses at-sentencing risk assessments, while 37.7% do not.

Responding judges indicated a general belief among members of the judiciary that their judgment was more accurate than actuarial at-sentencing assessments. When asked about the general perceptions regarding at-sentencing risk assessment among their colleagues, 37.2% of responding judges (n=83) indicated that clinical judgment was believed to be more accurate. Less than ten percent of responding judges indicated that actuarial tools were more accurate, while the remaining 13.9% indicated that the two methods of assessing risk were equivalent. These responses highlight the significant efforts that must be undertaken in jurisdictions that have adopted or are considering at-sentencing risk assessments, as there is a significant literature that suggests that, with regard to accuracy, statistical methods generally outperform subjective clinical judgments.² Although there are a constellation of relevant factors, accuracy is an essential element of any informed policy debate about at-sentencing risk assessment.

At-sentencing risk assessments are believed to be slightly better employed for identification of low-risk individuals by this group of judges. When asked to consider if at-sentencing assessments were better suited for the identification of potentially high- (n=91) or low-risk (n=90) individuals, respondents on average indicated slightly preferred using risk to identify non-violent individuals for diversion. Judges, however, remained split on this issue, with 20.9% indicating an agreement with the use for high-risk cases and 27.8% indicating the same, strong level of agreement for use in low-risk cases.

Responding judges believe that the impact on average sentence length is limited. 39.1% of responding judges (n=92) felt that having risk information at sentencing would not meaningfully impact sentence length, 22.8% thought that sentences would become longer and the remaining 38.1% of the judges indicated that sentences would become shorter, on average, when presented with at-sentencing risk information.

VOICES FROM THE FIELD

“[The assessments are incomplete]. We are often only provided summary information indicating an offender is at low, medium or high risk to reoffend. We frequently are not provided some of the more detailed and specific information and data needed to target sentencing conditions.”

–District Judge, Iowa

Responding judges indicated a belief that prison populations would decrease as the result of at-sentencing risk assessment.

44.5% of the responding judges (n=91) reported that at-sentencing risk assessment would likely reduce the overall prison population. Just under 20% felt that there would be no impact and only 10.2% reported a belief that populations would increase. This is largely in line with the belief that at-sentencing risk assessment is best used for the identification of lower-risk individuals who are appropriate for diversion away from incarceration.³

Broad-based opposition is limited, though present, among this group of judges. Approximately, 89% of all responding judges indicated that they thought that risk assessment should be a part of the sentencing process in some manner (n=90). A follow-up question asked respondents to indicate, in open-ended form, their beliefs about the the most promising and most problematic aspects of at-sentencing risk assessment. Responding judges reported that the potential for at-sentencing risk assessment to provide empirical consistency and encourage uniformity in sentencing, as well as provide data that may facilitate more informed decision-making. However, the counterpoints, set out in a parallel open ended question, suggest that concerns about the transparency and accuracy of statistical methodologies, as well as about the net effects of risk assessment practices on judicial discretion, public perceptions and victim engagement remain. Select responses for each item are also provided in the section below.

Responding judges indicated that at-sentencing risk assessment would increase public safety. Judges who responded to these questions (n=91) overwhelmingly indicated that they believed at-sentencing risk assessment would increase public safety (67.0%). Only 5.5% of respondents indicated that risk information would have a negative impact, while the remaining 18.2% felt that having these data would not have an appreciable impact on public safety.

Responding judges generally did not indicate a belief that at-sentencing risk assessments pose a constitutional issue. Over sixty percent of responding judges (n=90) indicated that they did not feel that the general concept of at-sentencing risk assessments pose a constitutional issue (62.2%). However, 28.9% were unsure about the constitutionality and 5.8% believed that there were significant legal issues at play. The few published opinions revolving around the use of at-sentencing risk assessments have left many constitutional questions unresolved.

Summary

The information provided by the judges who responded to this survey highlights the challenges and opportunities that are associated with at-sentencing risk assessments. Though not a sample that can be generalized to all members of the judiciary, or even a particular jurisdiction, the survey shines a spotlight on areas in which both research and policy on at-sentencing risk assessment must be developed. For example, it is clear that additional research is necessary to fully evaluate the empirical claims of accuracy provided by advocates of at-sentencing risk assessment, while a consideration of what factors can -- and normatively should -- be used in these models is also warranted. Additionally, these responses highlight the need for education within jurisdictions considering the implementation of at-sentencing risk assessment practices. If these responses are any indication, the judiciary is open to the idea of at-sentencing risk assessment, but remains cautious and uncommitted to any particular methodology or ideology.



STATE SPOTLIGHT

State: State of Utah

Status of At-Sentencing Risk Assessment:
Recently enacted.

General Sentencing Structure: Utah employs an indeterminate sentencing system in which the judge imposes a sentence after receiving a pre-sentence recommendation from Adult Probation & Parole consistent with advisory sentencing and release guidelines.¹ The advisory guidelines apply to both felony and misdemeanor offenses. However, judges in Utah can either commit a felony offender to prison or impose jail time of less than 365 days. If an offender is committed to prison, the Parole Board then obtains jurisdiction over the offender, who is subject to discretionary release by the Parole Board. The guidelines include recommended lengths of stay, which are taken into consideration by the Parole Board but remain advisory only. Since 1998, the Utah guidelines have been expressed through a two-axis matrix reflecting the nature of the offense, classified by grading, and a measure of the offender's criminal history. The Utah Sentencing Commission, which was created in 1993, currently articulates the following three primary goals of sentencing: risk management, risk reduction, and restitution.² The use of the term "risk management" in Utah is roughly equivalent to the concept of retribution elsewhere, and "includes the broader objective of holding offenders accountable and providing appropriate incapacitation and punishment for the violation of laws."³ Risk reduction, in contrast, focuses on determining the appropriate intervention. The Utah Sentencing Commission notes that "[w]here incarceration is not warranted based on the severity of the offense and the culpability of the offender, incarceration should not be viewed as a risk reduction tool. Where incarceration is warranted, programming should target criminogenic factors. The goal of risk reduction extends beyond the limited term of incarceration and seeks to reduce the likelihood of future criminal activity through appropriate programming."⁴ Restitution includes both monetary repayment and community service.⁵

Context: The role of risk assessment in sentencing has been discussed in Utah for decades.⁶ In 2015, as part of the Justice Reinvestment Initiative, the Utah legislature emphasized the role of evidence-based practices, explicitly including risk reduction as a goal of sentencing.⁷ The guidelines now highlight risk and needs assessments as determinative of the appropriate level of supervision and treatment if community supervision is ordered.⁸

Methodology: Adoption of existing commercial risk assessment instrument: Level of Service Inventory/Risk, Needs, and Responsivity instrument (LS/RNR)

Factors considered: Although it permits other validated instruments both as screening mechanisms and for full assessments, the Utah Sentencing Commission emphasizes the value of the LS/RNR, which has long been part of PSIs in Utah, has been validated in Utah, and is used by the Utah Department of Corrections.⁹ The LS/RNR helps the sentencing judge evaluate the proper conditions for a nonincarcerative sentence. It is not designed to be used in a punitive fashion, although all the information, including the at-sentencing risk assessment, is available to judges at the time of sentencing. The Sentencing Commission articulates the following eight dynamic factors that are relevant to risk reduction: anti-social behaviors, anti-social personality, anti-social cognition, anti-social peers, family, school/work, leisure/recreation, and substance abuse.¹⁰ The Sentencing Commission also emphasizes the importance of responsivity, which it describes as addressing individual "barriers to appropriate intervention that must be considered in relation to program delivery." Examples include "mental health disorders and low reading levels."¹¹

Logistics: The Sentencing Commission provides risk management forms, which address the nature of the offense and the criminal history of the offender, and risk reduction tools, which address the validated risk and needs assessments. Recommendations for place and type of sanction derived from guidelines and risk/needs information derived from the LSI/RNR are included within the pre-sentence investigation report (PSI) completed by the Department of Corrections. The sentencing judge then considers the PSI when crafting the sentence.¹²

Evaluative Results: Given that these changes are recent, no evaluations have yet taken place. No peer-reviewed studies have been published.

Reaction: The Utah approach has been the subject of differing publically expressed views during this early phase of its implementation.¹³

SELECTED PUBLISHED OPINIONS ON AT-SENTENCING RISK ASSESSMENT

Discussions about the application and appropriateness of at-sentencing risk assessments have become increasingly commonplace in policy circles and within the legal and social science literatures. Despite the increasingly prevalent recognition of the role that at-sentencing risk assessment could play in the sentencing process, few courts have directly addressed these matters. As the Supreme Court of Wisconsin has recently noted, “[i]n response to a call to reduce recidivism by employing evidence-based practices, several states have passed legislation requiring that judges be provided with risk assessments and recidivism data at sentencing.”¹ Yet the present use – let alone the future implementation – of at-sentencing risk assessment is contested. Various scholars have questioned, challenged and criticized the adoption of these instruments on a wide array of grounds, including constitutional, practical and moral.² Others emphasize that “[u]nless criminal justice system actors are made fully aware of the limits of the tools they are being asked to implement, they are likely to misuse them.”³

Despite increases in the number of jurisdictions that employ these tools in some manner, relatively few courts have explored the appropriateness of using at-sentencing risk assessments. The handful of published judicial opinions on this matter have consistently rejected challenges to at-sentencing risk assessments, although those decisions have been fairly cautious and generally disinclined to confront constitutional questions if at all possible. This may be related to the fact that risk assessments are typically just one piece of information a judge considers when exercising discretion and that defendants may have little incentive to appeal when a risk instrument encourages a judge to display leniency or is limited to crafting rehabilitative conditions of probation. Decisions from Indiana, Virginia and Wisconsin provide examples of how some courts have responded to defense challenges to the use of at-sentencing risk assessments.

Virginia

The Court of Appeals of Virginia has turned away due process and reliability objections to an upward adjustment to sentencing guidelines ranges for sex offenders because the Virginia guidelines are voluntary and themselves are only a tool to help the judge exercise discretion.⁴ In fact, given the structure of guidelines in Virginia, that Court has held “that the trial judge’s consideration of the assessment instrument as a factor in applying the discretionary sentencing guidelines provides no basis for review of [the defendant’s] sentence on appeal.”⁵

Indiana

In *Malenchik v. State*,⁶ the Supreme Court of Indiana addressed the use of at-sentencing risk assessments in a case involving a property offense committed by an individual classified as a habitual offender. That Court held “that legitimate offender assessment instruments do not replace but may inform a trial court’s sentencing determinations and that, because the trial court’s consideration of the defendant’s assessment model scores was only supplemental to other sentencing evidence that independently supported the sentence imposed, we affirm the sentence.”⁷ The Court found the risk assessment instruments in this case to be “sufficiently reliable,”⁸ and “significant sources of valuable information for judicial consideration in deciding whether to suspend all or part of a sentence, how to design a probation program for the offender, whether to assign an offender to alternative treatment facilities or programs, and other such corollary sentencing matters.”⁹ The *Malenchik* Court described the assessments as not being “in the nature of, nor do they provide evidence constituting, an aggravating or mitigating circumstance. In considering and weighing aggravating and mitigating circumstances shown by other evidence, however, trial courts are encouraged to employ evidence-based offender assessment instruments ... as supplemental considerations in crafting a penal program tailored to each individual defendant.”¹⁰

Wisconsin

The Supreme Court of Wisconsin, in *Loomis v. State*, faced the question of whether the use of a commercially produced at-sentencing risk assessment tool violated the defendant’s due process rights “either because the proprietary nature of the [instrument] prevents defendants from challenging the [instrument’s] scientific validity, or because [the instrument] takes gender into account.”¹¹ The Court rejected the due process challenge as long as the instrument was “used properly” and various “limitations and cautions” were employed.¹² The presentence investigation report in this case informed the sentencing judge that the assessment instrument was designed to “target risk factors that should be addressed during supervision” and “should not be used to determine the severity of a sentence or whether an offender is incarcerated.”¹³ The trial judge referred to the results of the risk assessment instrument in addition to other information in deciding that probation was not appropriate, and later explained that the same sentence would have been imposed even without considering the risk assessment instrument.¹⁴

VOICES FROM THE FIELD

“All sentencing, though predominantly to adult probation, does have a risk assessment but not through a formal analysis. Probation officers, the District Attorney and the judge look at presentence reports. A defined quantifiable assessment would be an improvement.”

–District Court Judge, Texas

Stressing the importance of constraints on using risk assessment tools, the *Loomis* Court held that “risk scores may not be considered as the determinative factor in deciding whether the offender can be supervised safely and effectively in the community.”¹⁵ The Court did not reject the use of the instrument outright, but established various limitations, cautions and assumptions for its permissible use.

The Court also considered the defendant’s specific claims relating to access to the underlying analysis of this proprietary instrument, the group risk nature of the information, and the use of gender. The Court seemed relatively unmoved by the fact that the defendant did not have access to the instrument’s risk algorithm in light of the other information available.¹⁶ It was concerned, however, that the instrument was not validated on a Wisconsin population and analyses from other jurisdictions raised serious questions about the reliability of the instrument.¹⁷ Thus, the Court identified four cautions a presentence investigation report must provide to trial judges about the limitations of the instrument.¹⁸

The fact that the instrument predicts group behavior and not individual behavior was deemed acceptable because judges still exercise discretion and the instrument was not the “determinative factor.”¹⁹ The Court wrote that considering the instrument “at sentencing along with other supporting factors is helpful in providing the sentencing court with as much information as possible in order to arrive at an individualized sentence.”²⁰

Concerning gender, the Court noted that the defendant did not raise an equal protection challenge and thus focused on only the due process claim.²¹ It also observed that there is a “factual basis underlying [the instrument’s] use of gender in calculating risk scores. Instead, it appears that any risk assessment tool which fails to differentiate between men and women will misclassify both genders.”²² In fact, the Court found that the instrument’s “use of gender promotes accuracy that ultimately inures to the benefit of the justice system including defendants.”²³ However, the Court – perhaps significantly – concluded that the defendant did not demonstrate that the sentencing court “actually relied on gender as a factor in imposing its sentence.”²⁴

The *Loomis* Court rebuffed the defendant’s challenges, endorsed a limited use of at-sentencing risk assessment generally and observed that “using a risk assessment tool to determine the length and severity of a sentence is a poor fit.”²⁵ Ultimately, the Supreme Court of Wisconsin held that the at-sentencing risk assessment tool “cannot be determinative,” but may be used to divert low-risk defendants otherwise headed to prison, assess “whether an offender can be supervised safely and effectively in the community,” and set conditions of community supervision and react to violations of those conditions.²⁶ The distinctive procedural posture of *Loomis* may leave several important questions for another day. For example, the Chief Justice, concurring in the result, wrote that the majority “permits a sentencing court to *consider* [the at-sentencing risk assessment instrument, but did] not conclude that a sentencing court may rely on [that instrument] for the sentence it imposes,”²⁷ and asserted that such reliance would be unconstitutional.

As a general matter, the courts have reacted favorably to the idea of at-sentencing risk assessment, but long-term practical consequences are far from clear. It will be important to pay close attention to the legal landscape as it continues to evolve. This is particularly true as courts begin to address the broader constitutional issues raised in critiques with the academic literature that have not yet been raised in court.²⁸



ACCORDING TO RESPONDING JUDGES, THE MOST POSITIVE OR PROMISING ASPECT OF RISK ASSESSMENT AT SENTENCING IS:

the introduction of some amount of objectivity; potential minimization of implicit bias.

- County Judge, Washington

that it is a better ability to gauge whether the sentence will be effective and/or the defendant's likelihood of reoffending.

- State Court Judge, Washington

[encouraging] informed decision making.

- State Court Judge, New York

that we may get more information than we would otherwise have.

- State Court Judge, Washington

tailored sentencing decisions based on scientific methods.

-State Court Judge, Louisiana

[that] it enables a holistic approach to sentencing.

- State Court Judge, Florida

[the] potential for more accurate sentencing, both for longer sentences for those at high risk to the community and shorter sentences for those at low risk to the community.

-State Court Judge, Maine

[that it] helps provide another consideration at sentencing.

-State Court Judge, Indiana

the placement of offenders in the environment most likely to provide appropriate rehabilitation while affording society protection as needed.

-State Court Judge, Montana

using standardized, validated criteria to determine which offenders are least likely to recidivate and who do not require costly incarceration.

-State Court Judge, Virginia

[that] risk assessment provides the court with another objective factor to consider when crafting the sentence in a case.

-State Court Judge, Iowa

that it can allow standardization to become a reality and reduce disparate sentencings to some extent.

-State Court Judge, Iowa

At-sentencing risk assessment provides a "standardized and consistent way to think about risk if the judge chooses to do so."

-Court staff

"[Judges] are doing their own risk assessments presumably, but it is not discussed in the courtroom. Do most judges assess risk appropriately? Who knows? ... We certainly don't have much data on that. ... [There are] huge potential dangers on either side."

--Policy advocate

X ACCORDING TO RESPONDING JUDGES, THE MOST NEGATIVE OR DETRIMENTAL ASPECT OF RISK ASSESSMENT AT SENTENCING IS:

the potential to use risk assessments as a template, rather than a guide.

- County Court Judge, Ohio

the categorization of human beings to the detriment of seeing people as individuals.

- County Court Judge, Washington

that when risk tools that have not been validated it is problematic. Overreliance on the tool is also problematic.

- County Court Judge, Washington

[that we are] sentencing based on group characteristics, not individual circumstances.

- State Court Judge, Washington

that I sometimes don't understand sometime how risk is measured.

- State Court Judge, Indiana

the undue influence in Judicial Process.

- State Court Judge, Arkansas

the increased time spent reviewing risk assessment tools and inability to verify risk assessment data.

- State Court Judge, Louisiana

the public perception of "softness" if those seen as most deserving of harsh punishment are afforded anything other than incarceration.

-State Court Judge, Montana

that the risk assessment is only as reliable as the person conducting the assessment.

- County Court Judge, Ohio

that it may cause the court to overlook unique circumstances relevant to the nature of the crime, the circumstances of the offender, or the values and priorities of the community. Statistics deal only probabilities.

- State Court Judge, Montana

it can fail to treat the subject as an individual and not always sufficiently consider the changes a youth goes through as they age.

- County Court Judge, Ohio

[causing] incorrect public perceptions [about sentencing].

- State Court Judge, Washington

[that it] labels an offender.

- State Court Judge, Tennessee

explaining to a victim what it is and why it is used.

- County Court Judge, Pennsylvania

ADVANCING AT-SENTENCING RISK ASSESSMENT RESEARCH & POLICY

The integration of at-sentencing risk assessment may offer the opportunity to move sentencing towards becoming a more effective, transparent and even just enterprise. Some view at-sentencing risk assessment as an attempt to quantify and balance the competing goals of rehabilitation and incapacitation.¹ At-sentencing risk assessment can, in some circumstances, provide judges with standardized, actuarial data on risk that are not otherwise available. In turn, these data may guide the judicial exercise of discretion by, for example, encouraging the diversion of lower-risk individuals away from incarceration and into appropriately tailored supervision, and reserving scarce prison resources for those offenders presenting an elevated threat to public safety. There are also reasonable critiques of this approach to sentencing, including concerns about the categories of data being used in at-sentencing risk assessments² and the purposes for which results should be employed.³ The confluence of at-times conflicting policy goals, driven by such desires as responsibly managing the use of prison beds, effectively allocating treatment resources and improving public safety, have caused some policy makers and judges to engage – often slowly and cautiously – with at-sentencing risk assessment.

Integrating risk assessment into sentencing is not an overnight endeavor, and there is no one-size-fits-all solution.⁴ Successfully implementing risk assessment practices in jurisdictions with the interest to do so will require significant efforts by many parties. Notably, the creation and testing of a statistical model appropriate for this complex context can be difficult, as demonstrated in the few jurisdictions with active risk assessment programs. The creation of a climate and a culture, both within the judiciary and the broader criminal justice system, which is well-informed and receptive to the principled assessment of risk and needs may also require long processes and the engagement of multiple stakeholders.

In order to move research and policy forward, several opportunities for additional inquiry have been identified:

Systematically Track and Understand Local Practices

More information about what is being tried where must be systematically gathered before the costs and benefits of at-sentencing risk can be fairly and fully assessed. It is easiest, of course, to describe and study at-sentencing risk assessment efforts that are implemented as uniform, state-level policies, although all programs will need regular monitoring of numerous metrics.⁵ Yet relatively few states have mandated uniform efforts. Rather, many smaller jurisdictional units (e.g., county courts) have begun to act as laboratories and pursue at-sentencing risk assessment.⁶ This may be a valuable development in the long run, in part because it allows different strategies to develop. However, right now there is too much happening in too many different places to draw the desired kinds of conclusions without more descriptive information.

The taxonomy of jurisdictions – Structural Opposition, Disinterest or Investigation, Full Engagement and Limited Use – suggested here, as well as the preliminary evidence of ad hoc and off-label use of at-sentencing risk assessment by courts and individual judges, highlights the need for a systematic effort to catalog and understand which at-sentencing risk assessments instruments are being used where. Ideally, a centralized body in each state, such as the Supreme Court’s administrative arm, could obtain this information annually from each jurisdictional court unit and report to a national organization for regular synthesis and dissemination.

Focus on the Judicial Perspective

As the primary “consumer” of the results of at-sentencing risk assessments, the reactions and desires of members of the judiciary should be obtained and considered as key components of any coordinated at-sentencing risk assessment policy. National work in this area should pursue at least the following two important strategies: First, more information is needed to understand judicial concerns and needs surrounding at-sentencing risk assessments. As described here, there appear to be a wide range of judicial beliefs – both accurate and imprecise – about at-sentencing risk assessment, as well as meaningful questions revolving around the appropriate use of such assessments in the courtroom. Secondly, policy makers need to better comprehend how these evolving judicial attitudes may impact sentencing decisions. Understanding how judges are likely to respond to at-sentencing risk assessment data is an essential component of successful implementation. For example, understanding the most effective strategies for communicating the results of at-sentencing risk and needs assessments (e.g., numeric scores, PSI narratives, graphs)⁷ may increase the likelihood of conquering the so-called “last mile” challenge of getting good data to be used properly.

Develop an Infrastructure for Research and Monitoring

It is widely accepted that monitoring and evaluation are vital components of any research-based public policy intervention. At-sentencing risk assessment is no exception.⁸ This is not a one-and-done exercise. It is worth emphasizing the importance of this point, which is often overlooked in practice. Instruments must be validated for the population on which they will be used. In fact, at-sentencing risk assessment instruments must be regularly examined and revalidated to ensure that they continue to be as accurate as possible. Virginia, for example, continuously monitors its risk assessment model for diverting nonviolent offenders and has made revisions as needed. Although finding the necessary resources may be challenging, especially for jurisdictions just starting down this path, the crucial value of a long-term commitment to maintaining and improving at-sentencing risk assessment systems must be embraced by all stakeholders.

Conclusion

At-sentencing risk assessment offers both positives and negatives. The potential upsides include providing increased transparency and affording the judiciary additional information with which to inform discretionary decisions leading to more appropriately and effectively tailored sentences. Downsides include the risks of misuse leading to inappropriate sentences that may create or exacerbate sentencing unfairness and inequities. The number of jurisdictions that have fully implemented at-sentencing risk assessment policies remain the minority, though an increasing number are considering this option. As this area develops, policy makers should monitor the nascent case law, as well as the relevant legal and social science literatures, to ensure that at-sentencing risk assessment policies abide by constitutional commands and scientific best practices. Doing so will facilitate the development of risk assessment structures that have the potential to move the sentencing process towards meeting the accepted goals of punishment.

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