

## The Risk Assessment Era: An Overdue Debate

SONJA B. STARR\*

Professor of Law, University of Michigan  
Visiting Professor of Law, Harvard University

It is an understatement to refer to risk assessment as a criminal justice trend. Rather, we are already in the risk assessment era. Quantitative tools for the prediction of crime risk have quickly come to pervade the administration of criminal justice in the United States. In sentencing, their use is largely new and remains fast-expanding: today at least twenty states use these tools in some or all sentencing decisions, and many more plus the federal government are considering reforms that would introduce them. The modern revision of the Model Penal Code, currently in draft form, endorses their use in sentencing.<sup>1</sup> Risk assessment instruments are also commonly used to guide policing, bail decisions, diversion programs, prison assignment and programming, probation and parole supervision, discretionary parole decisions, and reentry programs.

And yet these instruments have largely escaped both legal and public scrutiny. We have not had a national conversation about their use and the risk factors that they include. This Issue reflects the view that that conversation is overdue. Risk assessment is meant to serve an important objective: protecting the public from crime while allowing better-tailored use of criminal justice resources (including incarceration). On the other hand, almost all the risk assessment instruments now in use base a defendant's risk assessment score in part on demographic and socioeconomic factors, not just on past and present criminal conduct. Whether it is appropriate to base defendants' risk assessment on such factors is a choice that involves serious value conflicts and raises serious constitutional questions.

This past summer, Attorney General Holder weighed in, raising the issue's public profile. While endorsing the broader practice of using data to inform criminal justice policy and practice, the Attorney General expressed serious concern about the use of risk assessment instruments in sentencing. In a speech to the National Association of Criminal Defense Lawyers, he stated:

Although these measures were crafted with the best of intentions, I am concerned that they may inadvertently undermine our efforts to ensure individualized and equal justice. By basing sentencing decisions on static factors and immutable characteristics—like the defendant's education level, socioeconomic background, or neighborhood—they may exacerbate unwarranted and unjust disparities. . . . Criminal sentences must be based on the facts, the law, the actual crimes committed, the circumstances surrounding each individual case, and the defendant's history of criminal conduct. They should *not* be based on unchangeable factors that a person cannot control, or on the possibility of a future crime that has not taken place.<sup>2</sup>

The Department of Justice also recently sent a letter asking the U.S. Sentencing Commission to examine the issue.<sup>3</sup> We can expect that the Commission will do so soon.

We have come to an important juncture, in which we can expect attention to the issue to increase among judges, policymakers, and the public. The risk assessment era is already underway, but it is young, and the trends are not irreversible. Much remains undetermined about what role these instruments will play in sentencing and other parts of our system, what factors they will include, and what courts will have to say about the constitutional issues.

So I think this Issue comes at an excellent time, and I am grateful for the opportunity to serve as its guest editor. I am also grateful to all of the contributors for taking the time to share their rich, informed, and often provocative insights. I have been an outspoken critic of the use of demographic and socioeconomic factors to shape sentencing risk assessments, but I have aimed to put together an issue with a range of different perspectives, including those of several of risk assessment's leading advocates.

*Federal Sentencing Reporter*, Vol. 27, No. 4, pp. 205–206, ISSN 1053-9867, electronic ISSN 1533-8363.  
© 2015 Vera Institute of Justice. All rights reserved. Please direct requests for permission to photocopy or reproduce article content through the University of California Press's Rights and Permissions website, <http://www.ucpressjournals.com/reprintInfo.asp>. DOI: 10.1525/fsr.2015.27.4.205.



The issue begins with the views of those advocates, and then proceeds to critiques. The first contribution is from the Honorable Richard Kopf, Senior U.S. District Judge for the District of Nebraska. Judge Kopf introduces readers to the objectives and mechanics of actuarial risk assessment, focusing on the example of the federal Post-Conviction Risk Assessment tool (PCRA). Although the PCRA is currently only used for supervision decisions by the Probation Office, Judge Kopf makes a strong case for the use of similar instruments in sentencing, and specifically defends the use of demographic classifications to predict risk.

The second piece comes from former New Jersey Attorney General Anne Milgram, now Vice President of Criminal Justice at the Laura and John Arnold Foundation; Marie VanNostrand, a risk assessment expert with Luminosity, Inc.; Alex Holsinger, a professor of criminal justice at the University of Missouri–Kansas City; and Matthew Alsdorf, Director of Criminal Justice at the Arnold Foundation. They focus on the use of risk assessment in pretrial detention decisions, arguing for its importance in protecting the public while reducing unnecessary incarceration. The authors also describe new research showing that pretrial risk assessment can be done effectively even *without* demographic and socioeconomic classifications.

Third, two scholars offer a forward-looking piece exploring new methods for improving the accuracy of risk predictions. Richard Berk, a professor of statistics and criminology at the University of Pennsylvania, and Jordan Hyatt, an assistant professor of criminology and justice studies at Drexel University, are experts in machine learning methods, which have so far not been used much in the criminal justice system but could be the wave of the future. The authors provide a lucid introduction to these methods for lay readers. They also offer responses to several criticisms of the risk-assessment movement more generally.

We then turn to several critical pieces. First, I present a constitutional and policy case against the widespread practice of using demographic, socioeconomic, and family background variables in risk assessments that affect the defendant's punishment. I argue that sentencing people based on poverty and identity sends a noxious expressive message and worsens existing disparities. Moreover, a number of the classifications used by the instruments are quite clearly unconstitutional, as I show by reviewing the Supreme Court's doctrine on "statistical discrimination" and on discrimination against indigent criminal defendants. I also respond to a variety of counterarguments, including the claim that the state's interest in crime prevention allows these classifications to survive heightened scrutiny.

Second, Professor Bernard Harcourt, a criminologist and law professor at Columbia University, raises an additional equality-related concern. He focuses on the risk factors that my piece leaves alone: those related to criminal history. Professor Harcourt argues that risk factors like prior arrests are essentially "proxies for race," and that further expanding the influence of criminal history by incorporating it into risk assessments in sentencing and parole will exacerbate existing racial disparities.

Next, Professor Kelly Hannah-Moffat, a criminologist at the University of Toronto, examines practical problems with the administration and use of risk assessments, drawing from her extensive research on their implementation in Canada. Hannah-Moffat argues that actuarial risk assessments are not as objective as their advocates suggest; many of the factors are subjective, and those who carry out the assessments have varied perspectives and sometimes actively manipulate results. Moreover, judges and other decision makers vary in their willingness to use the risk assessments and in their interpretations of their results.

This Issue reprints Judge Roger Warren's statement to the U.S. Sentencing Commission about what he describes as evidence-based sentencing in state courts. We also reprint Attorney General Holder's speech and the Department's letter to the Sentencing Commission, which praises certain developments in data-driven criminal justice policy while also raising serious reservations about the use of factors outside a defendant's control to determine his sentence. These were very important steps in kick-starting the conversation about risk assessment in our criminal justice system. We should take up Attorney General Holder's call. Whatever one's views on it, the rise of actuarial risk assessment is too important a development to occur without serious debate and consideration. I hope that the varied perspectives in this issue will help to move that debate forward.

#### Notes

\* I am grateful to Doug Berman and Steven Chanenson for the opportunity to edit this issue, and to all the contributors.

<sup>1</sup> Model Penal Code: Sentencing § 6B.09 cmt. a at 53, 55 (Tentative Draft No. 2, 2011).

<sup>2</sup> U.S. Dep't of Justice, *Attorney General Eric Holder Speaks at the National Association of Criminal Defense Lawyers' 57th Annual Meeting and 13th State Criminal Justice Network Conference: Remarks as Prepared for Delivery* (release date Aug. 1, 2014), at 3.

<sup>3</sup> Jonathan J. Wroblewski, U.S. Department of Justice, Letter to the Hon. Patti B. Saris, Chair, U.S. Sentencing Commission, July 29, 2014, available at <http://www.justice.gov/criminal/foia/docs/2014annual-letter-final-072814.pdf>.