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Risk Assessment: Promises and Pitfalls

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Risk assessment pervades our daily lives. Insurance companies and anti-terrorism specialists make their livelihoods by guessing at the likelihood of catastrophic events. All players in the criminal justice system have also routinely — and informally — used risk assessment. In setting a sentence, courts consider the recidivism risk an offender presents; parole authorities attempt to ascertain how likely a potential parolee is to re-offend; presidents and governors assess the likelihood a convicted offender will commit further crimes after receiving a pardon. In the past, however, risk assessment has been an informal process, in some cases assisted through the clinical judgments of psychologists and psychiatrists. Increasingly, it is now being supplemented with statistical data and actuarial methods.

The authors in this Issue discuss currently used methodologies in assessing risk and address the application of risk assessment at different points of the criminal justice system. While some of the authors focus on sex offenders, risk assessment is much more broadly applicable, as others indicate. What are the advantages of risk assessment in sentencing and post conviction? What pitfalls does risk assessment present?

I. The Impact of Risk Assessment on Incarceration

The high per capita imprisonment rate in the United States has been well-documented. In addition, at year-end 2002 about 4.7 million offenders were under the supervision of the criminal justice system, either as probationers or after having served a prison term. As the appeal of crime as a political issue has decreased and states have faced tighter budgets, the states have increasingly attempted to develop strategies to contain, if not decrease, incarceration rates. Early release or diversion of otherwise prison-bound offenders are among the avenues pursued. On the other hand, the states have been concerned about incarcerating for longer periods the most dangerous offenders.

Risk assessment instruments have been helpful in distinguishing between those who constitute a future threat and those who will abide by the law. As James Austin notes, however, states have often thwarted the use of risk assessment through the adoption of "mandatory minimum sentencing, truth in sentencing, and the abolition of indeterminate sentencing with discretionary parole release powers."

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A. Avoiding Imprisonment

Risk assessment has become an integral component of the Virginia sentencing system, according to Richard Kern and Meredith Farrar-Owens. It has been used to select those considered low-risk offenders and divert them from prison. Diversion has already led to substantial cost savings. On the other hand, Virginia has subjected those considered the most dangerous sex offenders to longer terms. From a public safety perspective, selection of those most likely to re-offend is highly desirable. From a moral perspective, however, risk-based incarceration may be questionable, as Eric Janus and Robert Prentky write. So far, Virginia's appellate courts have nevertheless upheld a sentencing regime that imposes substantially lengthened sentences on those considered the most dangerous.

Less controversial may be the use of risk assessment in the managing of correctional populations, as supported by James Austin. To enhance public safety, high-risk offenders need to be held in the most restrictive setting and/or be offered treatment services while low-risk offenders should not be subjected to unnecessary treatment. The latter is important not solely for

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budgetary reason but also, as Austin notes, because low-risk offenders provided with unnecessary supervision or treatment are more likely to recidivate.

In their study Jeffery Ulmer and Christine Van Asten analyze the impact of Pennsylvania's restrictive intermediate punishment (RIP) on recidivism. RIP is used for offenders who would have otherwise been sent to state prison or county jail. Ulmer and Van Asten find that longer RIP sentences significantly reduced the odds of reconviction, as did non-drug/alcohol RIP sentences. At the same time, it turned out that those sentenced to state prison and then discharged to an alternative program had the lowest recidivism rate. Offenders sentenced to drug/alcohol RIP programs are more likely to reoffend, which does not imply that "drug/alcohol dependent offenders would have been better off incarcerated." While much of the study's findings remains unexplained, they "suggest that RIP do not threaten the Pennsylvania public with significantly greater recidivism risk than probation or county jail sentences." How recidivism and RIP are connected, remains an unanswered question.

B. Risk-based Preventive Incapacitation

Rather than building risk assessments into the sentencing process, they may be part of a different regime. Janus and Prentky, for example, focus on the use of risk assessment in the civil commitment of sex offenders.

As Hans-Jörg Albrecht and Bernd-Dieter Meier describe, the German sanctioning regime distinguishes between guilt- and prevention-based components of a sanction. Preventive and incapacitative considerations can play a role in the selection of the type of penalty and the precise length of a sentence while the sentence range must be proportionate to the type of crime. As Albrecht describes them, "measures of rehabilitation and security" depend "solely on the degree of dangerousness and the need for treatment exhibited by a criminal offender and the corresponding need for preventive action." Such a two-track sentencing regime allows the criminal justice system to hold dangerous offenders who are found to constitute a future threat for an additional period of time when proportionality concerns would otherwise limit their sentence exposure. Dangerous offenders may be incapacitated in a high security prison if they are "highly probable to commit further crimes which cause serious psychological or bodily harm to the victim or serious property damage." To show such likelihood, the offender must either have "a history of criminal offending" or must have committed multiple offenses.

Since professional clinical judgments alone have proven insufficiently accurate, they have increasingly been supplemented with actuarial risk assessments (ARA).

II. Effectively Assessing Risk

Even though risk assessment holds out the promise of distinguishing between low-risk and high-risk offenders, making this determination is fraught with difficulties. All of the authors discussing methods of risk assessment agree that a combination of individual and empirically based group assessments yields the most effective results. Since professional clinical judgments alone have proven insufficiently accurate, they have increasingly been supplemented with actuarial risk assessments (ARA).

A. Actuarial Risk Assessment

Philip Witt and Natalie Barone outline the five categories of risk assessment generally available, ranging from "unstructured clinical" to "actuarial." They note that in New Jersey all of these methods continue to be used for the sentencing of sex offenders, for civil commitment determinations and for community notification. Austin concludes that the most effective risk assessment method may be the adjusted actuarial method which allows for modifications of an otherwise strictly statistically driven model. In his article, Austin details how a jurisdiction should go about selecting a risk assessment instrument.

Janus and Prentky also advocate the use of actuarial risk assessment in addition to clinical risk assessment. They consider important the use of dynamic factors, such as marital status, education and employment, in risk assessment instruments. Such factors are more determinative of risk than solely static factors, such as age. The focus of their piece is an argument for the admissibility of actuarial risk assessment. While they are not persuaded that risk assessment should have a place in our criminal justice system at all, they strongly advocate the use of actuarial risk assessment because "[w]ith proper safeguards, ARA should increase the accuracy and accountability of forensic risk assessment." In their piece, Janus and Prentky develop guidelines designed to decrease inaccurate assessments and possible prejudice arising from the use of statistical methods.

B. What Level of Probability is Good Enough?

Even though risk assessment appears to provide a solution to many of the problems facing the criminal justice system while assuring public safety, it presents a host of practical and moral problems. The overarching question is whether risk assessment should play any role in the criminal justice system. After all, much of our sentencing regime assumes that there is at least a rough proportionality between the offense and the penalty. Nevertheless, as Janus and Prentky and Albrecht note, U.S. and German courts have both upheld the constitutionality of risk assessment.

Even with a general acceptance of the use of risk assessment, practical issues arise, however. What error rate on false positives is acceptable? How long should we hold individuals who pose a threat to the public? What type of threat should be required? What should be the likelihood of reoffending before an individual can be held based on a risk assessment?

The German system of security detention, for example, requires a serious threat to physical integrity or to property. It is questionable, however, whether property offenses should ever be the reason for safety-based detention.

Equally difficult is a translation of psychological into legal terminology. As Janus and Prentky point out, "judges — and we may assume jurors — have wide variability in how they understand the threshold of dangerousness that is sufficient to justify civil commitment." Even if there is agreement on the level of dangerousness to be required, judges and jurors may be inclined to decide against the offender's liberty interest even when the chance of reoffending is relatively limited.

Albrecht's assessment of the use of risk assessment in the commitment of sex offenders is scathing as he views risk assessment as the result of the public's desire for safety which politicians have exploited and manipulated. He bemoans the alliance of legislators — including some otherwise considered liberal or left-leaning — and courts which has led to increased restrictions on sex offenders, and a zero-risk attitude for dangerous offenders. About a recent German Constitutional Court decision, Albrecht writes that "[t]he political and judicial language reveals itself as mere risk rhetoric that camouflages a decision-making process that pays lip-service to risk assessment that does not accept risks." The potential denial of liberty to offenders whose release is deemed somewhat risky may present one of the most important challenges for the advocates of risk assessment. Risk assessment will fail to live up to its fiscal promises if everyone ends up serving time, and will present a civil liberties problem.

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III. Sex Offenders

Increasing harshness and a growing number of restrictions on sex offenders have characterized legislation in Europe and North America during the 1990's. Legislatures, often with the assistance of sentencing commissions, have increased sentences; sex offender post-release supervision has been tightened; and novel forms of control, such as sex offender notification and registration laws, have been implemented. As Albrecht notes with respect to Germany, "[t]he formal conditions for incapacitative sentences [] were softened."

Often politicians and the media portray all sex offenders as high risk criminals. The mantra of "nothing works" continues to hold sway with respect to sex offenders. However, empirical research indicates that not all sex offenders pose a continuing threat to the public. Virginia's sex offender guidelines, as Kern and Farrar-Owens discuss, group sex offenders into different risk categories. Based on their recidivism risk, their sentences have been increased.

A study conducted in New Jersey shows that intensive sex offender treatment can decrease general and sex offense specific recidivism rates. Nevertheless, as Witt and Barone indicate, it has become difficult for sex offenders in New Jersey to be paroled. In addition, sex offenders face the prospect of being civilly committed, the likelihood of which has increased substantially.

Witt and Barone are concerned that only little research exists in New Jersey to determine whether sex offender risk assessment achieves its desired goal — greater public safety. Does the knowledge that a sex offender lives in the community contribute to his stigmatization and recidivism or does it allow the public to protect itself? While risk-based community notification may be more effective than notification of all sex offenders, the effect of even such limited notification remains questionable.

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Celia Rumann and Jon Sands focus on a particular sub-group of sex offenders, Native Americans. Recent changes to the sex offender provisions of the federal guidelines, mandated by the PROTECT Act, "will disproportionately affect Native Americans," a consequence likely unintended by Congress. To decrease recidivism and help such offender's reintegration efforts,

Rumann and Sands suggest "expanding Native American participation in a treatment program while in custody. . . ." The Native American Advisory Group recommended a sentence reduction in exchange for completion of such a program which accords with current information about successful sex offender treatment.

Hans-Jörg Albrecht outlines the German sanctioning regime for sex offenders. He describes increases in penalty ranges throughout the 1990's. His discussion focuses on so-called incapacitative sentences which are imposed together with the guilt-based component of the sentence but are based on preventive principles. The German legislature passed legislation lifting the ten-year limit on the first imposition of an incapacitative sentence, which the Constitutional Court recently upheld. Even though the Constitutional Court struck down the attempt of some German states to impose preventive detention on offenders whose dangerousness became obvious during incarceration but after the judgment had become final, in July 2004 the German federal legislature adopted the measure.

Albrecht admits that the number of offenders held under measures of rehabilitation and security remains very small as compared to the total number of offenders. However, it has increased during the 1990's, and it is many times the number of individuals annually sentenced to life imprisonment. This disparity raises troubling questions about the relationship between retributive sanctioning and the role public safety should play in sentencing. The increasing role of risk sets the two on a collision course, reinvigorating the traditional purposes debate.

Merging the expertise of U.S. probation officers in individual risk assessment and the Commission's statistical prowess could make the federal system a role model for risk-based sentencing.

IV. The Future of Risk Assessment

The authors in this Issue all agree that risk assessment will continue to play an important role in sentencing and related areas in the future. Kern and Farrar-Owens describe the Virginia General Assembly's request to the Sentencing Commission to develop risk-based revocation guidelines for so-called "technical violations" of parolees and probationers.

Even the U.S. Sentencing Commission staff's recent work on criminal history indicates interest in risk assessment. After all, prior record foreshadows the risk of future offending. However, the upheaval caused by the Supreme Court's *Blakely* decision in the federal sentencing system may be the beginning of a much greater opportunity.[1] One way in which sentencing may be restructured is through the more intensive and empirically based used of risk assessment.

Jack Griggs, a Supervising U.S. Probation Officer, highlights the role the presentence report (PSR) can play in such risk assessment. He criticizes the current use of PSRs in the federal sentencing process as insufficiently effective in determining how to manage risk. Instead he suggests in-depth assessments of individual offender needs and risks through probation officers. Griggs strongly believes that probation officers have the skill to assess the risk an offender's personal qualities pose but that they are currently restricted by the need "to provide sentencing courts with information that supports guideline determinations." Therefore, he hopes for greater "commitment, resources and time" to help probation officers in developing presentence reports that allow inmates released into the community to avoid recidivating.

While Griggs does not foresee a role for the Sentencing Commission in his proposal, the Commission may be able to assist with actuarial findings. Merging the expertise of U.S. probation officers in individual risk assessment and the Commission's statistical prowess could make the federal system a role model for risk-based sentencing.

The application of risk-based analysis to collateral sanctions may help in the reintegration of offenders while preserving public safety.

Further avenues for risk assessment remain. Collateral sanctions could be more clearly risk based so as to help with the reintegration of offenders while preserving public safety. Some impede the reintegration; others are clearly risk-based, albeit often overbroad. The application of risk-based analysis to collateral sanctions may help in the reintegration of offenders while preserving public safety.

V. Conclusion

The future of risk-based methods appears bright. Sentencing, post-conviction supervision, civil commitment, sex offender notification and registration, parole and probation revocation and collateral sanctions may all benefit from risk analysis. However, we should not forget the consequences of labeling an offender a future threat, especially since our methodologies remain fallible.

Note

[1] Blakely v. Washington, 2004 U.S. Lexis 4573, 72 U.S.L.W. 4546 (June 24, 2004).