Policy Essay  A View from the Field: Practitioners' Response to
Actuarial Sentencing: An “Unsettled” Proposition

Mark H. Bergstrom, Executive Director
Pennsylvania Commission on Sentencing

Richard P. Kern, Ph.D., Director
Virginia Criminal Sentencing Commission

In her paper, Professor Hannah-Moffat raises a number of important issues regarding the use of risk assessment at sentencing, including policy considerations related to theories of punishment as well as practical concerns about systematic expansion of disparity and discrimination as a consequence of implementation. She makes a compelling argument for the need for expanded research to justify the use of actuarial risk as part of the sentencing process and to test and improve the accuracy and validity of risk assessment instruments. In this policy essay, we respond by describing the experiences in two jurisdictions, Virginia and Pennsylvania, and the practical realities of developing and implementing actuarial sentencing policies within a political environment.

The Commonwealth of Virginia has a determinate sentencing system, in which advisory sentencing guidelines structure decision-making by criminal courts. In 1997, in response to a statutory mandate, the Virginia Criminal Sentencing Commission incorporated into its sentencing guidelines an empirically-based risk assessment instrument, intended to divert 25% of the lowest risk, prison-bound drug and property offenders from state incarceration (Kern and Farrar-Owens, 2004). In 2001, again as a result of a legislative mandate, the Commission adopted and incorporated into its sentencing guidelines a sex offender risk assessment instrument, intended "... to identify those offenders who, as a group, represent the greatest risk for committing a new offense once released back into the community"(Kern and Farrar-Owens, 2004).

The Commonwealth of Pennsylvania has an indeterminate sentencing system, in which advisory sentencing guidelines adopted by the Pennsylvania Commission on Sentencing structure decision-making by criminal courts, and an internally-developed parole decisional instrument established by the Pennsylvania Board of Probation and Parole guides parole determinations. This latter instrument incorporates the use of LSI-R and Static-99 scores, as well as weighted and non-weighted risk factors. In 2008, as part of a comprehensive sentencing and corrections legislative reform package,¹ the Commission was required to develop and adopt parole guidelines, and was empowered to make other changes to enhance public safety and to promote better coordination of sentencing and parole policies and decisions. In the development of coordinated sentencing and parole guidelines, certain static factors presently considered during the parole phase may be shifted to the sentencing phase. It is anticipated that legislation² will be enacted in late

---

¹ Acts 81-84 of 2008
² SB1161
2010 to mandate the Commission to develop a risk assessment instrument for use at sentencing, and to incorporate risk into the sentencing guidelines.

Whether risk should be "... adopted as an organizing principle for sentencing" is an argument and area of research that we gladly leave to the academy; from a practitioner's point of view, risk has and will continue to be used by courts at sentencing, whether formally or informally. It would be difficult to argue that courts do not presently consider risk factors such as the age of the offender, criminal record, prior incarceration or social stability (i.e., educational record and employment history) when determining an appropriate and individualized sentence. And in indeterminate sentencing systems, these and other risk factors are certainly being considered in deciding whether and under what conditions to parole an offender. So, how formal should the consideration of risk be, and should crime prevention replace just deserts as the primary purpose of sentencing and sentencing guidelines?

The reality is that formal risk is increasingly being used by jurisdictions at sentencing, encouraged by such prominent organizations as the National Center for State Courts and the Pew Center on the States' Public Safety Performance Project. Important work has been done reviewing Virginia's ground-breaking efforts in this area (Ostrom, et al, 2002), and additional study is needed to promote best practices around the use of risk at sentencing. The research areas identified by Professor Hannah-Moffat... methodological structure and logic of risk, effect of actuarial risk models on individuals and groups of criminal defendants, legal relevance and epistemological basis of risk, and the organizational and policy impact of risk-needs technologies... are all important aspects of future investigations.

Many advocating the formal consideration of risk at sentencing are not suggesting the elimination of other purposes such as just deserts. However, the consideration of risk does represent a shift in the purposes of sentencing, moving from a backward-looking retributive approach with a focus on uniformity, proportionality and reduction of unwarranted disparity to a forward looking utilitarian approach with a focus on public safety and crime reduction. This is sometimes characterized as a shift from punishment for what an offender has done to punishment for what an offender might do.

When the first sentencing commissions were established in the later 1970's, just deserts was the guiding principle... offense gravity assignments based on harm and blameworthiness, limited consideration of criminal history, and assignment of penalties for offense groups based on proportionality. Over time, prior convictions took on a more prominent and arguably more utilitarian purpose, led by 'three strikes' legislation but included in sentencing guidelines, to promote incapacitation of serious and violent repeat offenders. More recently, rehabilitation has gained renewed prominence in the form of dispositional alternatives for the treatment of offenders diagnosed with drug dependency or mental illness, either through diversion to community-based programs and services and/or through participation in problem solving courts.

---

Fraser (2005) has observed that most sentencing guidelines fit a modified just deserts model, where modest consideration of factors predictive of future criminal conduct are bounded by consideration of blameworthiness and proportionality. The question is whether the current political environment, which prioritizes crime reduction and cost reductions, has prompted a shift to a modified predictive model (von Hirsch, 1983), with greater focus on prevention of recidivism, diminished concern about proportionality, and with desert constraints providing upper and lower bounds? Even if we have not reached this conceptual tipping point, prediction is a more prominent aspect of sentencing, whether formal or informal, and whether used to inform (advisory) or to direct (presumptive) criminal courts; it is being used to identify high risk serious and violent offenders for incapacitation, and lower risk and less serious offenders for diversion.

Turning to the discussion of implementation, Professor Hannah-Moffat raised many serious concerns, which we have collected into four broad categories: (1) accuracy and transparency of information; (2) development and validation of a risk assessment instrument; (3) impact on dispositions and disparity; and (4) incorporation of risk into sentencing guidelines.

(1) Accuracy and Transparency of Information

In her paper, Professor Hannah-Moffat states that “Sentencing reports and statements about an offender’s risk level remain with the offender for the entirety of his or her sentence, affecting a range of correctional decisions, from levels of surveillance and intervention to eventual parole release,” and further that “most research on actuarial risk is highly compartmentalized; limited meaningful dialogue takes place between risk theorists, legal scholars, sentencing and government researchers, policy-makers, and practitioners.”

In Virginia, there is no parole so the risk assessment plays no such role. Since those felons not receiving a positive risk assessment generally receive a prison term of two years or less, most offenders spend their incarceration period in the local jail and are treated no differently vis-à-vis surveillance and security level than any other inmate. In Pennsylvania, factors known to be predictive of future danger to society will and should be viewed by the paroling authorities as they deliberate release and reentry decisions.

The judge appropriately examines static factors in a risk assessment scheme, whereas the paroling authority considers a broader range of dynamic factors, such as institutional behavior and programming as well as criminogenic needs to be addressed as part of a structured reentry. Certain risk factors such as an offender’s age at first felony arrest and juvenile and adult criminal record, as well as sustained periods of law abiding behavior (i.e., redemption)(Blumstein & Nakamura, 2009; Kurlychek & Bushway, 2009), inform risk and should play a role in decisions regarding the disposition and time served by the offender; however, the relevance and weight of these factors may vary depending on the
stage of the criminal justice system, and reliance on a single instrument or a dated risk assessment score is likely misplaced.

In Virginia, the long process of developing a risk assessment tool (pilot testing, independent evaluation, and re-validation study) was guided by a Sentencing Commission composed of judges, governor’s appointments, legislators, corrections officials, prosecutors, public defenders, defense attorneys, criminologists and representatives of victim’s organizations. In short, while assertion of compartmentalization may apply to other applications of risk assessment tools, it does not in this instance or in any instance wherein a risk assessment tool is developed and overseen by a sentencing commission comprised of representatives throughout all aspects of the criminal justice system.

The points made by Professor Hannah-Moffat on the lack of neutrality and transparency in the scoring of instruments such as the LSI-R are well made but do not apply to all risk assessments tools, and not to the instrument developed in Virginia. While it may be true that some risk assessment tools utilize data via “collateral contacts” without the benefit of legal protections, cross-examination or validation, in Virginia, all risk assessments are presented to the judge in open court; the defense counsel and prosecutor have already had the instrument for at least a week and, in open court, can challenge any of the risk factor scoring done by the probation officer. So, while we join in criticizing systems that forbid this explicit review process, we find it unlikely and disconcerting that any state would adopt the use of risk assessment tool for use by a judge at sentencing and not provide for the offender’s legal protections. Risk tools need to focus on factors that can be reliably and validly captured so as to eliminate the possibility of shifting discretion in the sentencing decision to those preparing the forms.

Virginia was the first state to integrate the explicit use of a risk assessment tool into the sentencing process, with the cornerstone of implementation a comprehensive training curriculum on the appropriate use of risk tools. All major players in this process (defense lawyers, prosecutors, judges, probation officers) must be thoroughly trained on the genesis of the instrument, the study and its findings, and the risk instrument and how all of its factors are to be correctly scored. This necessarily includes coverage of the limits and strengths of actuarial risk tools so that they can correctly interpret and apply their findings. There is ample evidence that judges in Virginia rely substantially on the risk tools; the findings are conclusive in that the risk tools do alter sentencing practices across the entire state and do alter the flow of offenders into prison, jail and community based sanctions.

(2) Development and validation of a risk assessment instrument

Professor Hannah-Moffat discusses second-generation risk assessments that use static historic factors that produce a “fixed” prediction of risk based on accumulated historic and immutable factors. As she notes, second generation actuarial risk assessments are "better predictors of recidivism than clinical judgments," and although she expresses concern about the "fixed" prediction of risk, judges are making their sentencing decisions
at a fixed point in time, relying on contemporary risk factors. In indeterminate systems, a shift in the consideration of these static factors from parole to sentencing reduces both concerns about the use of fixed prediction of risk and the potential for "resentencing" the offender during parole review.

Although there is concern that “actuarial risk de-individualizes the assessment of risk by categorizing offenders on the basis of unalterable group characteristics,” this is also true of risk assessments as practiced in the field of medicine, yet the treatment regimes guided by such individual comparison with an aggregate group lead to treatment regimes that result in better overall patient outcomes than if such information were ignored.

The use of a second generation instrument at sentencing formalizes the consideration of static risk, but does not eliminate consideration of an offender's needs or of protective factors; the sentencing court is free to consider factors such as offender characteristics and circumstances in determining an individualized sentence. In fact, Baird (2009) argues that risk and needs should not be combined as a composite measure.

Professor Hannah-Moffat correctly notes that our present risk knowledge does “not allow us to provide an absolute statement about an offender’s likelihood of recidivism or the timing of potential recidivism. Nor can risk scores tell us with certainty how an offender will recidivate, whether violently, sexually, or simply violation of a condition.” Notwithstanding the promising work by Berk and others (2009) on forecasting violent reoffending, this uncertainty is why it is important to qualify the risk assessment with a caveat to the effect that characteristics of the offender and the circumstances of the offense have correlated with a significant risk of lower recidivism rates among all similarly situated offenders. In Virginia, this statement is included in the risk assessments and addresses the fact that no risk tool can state with absolute certainty that a particular felon will not recidivate.

A methodologically sound risk assessment research study will typically employ multiple measures of offender failure. In Virginia, the commission used seven different measures of recidivism and analyzed the data using all of the different measures of the dependent variable. The final decision on the dependent variable measure was left to the policy makers – the sentencing commission members. Contrary to suggestions that courts accept "weak standard of scientific evidence," the detailed data analysis of Virginia felons clearly demonstrates a high degree of statistically significant correlation between risk scores and the likelihood of criminal recidivism. Regarding the predictive ability of risk instruments that are based on studies of offenders whom have been imprisoned, the Virginia guidelines have specifically targeted this imprisoned population for diversion, so it is appropriate to identify characteristics of offenders who have been imprisoned who, perhaps, did not pose a continuing danger to public safety.

Professor Hannah-Moffat concedes that risk instruments, regardless of their flaws, foster greater professional confidence in the system because they appear objective, rational, and empirical, and that they may facilitate a reduction in prison populations. But, she posits that the uncritical acceptance of risk tools can jeopardize due process, produce disparities, undercut proportionality, escalate the harshness of sanctions, and punish some for crimes
that they have not committed. She remains concerned about how risk tools will impact already disadvantaged and treatment-resistant offenders.

This is especially true in the area of “social context – gender, race, and economic and socio-structural factors,” and the potential to over-classify women or ignore the differences between men and women in predicting the likelihood of recidivism. She makes the case that factors such as race, gender, substance abuse, marital history and employment history are experienced differently across our trans-cultural society, and that certain marginalized groups will score higher on risk tools due to their exposure to discrimination and inequality and not because of their higher likelihood of being a recidivist. She argues that for risk assessment tools to be properly normalized for bias, factors such as bias in initial arrests, crime for which no arrest was made and racial targeting must be accounted for.

These are important observations, and appropriate care is required in the development of risk assessment instruments to avoid systemic discrimination. Of course, efforts to address these concerns must be tempered by the realities of the criminal justice system. The immediate goal of risk assessment at sentencing is an incremental improvement over the status quo; the perfect cannot be the enemy of the good. It is the influence of individual factors that provide for individualized rather than statistical justice. In Virginia, the commission closely examined the influence of gender on recidivism patterns and took this factor into account. They found that women, all other things being equal, are at lower risk of recidivism. To the degree reliable data are available to normalize risk assessment tools for social context and socio-structural factors, efforts should be undertaken to do so. However, the types of variables mentioned herein are very fugitive and unlikely to be gathered, making the argument for this research more theoretical than pragmatic at this time.

(3) Impact on Dispositions and Disparity

Professor Hannah-Moffat argues that the incorporation of risk into sentencing prioritizes forward looking theories of punishment to the detriment of concerns about disparity and discrimination. There must be a balance, but if there is a concern about slowing down the pace of incarceration without a concurrent increase in the crime rate, then it is hard to find a better tool to guide such a desired result than one grounded in empirical research on similarly situated felons. While it may be true that offenders with very similar criminal histories convicted of the same offense under sentencing guidelines may get different sanctions under the added reference to risk assessment, that is because the offenders are not equally situated with regard to their likelihood of being a recidivist. The paradox here is that some of the elements that are very predictive of the likelihood of recidivism (age, gender, employment history, etc) are, in the criminological literature, cited as sources of unwarranted disparity but, at the same time in the criminological literature, consistently cited as significant factors in their ability to predict recidivism. The approach implemented in Virginia, and under development in Pennsylvania, relies on a risk score to help establish who can be safely diverted out of the prison system.
determination of what level of risk is acceptable is a policy decision, and should be made through a public process. In Virginia, the legislature passed language whereby 25% of non-violent felons who were otherwise prison bound would be targeted for an alternative sanction. The 25% figure was largely driven by political and budgetary concerns. When the prison population increased and additional beds were required, the commission was asked to provide further analysis to support a decision to safely raise the threshold. The determination of risk levels is a dynamic process and the cut-points will continue to evolve over time.

As suggested previously, a shift in focus to prevention of recidivism may occur at some cost to proportionality and uniformity. This is particularly the case if sentence uniformity is defined as equally situated offenders convicted of the same crime(s) receiving very similar sanctions. Under risk assessment, some portion of otherwise prison bound felons will be recommended for an alternative sanction, and factors such as age, education, gender and employment history will have a role in those recommendations. Accordingly, there will be a situation wherein offenders convicted of the same crime with a similar criminal history may receive dissimilar sanctions. They receive dissimilar sanctions because they are not equally situated with regard to those factors that are highly predictive of the relative risk to become a recidivist. Extending this to other areas, an examination of the racial composition of felons across all risk scores in Virginia reveals a disproportionate percentage of blacks as compared to their representation in the entire state population.

(4) Incorporation of Risk into Sentencing Guidelines

Professor Hannah-Moffat has described the incorporation of risk tools into sentencing guidelines as "... part of an established effort to curtail judicial discretion and regulate sentencing" started in the later 1970's. While there may be little argument that the sentencing reforms of the 1980's and 1990's introduced sentencing structures intended to curtail unfettered judicial discretion, advisory sentencing guidelines arguably posed the weakest threat to judges' sentencing authority. Advisory guidelines, such as those in Virginia and Pennsylvania, inform rather than mandate decisions by the sentencing courts; judges are not required to adhere to the guidelines. In these jurisdictions, the addition of an empirically based risk assessment tool for use at sentencing, even one explicitly incorporated into the sentencing guidelines, does not change the advisory nature of the recommendations.

By integrating a risk tool within a guideline structure, one can address the problem of “net widening” whereby low risk offenders unlikely to receive a prison sentence are funneled into the limited alternative sanction spaces. To avoid this net-widening effect, one can strongly argue that risk assessment tools should be integrated into a sentencing guidelines scheme such that the tool is only applied to those offenders who are first being recommended for incarceration. In states that operate without a sentencing guidelines structure, it would be difficult to successfully integrate a risk assessment tool that would not result in net widening.
In Virginia, the nonviolent risk assessment tool is focused on a specific population of felons while the overarching primary goal of the entire sentencing scheme is selective incapacitation. One of the primary motivations behind the political adoption of the risk assessment tool for judges was to free up more prison bed space to house violent offenders longer. Most of these nonviolent offenders are at very low risk of committing new felonies and many are best left with minimal supervision, otherwise a great share of this offender population will return as violators for relatively minor technical violations.

In closing, risk assessments should always be seen as a tool residing in a larger tool box of information that a judge can refer to when pondering the sentencing decisions. A risk assessment should provide concise and reliable information to judges to help them decide which subset of prison bound felons could be safely sanctioned in a less expensive and intrusive manner. The larger tool box should also include a presentence investigation report, the police report, a victim-impact statement, and sentencing guidelines. In sentencing, judges do not always have access to all of this information for every case, particularly in instances where a plea agreement involving a sentence has been negotiated by the prosecutor and defense attorney. In situations such as this, the sentencing decision is less informed and, it could be argued, more likely to be an impediment to enhancing public safety.
References


