

A Lawyer's Take on Current Issues In Violence and Re-Offense Risk Assessments 2018-

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Areas of concern to defense counsel

- As explained by Singh et al, Eds, in *Recidivism Risk/Needs Assessment Tools* (2018), there are evolving approaches to risk of re-offense and risk of violence assessments involving a wide array of sentencing related, prison related, release/parole related tools
- A wider range of persons (and disciplines) are becoming involved in risk assessment—raising questions about the implications of the adequacy of training to conduct assessments, and interpret results
- Courts have varying views about the utility of risk assessments, and of risk assessment tools
- Existing research and current literature confirms that the operational utility of risk assessments continues to depend on many different variables, including on clear and useful statements about their limitations

Increasingly use of risk assessment is discussed:

- When pretrial release is being considered
- In conjunction with competence to stand trial assessments, and where jail placement issues arise during the pendency of a case
- In the formulation of sentencing recommendations
- In the classification, and housing, decision-making in prisons
- When release to the community is being considered

Covering—risk assessment issues of concern to defense counsel in criminal cases 2018-

- WELL PUBLICIZED CHALLENGES TO USE OF 'COMPAS' TOOLS AT SENTENCING, *STATE v. LOOMIS*, HAS RESONATED AMONG CRIMINAL DEFENSE COUNSEL [Correctional Offender Management Profiling for Alternative Sanctions]
- CHALLENGES TO ASSESSMENT APPROACHES HAVE OCCURRED BASED ON CONTENTIONS THAT RACE AND/OR GENDER BASED DISCRIMINATION IS OCCURRING BECAUSE OF THE RISK ASSESSMENT APPROACHES CHOSEN
- CHALLENGES TO SENTENCING AND PRISON PLACEMENT ASSESSMENTS ARE OCCURRING BASED ON THE INADEQUACY OF SUPPORT FOR DECISIONS MADE ON THE BASIS OF THE USE OF CERTAIN FORMS OF ACTUARIAL ASSESSMENTS

STATE v. LOOMIS 371 Wis.2d 235, 881 N.W. 749 (Wis., 2016)

- "... defendants have the right to be sentenced based on accurate information. [citation omitted]." Id. at 260
- May of 2016, the investigative journalism group Pro Publica published an assessment of the COMPAS algorithm that concluded, based on a review of a COMPAS database from Florida, that blacks "were twice as likely as whites to be misclassified as a higher risk of violent recidivism . . ."

WHAT MIGHT YOU BE ASKED TO ADDRESS ?

1. Your knowledge of the major issues affecting the development and validation of the risk assessment tools that you are purporting to rely on or reference
2. Your understanding and explanation of the predictive validity of your assessment approach
3. Your awareness of the literature that addresses the need for mental health and other professionals to acknowledge the limitations of the endeavor of risk assessment particularly in predicting future behavior (as distinguished from addressing support needs and release plans given that the individual can be defined in to be placed in a given risk category)
4. Your knowledge of literature demonstrating general acceptance of your approach; the existence of a published methodology that has been subjected to a validation process; your knowledge of error rates and cautionary information; your documentation of use of a valid and reliable methodology

What might you be asked to address ?

- What evidence can you point to demonstrating that your methodology categorizes risk appropriately ?
- To what degree does your methodology allow an understanding of the extent to which you can discuss the risk assessment in relation to varying populations—also, the degree to which you rely on tools that may not address the specifics, including the population characteristics, or the resources, in a particular community (to which an individual might be released)
- Can you address the *Daubert* or *Sargon* factors, and the legal reliability issues ?

The Aftermath: *Baxstrom v. Herold*, 383 U.S. 107 (1966)

- The Supreme Court rules that it is a violation of equal protection rights for New York to require certain inmates to be transferred to the State Hospital on expiration of their prison term on the basis of a classification of 'dangerously mentally ill' without a judicial determination
- 967 inmates release to community; 20% subsequently reportedly violent in a hospital or in community. Of a cadre of 176 who were discharged to the community, 1% returned to hospital within one year
- Coccozza, Steadman, Monahan—violence predictions open to question

Jurek v. Texas 428 U.S. 262, 269, 275-76 (1976)

The Court finds that while inartfully drafted, the 1975 Texas statute focuses on heartland issues: a convicted person's future conduct is a legitimate sentencing factor: "...prediction of future criminal conduct" is a sufficiently "essential element" of routine decision making in criminal justice to be a factor in death penalty decisions. The Court notes that from decisions on bail through sentencing decisions, courts routinely engage in risk assessment.

Barefoot v. Estelle 463 U.S. 880 (1983)

Neither prosecution psychiatrist had examined Barefoot. Regardless-- the opinion of the two State experts was that he was a sociopath and likely to commit violence was permissible notwithstanding objections mainly on appeal that psychiatrists are unable to predict violence with reliability.

The dissent in *Barefoot*:

"Neither the Court nor the State...has cited a single reputable scientific source contradicting the unanimous conclusion of professionals in this field that psychiatric predictions of long-term future violence are wrong more often than they are right...." *Id.*, 463 U.S., at 921, and fn.2.

The majority focused on the value of having the evidence before the jury

"All of these professional doubts about the usefulness of psychiatric predictions can be called to the attention of the jury. Barefoot's entire argument, as well as that of Justice Blackmun's dissent, is founded on the premise that a jury will not be able to separate the wheat from the chaff. We do not share in this low evaluation of the adversary process." *Id.*, at 901-02.

REFERENCE MANUAL ON SCIENTIFIC EVIDENCE (3rd Ed)-Federal Judicial Center

• Dr. Paul Appelbaum, *Reference Guide on Mental Health Evidence*:
 "...predictive assessments are the most challenging evaluations performed by mental health professionals. The most common tasks involve the prediction of violence risk..." p. 846

Challenges to the statement of opinions, in view of the limitations acknowledged in the field

- "The professionals who choose or are mandated to perform risk assessments are expected to have the requisite knowledge and expertise..." p. 134 [Guyton and Jackson, "Violence Risk Assessment" in *Learning Forensic Assessment* (2nd Ed)]
- What standards have you referenced and adhered to in stating, in communicating the risk of violence and/or of re-offending ?
- To what degree have you referenced and adhered to the protocols and practice guidelines that have been published for use by mental health professionals ?

Practice Guidelines

- Buchanan et al, 'Resource Document on Psychiatric Violence Risk Assessment' APA Official Actions, Am J. Psychiatry March 2012
- Baldwin, 'Sex Offender Risk Assessment', Sex Offender Management Assessment and Planning Initiative, Office of Justice Programs
- Stahl, et al, 'California State Hospital Violence Assessment and Treatment (Cal-VAT) Guidelines, www.doi.org, August, 2014
- Melton et al, *Psychological Evaluations for the Courts* (4th Ed, 2018), Ch. 9
- Heilbrun, *Evaluation for Risk of Violence in Adults* (2009)-Best Practices

RISK ASSESSMENT PRACTICES VARY WIDELY

- From a lawyering—and judicial review perspective—varying standards and methodologies tends to mean a developing field
- The literature makes reference to the field explains that, from a legal viewpoint, it is essentially not 'reliable'. Note Melton et al (2018):
 "The literature on risk assessment shows that mental health professionals can do better than chance at ranking *relative* levels of risk, but that their binary 'dangerous or not' predictions will often be inaccurate. In addition, the ambiguity of legal definitions of dangerousness and the general concern regarding ultimate-issue testimony make conclusory testimony problematic" p. 310

Risk Assessment Themes for Lawyers

1. Current training explains that actuarial instruments have limitations acknowledged by researchers;
2. 'Clinical evaluation' and/or use of 'clinical judgment' is too unstandardized to be legally reliable;
3. 'Structured professional judgment' as practiced also may suffer from a lack of standardization depending on case particulars;
4. In practice, many 'risk assessments' are of a screening nature only
5. Neurochemical assessment techniques, 'neuroprediction,' and 'bioprediction' are the subject of a number of more recent publications.

Monahan & Skeem

The Evolution of Violence Risk Assessment

"While the 'sound barrier' for predictive accuracy in the case of violence may prove to be somewhat higher than it is now . . . there is no question that 'the contingencies of life' will place an upper limit on what can be achieved in many risk assessment contexts."

Monahan & Skeem, *The Evolution of Violence Risk Assessment*, CNS Spectrums (2014)

2005 – *U.S. v. Fields*

- *U.S. v. Fields*, 483 F.3d 313 (5th Cir., 2007)
- American Psychological Association *Amicus* Brief
- The ethical and scientifically reliable position is that the expert purporting to an assessment of a given individual's risk of future violent conduct should know the appropriate *base rate for violence given the context of the evaluation, specifics of the defendant, context of future placement*

APA Brief argues that:

- "... There are extremely low 'base rates' of violence in prison," making it difficult to offer reliable opinion that a person is 'more likely than not' to commit a serious violent act while in prison;
- "... The severity of the immediate past offense and a past history of violence within the community are *not* reliable predictors of prison-based violence."

The *Fields* record

- The psychiatrist who testified had reviewed only records of prior incarcerations and some juvenile records;
- He had not examined Fields
- He rendered his opinion in response to a hypothetical question based on Fields' prior bad acts
- He did not consider Fields' future placement; base rates of violent acts by convicted murderers; the risk or protective factors
- No standardized assessment process used

Kelly, Skeem, et al, *DSM-5 Antisocial Personality Disorder: Predictive Validity In A Prison Sample*, 39 Law and Human Behavior 123 (2015)

- "The symptom of remorselessness in particular showed no relation to future misconduct in prison. Childhood symptom counts of conduct disorder demonstrated modest predictive utility. Our results offer essentially no support for the claim that ASPD diagnoses can predict institutional misconduct in prison, regardless of the number of adult symptoms present. In forensic contexts, testimony that an ASPD diagnosis identifies defendants who will pose a serious threat while incarcerated in prison presently lacks any substantial scientific foundation."

CHALLENGES TO PRETRIAL DETENTION FORMULAS AND PREDICTIVE ALGORITHMS

- Koepke and Robinson, *Zombie Predictions and the Future of Bail Reform* (2017)
- Brauneis and Goodman, *Algorithmic Transparency for the Smart City* (2017)
- Christin et al, *Courts and Predictive Algorithms* (2015)
- *State v. Loomis: Wisconsin Supreme Court Requires Warning Before Use of Algorithmic Risk Assessments in Sentencing* 130 Harv. L.R. 1530(2017)
- Pretrial Justice Institute: *Pretrial Risk Assessment: Science Provides Guidance on Assessing Defendants* (2015)
- Note: *Bail Reform and Risk Assessment the Cautionary Tale of Federal Sentencing* 131 Harv. L.R.1125 (2018)

Bail Reform—example CALIFORNIA

- Diminishing or Doing Away With Cash Bail, and the rise of risk assessment for Pretrial Release
- The increasing number of states (20 or more) with pretrial risk assessments use varying kinds of risk assessment tools (Virginia, Colorado, Florida, Ohio, Maine, Connecticut, Kentucky, for example).
- There is a Federal Pretrial Risk Assessment Instrument (PTRA) in use throughout the United States
- The Risk assessment tools have been developed in varying ways and by varying publishers, groups of authors, and/or commercial groups.
- Challenges have focused on construction process, validation, administrator training, and documentation

State v. Loomis related litigation

1. Discovery issues: what is the tool or instrument design; what are the inventory or tool items?
2. What does the administrator's score sheet look like?
3. What does the algorithm, or data processing software, actually do—what are the factor weights? What is the factor and design validity?

Attacks on basics are being framed

1. On the issue of pretrial release—what risks are being addressed? [Risk of re-offense, risk of non-appearance at future hearings, or something else?]
2. What does the research say about the inferences that can be drawn from screening tools? [criminal history; demographics; antisocial attitudes; antisocial personality pattern; criminal peer networks; school or work related deficits; family dysfunction; substance abuse; leisure activities; residential instability]
3. What error rate or confidence level is being reported, if any?
4. What is the corroborating information, if any?

Examiners should know the current literature

- Stevenson, *Distortion of Justice: How the Inability to Pay Bail Affects Case Outcomes* (January 12, 2017)—noting disparities in conviction rates between those denied bail, or unable to secure bail, and those who obtain bail and are released, and noting the collateral financial fee consequences to those who post bail. SSRN:<https://ssrn.com/abstract=2777615>
- **NOTE:** *Bail Reform and Risk Assessment: The Cautionary Tale of Federal Sentencing* 131 Harv. L. Rev 1125 (Feb 9, 2018), addresses, in part, the Public Safety Assessment (PSA) tool from the Arnold Foundation, used in New Jersey, a 9 factor scale resulting in a prediction that someone with no risk factors has a 14% chance of committing an offense pretrial, and that someone with a high risk factor rating has a 50% chance of committing an offense pretrial

Mamalian, “State of the Science of Pretrial Risk Assessment”—BJS publication

- March 2011 (Bureau of Justice Statistics, DOJ): Acknowledges calls for changes in bail systems; reviews risk factor analyses re pretrial detention conducted in Virginia, NY; Harris County, TX; Hennepin County, MN; Allegany County, PA; Ohio; the Federal system—concludes “rates of pretrial misconduct among pretrial defendants are generally low and reasonably consistent through the years . . .” (p.14)
- Summarizes multi-jurisdiction analyses

Reviewing Current Commentary

Compare Pretrial Justice Institute review of pretrial risk assessment situation and contrast with 2017 study and pamphlet from Center for Court Innovation, “Demystifying Risk Assessment” which includes some factors used in state systems, but integrates factor items from Level of Services Inventory-Revised; COMPAS; and Ohio Risk Assessment System; acknowledges need for attention to levels or predictive accuracy and transparency; racial equity

Examiners Should Be Aware of Reports on Predictors of ‘Pretrial Failure’

Bechtel, et al., “Identifying the Predictors of Pretrial Failure: A Meta-Analysis” (2011), addressing studies based on identified random effects (factors), identifying 25 factors, setting forth analysis of static and dynamic predictors

Awareness of publications referencing recent research:

Special Issue: Methodological Issues in Measuring and Interpreting the Predictive Validity of Violence Risk Assessments—Behavioral Sciences and Law (2013)

Special Issue: Field Reliability and Validity of Forensic Psychological Assessment Instruments and Procedures—Psychological Assessment (June 2017)

Issues in legal ‘reliability’ or ‘trustworthiness’

- In the jurisdictions that use *Daubert* ‘reliability’ as the basis for admission of technical or scientific evidence, technical attacks on risk assessments are brought based on the ‘factors’—*Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993)
- Has the theory or methodology been tested; has it been subjected to peer review; is there scholarship or publication of the methodology; is there an identified rate of error involved with the methodology; does the methodology have general acceptance

What methodological issues have been identified, and are still currently discussed ?

- Training of evaluators in the techniques, tools, research and reporting of risk assessment varies widely;
- There are differing practices associated with the prediction of future violent (or non-violent re-offense) conduct associated with conditional release, parole, in custody behavior and risk management related assessments that should include protective/support factors analysis
- The extent data gathering and extent of the evaluation should be determined by the purpose of the evaluation (Guyton & Jackson, “Violence Risk Assessment”, in *Learning Forensic Assessment* 2nd Ed.)

What is the extent of the empirical proof of the validity and reliability of the approach used ?

- Fazel, Singh et al *Use of Risk Assessment Instruments to Predict Violence and Anti-Social Behavior in 73 Samples Involving 24, 827 people: systematic review and meta-analysis*, BMJ July, 2012—
- “The current level of evidence is not sufficiently strong for definitive decisions on sentencing, parole, and release or discharge based solely on these tools”
- “These tools appear to identify low risk individuals with high levels of accuracy, but have low to moderate positive predictive values”
- Douglas, Singh et al, *Risk Assessment Tools in Criminal Justice and Forensic Psychiatry: The Need For Better Data*, 42 Euro Psychiatry 134-7 (2016)

Are there legitimate questions about the methodology?

Imrey and Dawid, *A Commentary on Statistical Assessment of Violence Recidivism Risk*, 2 Statistics and Public Policy 1-18 (2015)

- “The issue is not that individual risks are exceptionally variable, or statistical intervals of any sort inherently too wide, or statistical methods lacking. It is that no relevant data are available to address the question as framed” p. 40 Authors note that by definition actuarial assessment does not lend itself to the inferences often stated

The Need for Better Data

Douglas, et al.—*Risk Assessment Tools in Criminal Justice and Forensic Psychiatry: The Need for Better Data*, 42 European Psychiatry 134-137 (2017)

- To what degree are there published validation studies on the tool at issue?
- Has the tool at issue only been validated on the initial sample, and to what degree have gender, race, and geographic location been taken into account?
- To what degree is there published research on the extent to which inferences drawn from the published validation studies can be applied to the population that is at issue?

U.S. v. Shonubi—the role of statistical analysis to judicial decisionmaking

- *U.S. v. Shonubi*, 895 F.Supp. 460 (1995)—one of many decisions, see Second Circuit decision
- Judge Jack Weinstein
- *Shonubi*—understanding the role of statistics in a sentencing decision
- A sentencing guidelines case decision
- A drug quantity related decision
- A decision about the use of statistical analysis in a courtroom

Shonubi—continued

Judge Weinstein appoints a panel of experts on statistics, estimates, inferences, and confidence levels. He specifically considers biases in fact finding.

He concludes that opinions based on statistical description and inference has been deemed helpful for some time, but needs to be considered, at the trial level in view of the totality of the evidence presented.

The Well Trained Expert

- Should be able to explain current theories of risk assessment including actuarial assessments; structured professional judgment; anamnestic
- The differences between accomplishment of the goal of prediction and classification and the goal of risk reduction
- Should be able to describe the literature related to risk assessment, and the literature that has analyzed predictions
- Should STATE THE LIMITATIONS of Risk Assessment predictions attached to a particular individual based on the literature, including the literature covering the limitations at issue--