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RISK ASSESSMENT AND REALIGNMENT

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INTRODUCTION

In 2011, California experienced a sea change in how felons were sentenced and supervised in the state, known as "realignment." Lower-level offenders who were previously the responsibility of the state are now being sentenced to serve time and being supervised at the local level. The "risk" level of the individual offender was all but ignored in this dramatic change. This Article discusses how risk assessment is used in corrections, California Department of Corrections and Rehabilitation (CDCR)'s prior experiences with risk-based policies and practices, and what we might expect from

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realignment, from a risk perspective.

I. CDCR AND RISK ASSESSMENT

In 2005, the California Department of Corrections added an "R" for "rehabilitation" to its name.[1] In late 2006, a panel of experts in the field of corrections met over the course of several months to examine rehabilitation programming within the Department. The panel produced a report for the California State Legislature that provided a roadmap for effective offender programming—otherwise known as the "Expert Panel Report."[2] Central to the roadmap was the "California Logic Model," a system consisting of eight steps based on empirical findings of effective programming principles (otherwise known as "evidence-based").[3] The first two steps are most important for the present Article. The first component of the Model was to evaluate the overall risk of offender recidivism.[4] The second was to identify dynamic risks—known as needs—that are commonly associated with recidivism, which would be targeted for correctional programming.[5]

One might say that the CDCR was slow to join the evidence-based movement. Since the early 1990s, a renaissance of the rehabilitation ideal spearheaded by the Canadians had been gathering momentum across the United States.[6] The Canadian model, often referred to as "Risk-Needs-Responsivity," posits that programming should be reserved for those offenders with the highest risk of recidivism; criminogenic needs—those factors associated with criminal behavior—should be the target of programming efforts; and programs should follow principles of responsivity.[7] The last component suggests that programs be

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1. S.B. 737, 2005 S. (2005 Cal.).

2. Cal. Dep't of Corr. and Rehab., A Roadmap for Effective Offender Programming in California, Leg., at vii (2007).

3. *Id.* at 20.

4. *Id.* at 21.

5. *Id.* at 25.

6. DON A. ANDREWS, THE PSYCHOLOGY OF CRIMINAL CONDUCT AND EFFECTIVE TREATMENT IN WHAT WORKS: REDUCING REOFFENDING (James McGuire ed., 1995); DON ANDREWS & JAMES BONTA THE PSYCHOLOGY OF CRIMINAL CONDUCT (5th ed. 2010,).

7. DON A. ANDREWS & JAMES BONTA, RISK-NEED-RESPONSIVITY MODEL FOR OFFENDER ASSESSMENT AND REHABILITATION, at i (2007), http://www.sedgwickcounty.org/corrections/resources/Risk_Need_Responsivity/Risk_N

appropriately delivered.[8]   Cognitive-behavioral and other methods that take into account the learning styles of the offender are most effective.[9]

Despite being a relatively late adopter of evidence-based practices, the CDCR rapidly moved forward in the development and utilization of risk assessment tools. In late 2007 and early 2008, the CDCR, in collaboration with the University of California, Irvine's Center for Evidence-Based Corrections, developed an automated risk assessment tool utilizing automated criminal history information from the CDCR and the California Department of Justice's records (i.e., "rap sheets").[10]   The California tool, known as the California Static Risk Assessment (CSRA) was modeled on a tool researchers had developed in Washington State, and essentially counts up the number of prior convictions using specified counting rules (e.g., none, one, two, three, or more) for eighteen felony and misdemeanor categories.[11]   The convictions receive a weight, and the tool classifies each offender in one of five different risk groups for *future* recidivism: high risk "violent," high risk "property," high risk "drug," moderate, and low risk offenders.[12] Thus the tool uses prior criminal history information to predict future risk of recidivism. Because the tool uses automated information (as opposed to a structured interview, which could require forty-five minutes per offender to administer), it almost instantaneously identifies the risk group classification for more than ninety-five percent of offenders under CDCR jurisdiction.[13]   The CSRA is the current tool utilized in prioritizing treatment for inmates within the institution, and for determining recommended sanctions for parole violations.[14]   CDCR also used it in the short-lived policy experiment with non-revocable parolees in which low- and moderate-risk offenders, who satisfied a number of offense

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eed_2007–06.pdf [hereinafter RISK-NEED-RESPONSIVITY].

    8. ANDREWS & BONTA, *supra* note 6.

    9. *Id.* at 49–60.

    10. Susan Turner et al., *Development of the California Static Risk Assessment Instrument (CSRA)* 4 (Univ. of Cal., Irvine Ctr. for Evidence-Based Corr. Working Paper, 2009).

    11. *Id.*

    12. *Id.* at 5.

    13. *Id.* at 36.

    14. *See* Turner et al., *supra* note 10, at 37.

criteria (non-serious, non-violent, non-sex) and in-prison behaviors (no prison gang affiliation, no prison violations), were placed on a form of summary parole with no parole agent supervision.[15] A risk-based model makes good sense. Ideally, by identifying and targeting higher risk offenders, scarce resources are appropriately delivered, recidivism diminishes, returns to custody decrease, and the prison population declines.

It is somewhat surprising, then, that California's recently enacted "Realignment"[16] legislation virtually ignores risk. Realignment was passed with the expectation that it would help the CDCR meet the prison population reduction targets of the "Three-Judge Panel," imposed as part of long-standing lawsuits concerning inadequate medical and mental health care.[17] The legislation included three major leverage points. First, offenders whose current conviction offense was a non-serious, non-violent and non-sex offense, and who had no prior convictions for these offenses, would no longer be sentenced to state prison.[18] They would instead be housed or supervised at the local level.[19] Second, inmates leaving prison with a current non-violent, non-serious, non-sex offense would not be placed on state parole, but would instead be placed on Post-Release Community Supervision (or PRCS) and supervised by local county probation departments.[20] The third major lever is that parole violators or violations of PRCS would no longer be sentenced to prison: they would be handled locally, with a maximum local jail sentence of 180 days for a violation.[21] The target groups for local front-end (section 1170(h)) sentencing and PRCS are based on those "nonviolent," "non-serious," "non-sex" offenses.[22] Another way to look at realignment is that the CDCR reserves

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15. *See generally* OFFICE OF THE INSPECTOR GEN., SPECIAL REPORT: CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION'S IMPLEMENTATION OF THE NON-REVOCABLE PAROLE PROGRAM (2011) [hereinafter SPECIAL REPORT].

16. A.B. 109, 2011 Assemb. (Cal. 2011).

17. Coleman v. Schwarzenegger, Nos. CIV S-90-0520 LKK JFM P, C01-1351 TEH, 2009 WL 2430820, at *116 (E.D. Cal. Aug. 4, 2009) (ordering California to reduce its prison population to 137.5% of design capacity within two years).

18. Cal. A.B. 109.

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.*

responsibility for the "high stakes" offenders, those offenders the public and policy makers fear. The only place in which "risk" plays an explicit role is the determination of high-risk sex offenders.[23] This is accomplished through the use of risk-assessment tools originally developed for sex-offender recidivism (the Static 99 for men and the FSORA for women).[24]

II. DO RISK ASSESSMENT TOOLS WORK?

Do risk assessment tools work? A better question may be "are they better or worse than other methods of determining whether an offender will commit a future crime?" Are they better than a flip of a coin? Yes. Are they better than a clinical prediction? Yes. Are they 100% accurate? Unfortunately, no. What kinds of errors do they make? Risk assessment tools make two kinds of errors that are worrisome. Sometimes, they "predict" that a person will commit a crime and one is not actually committed. This is known as a "false positive."[25] Sometimes, they predict that someone will be crime-free and yet, that person commits a crime. This is known as a "false negative."[26] In addition, risk tools base their predictions on group aggregates, and are not necessarily accurate at the individual level.[27] Car insurance rates can be used as an example. A parent's first time driver son may be an "angel," and never have an accident, but in the larger population, his age and gender are associated with more accidents and higher claims, and this, for the parent, unfortunately, means higher insurance rates. In this case, the son is a false positive. With false positives, more resources or higher levels of correctional control may be focused on someone who does not need them. False negatives can be politically damaging. No agency wants to release a predicted "low risk" offender, only to have the person commit a particularly heinous crime. Political careers have been

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23. *See id.*

24. *See generally* ANDREW HARRIS ET AL., STATIC-99 CODING RULES REVISED — 2003 (2003) (The Static-99 is a ten-item risk assessment instrument developed specifically to assess the risk level of sex offenders.).

25. *See* Turner et al., *supra* note 10, at 10–11 (discussing predictive accuracy).

26. *See id.*

27. *See id.*

ruined by highly publicized heinous events committed by offenders (e.g., Willie Horton).

If we want our tool to be as accurate as possible, what kinds of factors should we include? Research has distilled eight core factors related to recidivism. They include:

- History of antisocial behavior
- Antisocial personality pattern
- Pro-criminal attitudes
- Social support for crime
- Substance abuse
- Family/marital relationships
- School/work
- Pro-social recreational activities[28]

The Level of Service Inventory-Revised (LSI-R), a direct product of the "Canadian's" risk-need-responsivity principles, is a widely used risk assessment tool that directly incorporates the factors above.[29] Of the above factors, all except the first are considered "dynamic" risk factors, otherwise known as "needs."[30] Services and treatment can be brought to bear on these needs, which in turn should reduce criminal behavior.[31] Prior criminal history is considered "static," since it cannot be changed.[32] Generally, tools that contain "dynamic" risk factors are considered more predictive than tools that contain "static" factors that are immutable.[33] It is the case, however, that some jurisdictions have achieved about the same level of predictive accuracy using risk tools based primarily on static factors.[34] There is also controversy in the field about the inclusion of "needs" or treatment-relevant items in predicting the risk of recidivism, some

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28. RISK-NEED-RESPONSIVITY, *supra* note 7, at 6.

29. *See* David J. Simourd & P. Bruce Malcolm, *Reliability and Validity of the Level of Service Inventory-Revised Among Federally Incarcerated Sex Offenders*, 13 J. OF INTERPERSONAL VIOLENCE 261, 264 (1998). This tool is one of the most commonly used risk and need assessment tools in the United States and Canada. The instrument consists of fifty-four items in ten domains (e.g., criminal history, emotional/personal, companions).

30. RISK-NEED-RESPONSIVITY, *supra* note 7, at 5.

31. *Id.* at 10.

32. *Id.* at 4.

33. *Id.*

34. *E.g.*, California's CSRA and Washington State Institute for Public Policy's risk assessment instrument.

favoring exclusion, others inclusion.[35]

Other popular risk tools in the field include the Salient Factor Score, The Correctional Assessment and Intervention System™, and the Correctional Offender Management Profiling for Alternative Sanctions (COMPAS).[36] A complete description of available tools is beyond the scope of this Article, however, risk and needs tools are available for both youth and adult populations.[37] Some are proprietary and require payment; others are in the public domain.[38] Some have been rigorously tested to make sure they are accurate; others less so.[39] Many tools tap similar conceptual domains and the evidence suggests that no one validated tool outperforms another.[40] Risk tools have what may be considered a modest ability to accurately predict recidivism.[41] They are by no means one hundred percent accurate.

III. ROLE OF RISK ASSESSMENT FOR COUNTIES IN REALIGNMENT

Realignment legislation encourages the use of alternatives to incarceration (e.g., GPS monitoring, day reporting) and the adoption of evidence-based practices.[42] As part of realignment, it fell to each county to develop a plan prepared by their Community Corrections Partnership group, consisting of law enforcement, probation, courts, corrections, and other social service and community representatives.[43] A recent analysis catalogued each county plan by the types of evidence-based practices they used, as well as their use of risk assessment tools.[44] The authors found that California counties utilized six different risk assessment tools, including the Static Risk and Offender Needs Guide (STRONG);

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35. Jennifer Skeem & John Monahan, *Current Directions in Violence Risk Assessment*, 20 CURRENT DIRECTIONS IN PSYCHOL. SCI. 38, 40–41 (2011).

36. Currently being used by the CDCR in its institutions and for offenders on parole. *See, e.g.*, SPECIAL REPORT, *supra* note 15, at 16.

37. *See, e.g.*, Angela McCray et al., *Realigning the Revolving Door? An Analysis of California Counties' AB 109 Implementation Plans* 36 (Stanford Sch. of Law Stanford Criminal Justice Ctr. Draft Paper, 2012).

38. *See, e.g.*, *id.* at 28.

39. *See generally* Skeem & Monahan, *supra* note 35.

40. *Id.* at 39–40.

41. *See id.*

42. A.B. 109, 2011 Assemb. (Cal. 2011).

43. *Id.*

44. McCray et al., *supra* note 37, at 41–43.

COMPAS; Correctional Assessment and Intervention System (CASI); Modified Wisconsin Risk Assessment, LS/CMI, and the Ohio Risk Assessment System (ORAS).[45] Seventy-eight percent of counties indicated they would use risk assessment, with the STRONG favored among almost half of the counties, and COMPAS by eighteen percent.[46] The STRONG and COMPAS assess both risk and needs, and integrate them into the offender's supervision process.[47] This type of tool is commonly referred to as a "4th generation tool" — one that goes beyond simple assessment and helps in the management process using an automated case planning system.[48] Studies of the risk assessment component of the STRONG and COMPAS tools have shown that the tools are moderately predictive of recidivism.[49]

As part of the hand-off from CDCR to the counties under realignment, pre-release packets are prepared 120 days prior to release for inmates headed for PRCS supervision.[50] Due to staff reductions, the CDCR is unable to conduct COMPAS reentry assessments; however, they are providing any assessments that may be in the inmate's Central File.[51]

The fact that the majority of counties are incorporating risk assessment in their county plans, coupled with CDCR's provision of available COMPAS assessments, suggests that risk considerations will play an important part in county response to increased responsibility for the realigned offenders. A primary and "best-practice" role for risk assessment is in the allocation of scarce resources to those who have a higher risk of recidivism. Assessing section 1170(h) and PRCS offenders may also give counties an indication of gaps in needed services for realigned offenders.

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45. *Id.*

46. *Id.* at 43.

47. *Id.* at 41.

48. RISK-NEED-RESPONSIVITY, *supra* note 7, at 4–5.

49. *See* Elizabeth Drake & Robert Barnoski, *New Risk Instrument for Offenders Improves Classification Decisions*, WASH. STATE INST. FOR PUB. POLICY 4 (March 2009).

50. *See, e.g.*, CAL. DEP'T OF CORR. AND REHAB., PUBLIC SAFETY REALIGNMENT   HANDBOOK   app.   A   (2011),   *available   at* http://www.cdcr.ca.gov/realignment/docs/County-Handbook-11-21-11.pdf (list of documents contained in pre-release packets).

51. The "Central File" (or C-file) is the master paper file maintained by CDCR that contains the records for each prisoner and parolee. CAL. CODE REGS. tit. 15, § 2000(b)(17).

As McCray and colleagues note, "[t]he focus on risk assessment seems to stem from the fact that counties are worried about resource management, particularly considering that they believe that the AB 109 [realignment] population is going to be higher risk and higher need than the state anticipated."[52]

IV. WHAT MIGHT WE EXPECT FROM A RISK-BASED ANALYSIS OF REALIGNMENT?

One of the ironies of realignment's focus on "stakes" as opposed to "risks" is that counties may actually be receiving former inmates who are actually "higher" risk than the parolees who will be continuing on the caseloads of the state parole agents.[53] We turn to this issue next.

As part of the Center for Evidence-Based Corrections' realignment research conducted by Gerlinger, expected three year recidivism rates for realigned parole and PRCS released offenders were calculated, approximating the definitions of non-serious, non-violent, and non-sex offenders in the realignment legislation, using a released cohort of male prisoners in 2005–06.[54] Because realignment was enacted in late 2011, little available data existed on the actual recidivism of parole and PRCS offenders; thus, the estimates provide a glimpse into what we might expect. Assignment to proxy groups mirrored the definition of offenders who would be placed on parole or PRCS under realignment. For the purposes of the study, an offender was considered to be in the proxy-state parole group if he was a current serious/violent offender, a high-risk sex offender (HRSO), or an offender with mental health history who met certain conditions.[55] All remaining offenders were considered proxy-PRCS offenders.

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52. McCray et al., *supra* note 37, at 43.

53. Julie Gerlinger, California's Public Safety Realignment: Examining the Offending Patterns of Proxy-State Parole and Proxy-Post-Release Community Supervision Groups (2012) (unpublished M.A. thesis, University of California, Irvine); *see also* McCray et al., *supra* note 37, at 48 (outlining such concerns as raised by Lassen County).

54. Gerlinger, *supra* note 53.

55. *Id.* For example, an inmate had a mental health code indicating an assignment to the Department of Mental Health or Crisis Bed, a participant in the Enhanced Outpatient Program in a level III or IV prison, or a participant in an Enhanced Outpatient Program serving a sentence for an offense listed in the MDO criteria.

Using data from the California Department of Justice automated criminal history files, as well as CDCR automated systems and the CSRA risk-of-recidivism tool, analyses showed that approximately eighty percent of the proxy-PRCS group was arrested within three years of release, compared to seventy-one percent of the proxy-state parolees.[56] Fifty-two percent of proxy-PRCS offenders were convicted of a crime, compared to thirty-nine percent of proxy-state parolees.[57] This suggests that offenders the counties receive for PRCS supervision are actually "higher" risk, as county representatives have suggested. Or, in other words, the serious, violent, and sex-offenders who will remain under traditional parole have lower expected recidivism rates than offenders to be supervised by the counties. Consistent with a hypothesis that *stakes* is inversely related to *risk* to recidivate, over half of proxy-parolees had "low" and "moderate" CSRA scores.[58] In contrast, thirteen percent of proxy-PRCS offenders had "low," twenty-eight percent had "moderate" and almost sixty percent had "high" risk scores.[59]

A. Recommendations for Risk Assessment in Realignment

The use of risk assessment tools is considered a "best practice" in the delivery of programming and treatment for offenders.[60] It is good news that a large number of California counties use or plan to use risk assessment tools to help manage the realigned population. Incorporating risk assessment into departmental operations, however, raises a number of issues, which are noted below.

Risk assessment tools are created and validated on particular populations, which may or may not be similar to the offender population in a particular county. It is important that a tool be validated with the population for which it is being used, otherwise it may not be predictive, the size of risk groups may be smaller or larger than expected, and inaccurate information may provide the basis for

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56. *Id.*
57. *Id.*
58. *Id.*
59. *Id.*
60. *See* DEP'T OF JUSTICE, NAT'L INST. OF CORR., IMPLEMENTING EVIDENCE-BASED POLICY AND PRACTICE IN COMMUNITY CORRECTIONS 12 (2d ed. Oct. 2009).

resulting decisions.

Training is important to make sure that tools are consistently used. This helps not only in understanding the technical aspects of administration, but also helps with a "culture" change to the use of actuarial tools. The technology transfer can be difficult, as many justice organizations have historically used clinical or professional discretion in decision-making. Resistance is commonplace in the movement to actuarial tools. Training is important to assure that staff uses a tool the way it is supposed to be used. A tool is not helpful if it is applied incorrectly.

Risk assessment tools do not exist in a vacuum. Risk and needs information should be used in conjunction with practitioner judgment and in the context of other information. An assessment of risk does not, in and of itself, suggest particular treatment or supervision strategies. Jurisdictions must consider available resources and other system constraints when matching risk levels to services. Practitioner overrides of a risk tool can be allowed in order to take into account information that may not be captured in the instrument. However, overrides should be kept to a minimum or the tool becomes one of clinical (and generally less accurate) decisions, rather than actuarial ones.

The research literature has provided strong evidence that programming and services should be delivered to those at the highest risk of recidivism. In fact, research has shown that high intensive services delivered to low risk offenders can have the opposite effect of what is intended.[61] Lower risk offenders should receive fewer and less intensive services. This may feel awkward to some practitioners, who feel that lower risk individuals might be the most deserving of resources.

And finally, one of the lessons about risk assessment is that it can be a "risky" business. In the rollout of CDCR's Non-revocable Parole in 2010, errors in the assignment to CSRA risk groups resulted in some higher risk parolees being placed on virtually no supervision in the community after release from prison.[62] Once discovered, it was corrected;

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61. *See* D.A. Andrews & James Bonta, *Rehabilitating Criminal Justice Policy and Practice*, 16 PSYCHOL. PUB. POL'Y & L. 1, 45 (2010).

62. SPECIAL REPORT, *supra* note 15, at 8.

however, a media firestorm erupted in California, with calls for an examination of the risk assessment tool itself as part of an investigation by the California Inspector General.[63] One politician stated he would approve a risk tool as long as it was one hundred percent accurate. A sobering lesson is that not only do we need to educate criminal justice practitioners about risk tools, but we need to bring the broader public into the discussion of the realities of risk-based approaches to decision making.

CONCLUSION

Realignment has brought significant changes to the California criminal justice system in an effort to reduce the number of offenders in state prisons. At the same time, the legislation itself does not consider "risk" of recidivism in deciding appropriate candidates for local county supervision, instead focusing more on the "stakes" of different offender groups. Risk-based approaches, although not 100% accurate, have garnered much support in the correctional literature and are an important component of many counties' management of offenders under realignment. Our analysis suggests, ironically, that the "stakes" versus "risk" focus may actually result in counties supervising among the most criminally active offenders.

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63. *Id.*