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### Abstract

The assessment of an offender's risk of recidivism is emerging as a key consideration in sentencing policy in many American jurisdictions. However, little information is available on how actual sentencing judges view this development. This study surveys the views of a population sample of judges in Virginia, the state that has gone farther than any other in legislatively mandating risk assessment for certain drug and property offenders. Results indicate that a strong majority of judges endorse the principle that sentencing eligible offenders should include a consideration of recidivism risk. However, a strong majority also report the availability of alternatives to imprisonment in their jurisdictions to be inadequate at best. Finally, most judges oppose the adoption of a policy requiring them to provide a written reason for declining to impose alternative interventions on "low risk" offenders.

*Keywords:* Risk assessment, sentencing, judicial process, recidivism

## **Judicial Appraisals of Risk Assessment in Sentencing**

### **Introduction**

The assessment of an offender's risk of recidivism was once a central component of criminal sentencing in the United States. In California, for example, indeterminate sentencing—whereby an offender is given a relatively low minimum sentence and a relatively high maximum sentence and released from prison when he or she is believed to present a low risk of recidivism—was introduced in 1917 (Monahan & Skeem, 2014, 2016). Ernest Burgess published the first statistical instrument to assess an offender's risk of recidivism in 1928 (Gottfredson & Snyder, 2005). In the mid-1970s, however, indeterminate sentencing based on forward-looking utilitarian assessments of offender risk fell into desuetude in many American jurisdictions in favor of determinate periods of confinement based on backward-looking retributive appraisals of offender blameworthiness (Tonry, 2013).

In recent years, however, in response both to a plummeting crime rate (Zimring, 2012) and to a surging—and unsustainable—rate of imprisonment (Travis, Western, & Redburn, 2014), there has been a resurgence of interest in risk assessment in sentencing (Simon, 2005; Heilbrun, Hart, & Green, 2009; Hyatt, Bergstrom, & Chanenson, 2011). Many have begun to argue that one way to begin dialing down “mass incarceration” without simultaneously jeopardizing the historically low crime rate is to put risk assessment back into sentencing. It has recently been estimated at least 20 states have begun to incorporate risk assessment into the sentencing process “in some or all cases” (Starr, 2014, p. 809). Many jurisdictions have similarly incorporated risk assessment into decisions made in the pre-trial process, including as an alternative to bail, as well as in juvenile cases, and when selecting conditions in correctional settings and during probation.

In the present study we gauge the benefits and the costs of reliance on risk assessment, as seen by the judges responsible for imposing sentences. As Hyatt and Chanenson (2016, p. 16) have recently stated, “As the primary ‘consumer’ of the results of at-sentencing risk assessments, the reactions and desires of members of the judiciary should be obtained and considered as key components of any coordinated at-sentencing risk assessment policy.” First, however, we place risk assessment in sentencing in jurisprudential context, and describe how risk assessment operates in Virginia, the jurisdiction that we studied. Virginia has gone farther than any other in legislatively mandating risk assessment for certain drug and property offenders. In the words of the new Model Penal Code (American Law Institute, 2017, p. 375), “On risk assessment as a prison-diversion tool, Virginia has been the leading innovator among American states” (see also Elek, Warren, & Casey, 2015). For that reason, the views of judges in Virginia towards risk assessment are a particularly important subject of study

### **The role of risk assessment in a “hybrid” system of sentencing**

The American Law Institute’s highly-influential Model Penal Code (2017) has explicitly adopted a hybrid approach to sentencing that incorporates risk assessment in sentencing decisions. A key provision of the Code (§ 6B.09(3)) provides that state sentencing commissions:

shall develop actuarial instruments or processes to identify offenders who present an unusually low risk to public safety. ... When accurate identifications of this kind are reasonably feasible, for cases in which the offender is projected to be an unusually low-risk offender, the sentencing court shall have discretion to impose a community sanction rather than a prison term, or a shorter prison term than indicated in statute or guidelines.

This approach is a hybrid as between what almost all scholars of sentencing distinguish as two broad and polar opposite approaches to the allocation of criminal punishment. One of these

approaches is usually termed *retributive* and the other *utilitarian*. Adherents of the retributive approach believe that an offender's moral culpability for crime committed in the past should be the sole consideration in determining his or her punishment. In the best known retributive theory, known as "just deserts" (von Hirsch, 1976), offenders should be punished "because they deserve it, and the severity of their punishment should be proportional to their degree of blameworthiness" (Frase, 2013, p. 8) for the crimes they have committed in the past, and to nothing else.

In stark contrast, advocates of the utilitarian approach believe that punishment is justified principally by its ability to decrease future criminal acts by the offender or by deterring other would-be offenders from committing—or continuing to commit—crimes (Slobogin, 2011).

Many legal scholars, however, have argued that any workable theory of sentencing must address *both* retributive *and* utilitarian concerns, rather than just one of them. The most influential hybrid theory of sentencing is the one developed by Norval Morris (1974) which he called "limiting retributivism." In Morris's theory, retributive principles can only set an upper (and perhaps also a lower) limit on the severity of punishment, and within this range of what he called "not undeserved" punishment, utilitarian concerns—such as the offender's risk of recidivism—can be taken into account. Reitz (2011, p. 472) elaborates Morris' view:

Here, proportionality in punishment is understood as an imprecise concept with a margin of error, not reducible to a specific sanction for each case. The "moral calipers" available to human beings are set wide, the theory asserts, producing a substantial range of justifiable sentences for most cases.

In such a hybrid system, as the Model Penal Code explains, risk assessment can be used to identify low risk offenders, who are then recommended for alternative sentences.

**“Nonviolent risk assessment” in Virginia**

In 1994, the Virginia General Assembly required the state’s newly-formed Criminal Sentencing Commission to develop an empirically-based risk-assessment instrument for use in diverting 25 percent of the “lowest-risk, incarceration-bound, drug and property offenders” to non-prison sanctions such as jail, probation, community service, outpatient substance-abuse or mental health treatment, or electronic monitoring (Kern & Farrar-Owens, 2004; Farrar-Owens, 2013; Kleiman, Ostrom, & Cheesman, 2007). The risk factors included on the original version of the tool developed by the Commission—termed the “Nonviolent Risk Assessment” (NVRA)—consisted of six types of variables: offense type, whether the offender was currently charged with an additional offense, “offender characteristics” (i.e., gender, age, employment, and marital status), whether the offender had been arrested or confined within the past 18 months, prior felony convictions, and prior adult incarcerations. In 2012, the Commission re-validated this risk-assessment instrument on large samples of eligible drug and property (i.e., larceny and fraud) offenders. In these samples, 63% of drug offenders scored in the “low-risk” group and 37% scored in the “higher-risk” group, while 43% of the property offenders scored in the low-risk group and 57% scored in a higher-risk group. Of drug offenders designated as low risk, 12% recidivated; by comparison, 44% of higher-risk drug offenders recidivated. Of property offenders designated as low risk, 19% recidivated; by comparison, 38% of higher-risk property offenders recidivated (Virginia Criminal Sentencing Commission, 2012). Recidivism in this research was defined as reconviction for a felony offense within three years of release from incarceration.

The NVRA, revised after the 2012 re-validation, is administered only to offenders for whom the state’s sentencing guidelines recommend incarceration. In addition, offenders must meet

certain eligibility criteria (e.g., no prior convictions for violent crime). If the offender's total score on the instrument is below a specified cut-off—the cut-off being chosen to yield the legislatively-mandated 25 percent “lowest risk” criterion for diversion—he or she is recommended for an alternative, community-based sanction; if the offender's score on the instrument is above that cut-off, the prison or jail term recommended in the state's sentencing guidelines remains in effect.

The sentence ultimately imposed is within the discretion of the individual Circuit Court judge presiding in the case. Moreover, the alternative sentences imposed are not departures from sentencing guidelines, since they are recommended as part of the modified guidelines. In fiscal year 2016, among offenders scored as low risk by the NVRA, 42.2 percent were in fact sentenced by the judge to a community-based program rather than to prison (Garrett, Jakubow, & Monahan, 2018).

### **Method**

Between November 2017 and January 2018 we conducted a mail survey of all 161 Circuit Court judges in Virginia. In Virginia, each city and county has a Circuit Court, which handles all criminal felony cases; there are 31 Circuits and 161 Circuit Court judges. Virginia is one of two states in which judges are selected by legislative election, based on a majority vote of the Virginia House of Delegates and Senate. Circuit Court judges serve for terms of eight years.

Responses were received from 85 judges (a response rate of 52.8 percent). To our knowledge, this is the highest response rate to a statewide judicial survey ever reported. (Surveys of federal judges, however, have reported similarly high response rates (e.g. U.S. Sentencing Commission, 2015). The survey consisted of questions addressing the judge's views of, and experience with, the NVRA instrument, the availability of alternative sentencing options



in his or her judicial circuit, and the judge's reactions to a hypothetical procedure whereby a community program rather than incarceration would be the presumptive sentence for an offender assessed as at low risk of recidivism. A final open-ended question invited judges to elaborate on their views of risk assessment in sentencing.

### Results

Four questions addressed judges' views of, and experience with, the use of the NVRA instrument in sentencing. The first question (Q1) was: "Check the option that best reflects your view of the proper role of risk assessment in sentencing eligible drug and property offenders," with the responses being "(1) Sentencing drug and property offenders should be based only on the seriousness of the crime committed and the offender's blameworthiness; the risk an offender will commit another crime in the future should play no role in sentencing; (2) Sentencing drug and property offenders should be based not only on the seriousness of the crime committed and the offender's blameworthiness, but also on the risk the offender will commit another crime in the future," [and] (3) Other" (emphases in original).

The second question (Q2) was: "How familiar are you with the use of the Nonviolent Risk Assessment in sentencing drug and property offenders in Virginia?," with the responses being "(1) Very familiar; (2) Familiar; (3) Slightly familiar; [and] (4) Unfamiliar."

The third question (Q3) was: "How often do you consider the results of the Nonviolent Risk Assessment worksheet before sentencing a drug or property offender?," with the responses being "(1) Always or almost always (i.e., in about 90-100% of the cases); (2) Usually (i.e., in about 50-90% of the cases); (3) Sometimes (i.e., in about 10-50% of the cases), (4) Rarely (in about 1-10% of the cases), [and] (5) Never (in 0% of the cases)."

The final question (Q4) in this section was: “When sentencing a drug or property offender, do you rely on your judicial experience, or on the Nonviolent Risk Assessment, to determine the risk that the offender will commit another crime?,” with the responses being “(1) I rely primarily on the Nonviolent Risk Assessment worksheet; (2) I rely primarily on my judicial experience; (3) I rely equally on the Nonviolent Risk Assessment worksheet and on my judicial experience; [and] (4) I do not believe the risk an offender will commit another crime should play a role in sentencing, and therefore I do not rely on either the Nonviolent Risk Assessment worksheet or on my judicial experience.”

Judges’ responses to these questions are contained in Table 1. In summary:

(1) Eight-out-of-ten judges believe that sentencing drug and property offenders should be based not only on the seriousness of the crime committed and the offender’s blameworthiness, but also on the risk the offender will commit another crime in the future.

(2) Eight-out-of-ten judges state that they are either “familiar” or “very familiar” with the use of NVRA instrument in sentencing drug and property offenders.

(3) Approximately half of all judges state that they “always” or “almost always” consider the results of the NVRA instrument in sentencing drug and property offenders, and approximately one-third state that they “usually” do so.

(4) Approximately half of all judges state that they rely equally on the NVRA instrument and on their judicial experience in sentencing a drug or property offender, and approximately one-third state that they rely primarily on their judicial experience.

Two questions addressed judges' views on the availability of alternative sentencing options in his or her judicial circuit. The first question in this section (Q5) was: "How would you rate the current availability of alternative interventions—such as outpatient drug or mental health programs—as realistic sentencing options for drug and property offenders within the jurisdiction served by your Court?," with the responses being "(1) Excellent; (2) Adequate; (3) Less than adequate" [and] (4) Virtually non-existent."

The second question (Q6) was: "If, in the future, alternative interventions became more available as realistic sentencing options for drug and property offenders within the jurisdiction served by your Court, would this change your sentencing practices?," with the responses being "(1) Yes, I would sentence offenders to alternative interventions more often; (2) No, I would not sentence offenders to alternative interventions more often; [and] (3) I do not know whether or not this would have an effect on my sentencing practices."

Judges' responses to both of these questions are contained in Table 2. In summary:

(5) Seven-out-of-ten judges rate the availability of alternative interventions—such as outpatient drug or mental health programs—within their jurisdiction as "less than adequate," and five percent of judges rate such alternatives as "virtually non-existent."

(6) Three-quarters of the judges responded affirmatively when asked whether an increase in the availability of alternative interventions for drug and property offenders would change their sentencing practices.

Two questions addressed judges' reactions to a hypothetical procedure whereby a community program rather than incarceration was made the presumptive sentence for an offender who scored as low risk on the NVRA. The first question in this section (Q7) was: "As

you know, a judge is not obligated to sentence within the range recommended by the Sentencing Guidelines. However, in cases in which a judge elects to sentence outside the Guidelines' recommended range, he or she must provide a written reason for the departure (*Code of Virginia* § 19.2-298.01). Assume a similar procedure were adopted for sentencing recommendations based on risk assessment. That is, assume that when an eligible drug or property offender scored as "low risk" on the Nonviolent Risk Assessment—and was therefore recommended for an alternative intervention—the judge were required to provide a written reason if he or she declined to impose such an alternative intervention. In your view, would the adoption of a procedure similar to the one described above increase the likelihood of judges imposing an alternative intervention when one is recommended by the Nonviolent Risk Assessment?," with the responses being "(1) Definitely increase the likelihood of an alternative intervention; (2) Probably increase the likelihood of an alternative intervention; (3) Probably not increase the likelihood of an alternative intervention; [and] (4) Definitely not increase the likelihood of an alternative intervention."

The second question in this section (Q8) was: "Would you favor the adoption of a procedure similar to the one described above? [i.e., in Q7]," with the options being "(1) Strongly favor the adoption of such a procedure; (2) Favor the adoption of such a procedure; (3) Oppose the adoption of such a procedure; [and] (4) Strongly oppose the adoption of such a procedure."

Judges' responses to both of these questions are contained in Table 3. In summary:

(7) When asked whether adopting a policy requiring judges to provide a written reason for declining to impose an alternative intervention on an offender who scores as "low risk" would increase the likelihood of judges imposing such alternative interventions, six-

in-ten judges believe that such a policy would increase the use of alternatives, and four-in-ten believe that it would not increase the use of alternatives.

(8) When asked if they favored or opposed the adoption of the policy described in the previous question, one-third of the judges responded that they favored adopting such a policy, and two-thirds responded that they opposed adopting such a policy.

Judges' responses were entered as ordinal variables into the Statistical Package for Social Sciences (SPSS, V.24). Because large numbers of participants provided similar responses, Goodman & Kruskal's gamma ( $\gamma$ ) tests were performed to identify correlations between items. Analysis of these data revealed ten statistically significant relationships, which can be found in Table 4. Belief that the proposed procedure would increase the use of alternative punishment was strongly correlated with support for the adoption of this procedure ( $\gamma = .82, p = .001$ ) as well as the belief that augmenting community resources in the future would increase alternative punishment in sentencing ( $\gamma = .57, p = .001$ ). A moderately strong correlation was found between support for this proposed procedure and believing that additional community-based sentencing options would increase the use of alternative punishment in the future ( $\gamma = .49, p = .005$ ).

Several statistically significant correlations were also identified for reliance on risk in sentencing, including a strong, positive association ( $\gamma = .74, p = .001$ ) with utilizing the NVRA results in the sentencing process. The reliance on risk assessment item was also moderately correlated with the belief that a hypothetical procedure in which a community program rather than incarceration was made the presumptive sentence for an offender who scored as low risk would increase alternative punishment ( $\gamma = .38, p = .018$ ) and with supporting the adoption of

the proposed procedure ( $\gamma = .47, p = .001$ ). Four statistically significant correlations emerged with NVRA familiarity. NVRA familiarity was associated with frequency of NVRA use ( $\gamma = .51, p = .001$ ) and with having adequate alternative programs within a jurisdiction ( $\gamma = .57, p = .001$ ). Moderate associations were found between NVRA familiarity, reliance on risk assessment in sentencing ( $\gamma = .30, p = .046$ ), and the belief that additional programs would increase alternative punishment ( $\gamma = .41, p = .047$ ).

### **Conclusion with Representative Comments from the Judges**

Our survey yielded three primary conclusions. First, a strong majority of judges endorse the principle that sentencing eligible drug and property offenders should include a consideration of the risk the offenders will commit new crimes, are familiar with the use of the NVRA in sentencing, and usually or always consider the results of the NVRA in relevant cases. However, a significant minority exclude considerations of risk when sentencing eligible drug and property offenders and are largely unfamiliar with the NVRA. This finding is in accord with that of Hyatt and Chanenson (2016, p. 10) that “broad-based opposition [to risk assessment] is limited, though present” among judges.

- “Constitutes a useful tool within the general sentencing scheme.”
- “I support the use of these risk assessments under current usage—specifically the risk assessment is used to reduce and not increase incarceration recommendations.”
- “It should be clarified to judges and litigants alike that Evidence Based Practices like the Nonviolent Risk Assessment are but another tool that aids but does not supplant judicial judgment.”

- “Frankly, I pay very little attention to the worksheets. Attorneys argue about them, but I really just look at the Guidelines. I also don’t go to psychics.”

Judicial education—both in the jurisprudential appropriateness of considering risk assessment in sentencing (e.g., American Law Institute, 2017) and in the vast behavioral science literature over the past sixty years indicating the clear superiority of statistical over subjective “experiential” risk assessment (Meehl, 1954; Silver & Chow-Martin, 2002; Guay & Parent, 2018)—may improve this situation.

Second, a strong majority of judges find the availability of alternative interventions for eligible drug and property offenders in their communities to be inadequate at best, and believe an increase in the availability of alternative interventions would change their sentencing practices.

- “The assessment is useful. The problem is the lack of useful alternatives. In several counties in my Circuit, there are no inpatient treatment options.”
- “We need more alternative options—lack sufficient treatment programs and follow-up. Unfortunately, that costs money which communities are reluctant to provide.”
- “To accurately impose and/or consider whether or not a judge is complying with a recommendation— bona fide alternative programs must first exist.”
- “There is presently no valid alternative in our area. Referral to local mental health takes 13 weeks for the initial interview. Who knows how long to start treatment... We need a statute which requires that all areas of the state have equal access to drug treatment.”

Adopting a “justice reinvestment” model (Council of State Governments, 2018), whereby the fiscal benefits of reducing incarceration rates through the use of risk assessments are used to

offset the costs of expanding correctional alternatives to incarceration (e.g., community-based mental health and substance abuse programs) has the potential to increase the availability of such alternatives. Relatedly, a “realignment” approach, where localities have fiscal incentives to reduce incarceration rates might also be a promising approach (Schlanger, 2013). Neither approach has been adopted in Virginia to date.

Finally, a majority of judges believe adopting a policy requiring a written reason for declining to impose an alternative intervention on eligible offenders who score as “low risk” would increase the likelihood such sentences would be imposed. Currently, Virginia judges are asked to provide reasons when departing from sentencing guidelines, but the use or non-use of the NVRA is not considered a sentencing departure. Requiring judges to express reasons might affect their behavior; one study of federal judges suggested that when reasons were required for sentencing departures, such departures were reduced (Freeborn and Hartmann, 2012).

However, a majority of judges oppose the adoption of such a policy.

- “Having to write out reasons for Guidelines departure is already an added time and effort burden on the sentencing process. To add another requirement to explain the sentencing decision would simply complicate and drag out the sentencing even more.
- “Requiring a reason in writing for a disposition should not be used as a way to compel more alternative punishments! At some point someone must realize that adding more paperwork...takes time and when court staffing remains the same, this takes time away from hearing cases, deciding cases, reading, signing orders, etc.”



- “Requiring judges to take 3-10 minutes per such sentencing to explain will be an unnecessary drag on our criminal dockets.”

One approach that might reduce the perceived burden on judges in explaining reasons for not granting alternative sentences under the NVRA is the adoption of the automated web-based Sentencing Worksheets and Interactive File Transfer (“SWIFT”) program, which has now been pilot-tested in Virginia (Virginia Criminal Sentencing Commission, 2017). This program will allow for much more rapid recording of all types of information required at sentencing, including the Nonviolent Risk Assessment for eligible offenders. Drop-down menus could supply the most common reasons a judge might decline to impose an alternative intervention on an offender who scores as low risk (e.g., “I believe the offender’s risk is higher than indicated by the Nonviolent Risk Assessment,” “No appropriate community program to address this offender’s needs exists in this community,” or “The offender appears not to be responsive to treatment intervention” (Andrews, 2012).

Virginia has long been considered at the forefront of American states in the use of risk assessment to provide “low risk” property and drug offenders with alternative, non-prison sentences. Yet judges in Virginia do not in fact impose alternative sentences on more than half of eligible low risk offenders (Garrett, Jakubow, & Monahan, 2018). To explore the reasons why that might be so, we surveyed all felony sentencing judges in the state. We found that most judges are familiar with and embrace risk assessment as a major consideration in sentencing property and drug offenders, but find that community alternatives to imprisonment in their jurisdictions are often scarce. Further, most judges oppose the adoption of a policy requiring them to write out reasons for declining to impose alternative interventions on low risk offenders. Judicial education in structured risk assessment, increased resources for community programs

addressing criminogenic needs, and the adoption of automated web-based information systems may make help realize the promise of risk assessment as a means of reducing mass incarceration.

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Table 1.

*Judges' views of Non-Violent Risk Assessment (NVRA) in sentencing\**

Item	Responses	Frequency	Percentage
Q1. The proper role of NVRA in sentencing			
	NVRA should play no role	10	11.8
	NVRA should play a role	67	78.0
	Other	8	9.4
Q2. Familiarity with NVRA			
	Very familiar	25	29.4
	Familiar	41	48.2
	Slightly familiar	16	18.8
	Unfamiliar	3	3.5
Q3. How often NVRA used			
	Always/almost always (90-100%)	39	46.4
	Usually (50-89%)	24	28.6
	Sometimes (10-50%)	8	9.5
	Rarely (1-10%)	8	9.5
	Never (0%)	5	6.0
Q4. Rely on judicial experience or NVRA			
	Primarily NVRA	4	4.8
	Equally NVRA and judicial experience	45	53.6
	Primarily judicial experience	32	38.1
	Not rely on NVRA	2	2.4

\*Q1 and Q2, n=85; Q3 and Q4, n = 84

Table 2.

*Availability of alternative sentencing options\**

Item	Responses	Frequency	Percentage
Q5. Current availability of alternative sentencing options			
	Excellent	8	9.5
	Adequate	13	15.5
	Less than adequate	59	70.2
	Virtually non-existent	4	4.8
Q6. Sentencing practices changed by increased options			
	Yes, sentence practices would change	64	76.2
	No, sentencing practices would not change	1	1.2
	Do not know re sentencing practices change	19	22.2

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\* Q5 and Q6, n = 84



Table 3.

*Requiring written reasons for departure from the Nonviolent Risk Assessment (NVRA) sentence recommendation\**

Item	Responses	Frequency	Percentage
Q7. Requiring written reasons for departure would increase alternatives			
	Definitely increase alternatives	15	19.2
	Probably increase alternatives	32	41.0
	Probably not increase alternatives	23	29.5
	Definitely not increase alternatives	8	10.3
Q8. Favor written reasons for departure			
	Strongly favor	11	13.8
	Favor	17	21.3
	Oppose	32	40.0
	Strongly oppose	20	25.0

\* Q7, n = 78; Q8, n = 80

Table 4.

*Correlation Matrix of Goodman & Kruskal's gamma for Judges' Responses to Survey Questions*

	1	2	3	4	5	6	7	8
1. Role	1.0							
2. Familiar	-.32	1.0						
3. Often	-.21	.51**	1.0					
4. Rely	.13	.30*	.74**	1.0				
5. Availability	-.18	.57**	.20	.33	1.0			
6. Future	.26	-.12	-.10	.41*	-.26	1.0		
7. Written	.25	.14	.21	.38*	.18	.57**	1.0	
8. Favor	.34	-.15	.19	.47**	.14	.49**	.82**	1.0

\*p &lt; .05; \*\* p &lt; .01