

This is the report of the Racial and Ethnic Considerations Workgroup, submitted to the Risk Assessment Committee April, 2018.

Reliance on Criminal History

The problem is the racial and ethnic disparities that our criminal justice system has created over time. Research shows that most of us have at least an implicit, meaning unconscious, racial bias. Social scientists term this a “pro-white” bias produced by the “cognitive filtering” that occurs on an unconscious level. That bias exists across all demographic groups, including law enforcement, lawyers, and judges: all decisionmakers in the system. Overt racial prejudice also exists. In addition, communities of color are often policed more intensely than white communities, increasing contacts with law enforcement and thus the likelihood of arrest.

According to the Bureau of Justice statistics, young black males are nine times more likely than young white males to be imprisoned.¹

Because defendants of color tend to have more law enforcement contacts and hence, criminal history, and criminal history is an important factor used in most risk assessments, particularly to predict new criminal behavior, then will use of a risk assessment have a racially disparate impact on minority defendants?² Does use of historical crime data to predict new criminal behavior in effect punish the victims of past racism by increasing their risk score and thus likelihood of pretrial detention?

Critics of risk assessments answer in the affirmative and argue that risk thus becomes a proxy for race because of this heavy reliance on criminal history, which is tainted by past race-based decision-making.³ A more precise description of the relationship between criminal history and race is that they overlap. The degree to which existing institutional racial disparity affects risk scores, and how to mitigate any such disparate effects, is the subject of emerging social science research.⁴

Currently, there is little empirical research on the effect, if any, of the use of risk assessments on racial disparities in the criminal justice system.⁵ However, King County discovered a substantial gap between the risk scores of whites and blacks for risk of new violent crimes and future failure to appear in its 2014 analysis of a pretrial risk assessment designed for King County.⁶

¹ “Risk Assessment in Criminal Sentencing”, John Monahan and Jennifer Skeem, page 38.

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2662082##

² The Arnold Foundation Public Safety Assessment (PSA), used in the Yakima project and the most commonly used tool in the country, heavily relies on past involvement in the criminal justice system. The PSA predictive factors for violent re-offense are: current violent offense; current violent offense + 20 years of or younger; pending charge at the time of the offense; prior conviction; prior violent conviction.

<https://university.pretrial.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=96b14899-4d9b-0e46-5de23761d945f31b&forceDialog=0>

³ “Risk as a Proxy For Race”, B. Harcourt (2010), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1677654 ⁴ “Fair Prediction with Disparate Impact: A study of bias in recidivism prediction instruments”, A. Chouldechova, (2017), <https://arxiv.org/pdf/1703.00056.pdf>

⁴ “Assessing Risk Assessment in Action”, Professor Megan Stevenson, December 8, 2017,

<https://poseidon01.ssrn.com/delivery.php?ID=66002908206707311811510407011909411300705905608802004512611802509709008910409312600501311705310201806300711911200602911506502011203807801306511600>

⁵ [86012006114&EXT=pdf](https://poseidon01.ssrn.com/delivery.php?ID=86012006114&EXT=pdf)

⁶ King County Pretrial Risk Assessment Tool Project, February 2014, by Dr. Robert Barnoski. King County did not adopt the pretrial risk assessment.

Can a “Race Neutral” Tool Still Result in Disparate Racial Impact?

The widely used Arnold Foundation’s Public Safety Assessment (PSA) has been thoroughly tested and the factors it uses to predict outcomes have been found to be “race neutral”, or free of predictive bias, according to Pretrial Justice Institute (PJI).⁷ According to PJI, this means that “Black and White defendants assessed with the PSA succeed at virtually identical rates”.⁸ “Race neutral” in this context and in the academic literature mean that whites and persons of color with the same risk score have similar FTA and new criminal offense rates. In other words, the tool has the same predictive accuracy regardless of the defendant’s race. Predictive accuracy is used to validate a risk assessment for race neutrality.

There are a couple of related problems here.

First is how determine new criminal behavior. Because of disproportionate policing and race bias among decision-makers, there may be a difference between crimes recorded in criminal history and crimes actually committed. For example, a white defendant in a seldom-policed neighborhood and a black defendant in a vigorously-policed neighborhood could have the same risk scores, even though the white defendant has actually committed more crimes than has the black defendant with whom she shares the same score. The difference is the white defendant got caught less often, perhaps because of policing patterns in that jurisdiction.⁹

Second, “predictive parity” as a test for racial bias, is a different inquiry from the impact of a tool on a racial or ethnic group. In other words, a risk assessment can have predictive parity among groups, yet systematically assign minorities higher average risk scores than whites⁹, with the gap in average risk scores between racial groups is due to differences in criminal history.¹¹

Can a Race Neutral Tool Mitigate Judicial Bias?

A validated risk tool can mitigate decision-maker bias. Well-designed algorithms have no prejudices, conscious or unconscious. Black defendants and white defendants with similar recorded criminal histories will have similar risk scores.

So, the question becomes, does the data show that release decisions informed primarily by a risk score show less racial disparity? The preliminary data from the Yakima project indicates the affirmative. Prior to the program, and without use of the PSA, 64 percent of whites were released pretrial compared to 49 percent of Latinos and 41 percent of other races. After the program started and with use of the PSA, the percentage of whites released was 73 percent and the percentage of Latinos released increased to

⁷ <https://university.pretrial.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=5cebc2e7-dfa4-65b2-13cd300b81a6ad7a>

⁸ *Id.*, at 5.

⁹ Skeem and Lowencamp, Risk, Race and Recidivism: Predictive Bias and Disparate Impact, pg. 25, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2687339&rec=1&srcabs=2662082&alg=1&pos=1

¹¹ Skeem and Lowencamp, “Risk, Race and Recidivism: Predictive Bias and Disparate Impact”, at pg. 25.

75 percent and other races increased to 65 percent.¹⁰ How much of this improvement is attributable to the risk assessment is difficult to determine because other improved pretrial practices, i.e., assigning counsel earlier in the process, were also implemented.

The Arnold Foundation reports that use of the PSA in Toledo, Ohio, Lucas County, followed with release of whites and blacks in equal rates.¹¹ That is promising news. As in Yakima, however, whether this change was due to the PSA or the combined effects of other improved pretrial practices is not known.

Can Race Equity and Predictive Accuracy Coexist in the Same Risk Tool?

Criminal history as a factor in a risk assessment presents a conundrum. Criminal history is one of the strongest predictors of new criminal activity, but it overlaps with race and may contribute to disparate incarceration.

One suggestion is to give less weight to criminal history; to calibrate the tool differently. The challenge would be how to determine the degree to which criminal history is or is not based on past system bias or policing patterns. Elizabeth Drake in her dissertation project terms this, “cumulative disadvantage”, and seeks to quantify exactly that. Other academics are exploring algorithms that incorporate a “fairness” or “equity” factor to address any disparate racial impact of using past criminal history to derive risk scores.¹⁴

If criminal history, regarded by experts as the most predictive factor of future criminal behavior, is given less weight in calculating a risk score, what does that do to the predictive accuracy of the tool? Is the resultant trade-off between accuracy and equity worth it? Then again, criminal history may not accurately reflect actual crime commission anyhow, given disparate policing patterns and past racial bias (structural racism).

Public Confidence in the Criminal Justice System

Important to consider in the mix is public confidence in the legal system, particularly that of the minority communities. There is a sizeable gap between whites and other racial groups in the perception of the fairness of our justice system. This cynicism of non-white Washington residents is documented in a 2012 study commissioned by the Washington Minority and Justice Commission, “Justice in Washington State Survey”. The study concludes that whites and racial minorities “are on two different ends of the spectrum” regarding the fairness of the courts.

This confidence gap could worsen if minority communities were to regard judges’ reliance on a risk tool that is heavily dependent on criminal history as a proxy for race. Such negative perceptions of criminal

¹⁰ https://www.yakimaherald.com/news/crime_and_courts/study-no-significant-crime-increase-under-yakima-county-pretrialprogram/article_dc87b8e4-d274-11e7-8969-239a1b1de844.html

¹¹ <http://www.arnoldfoundation.org/new-data-pretrial-risk-assessment-tool-works-reduce-crime-increase-court-appearances/>

¹⁴ See A. Chouldechova, footnote 1, *supra*.

justice unfairness undermine the legitimacy of the criminal law and the justice system as an institution.¹²

Yet, currently criminal history is a key consideration in pretrial release decisions made by judges.¹³ Criminal Rule 3.2 and the corresponding rule for limited jurisdiction courts expressly enumerate criminal history as a consideration for assessing risk of failure to appear and risk of future violent re-offense. CrR 3.2(c) (6), (e) (1). Most judges already weigh past crimes heavily in making release decisions. So, a risk assessment score based largely on criminal history is not a huge change from current practice mandated by court rule.

On the other hand, there is a difference between judges relying on criminal history as one factor under the court rule, albeit an important one, in making release decisions, versus the judiciary adopting an actuarial tool that is heavily reliant on that factor. Would the latter more formally incorporate past racial bias into the criminal justice system, or give the appearance of doing so?

Recommendations

1. The risk tool should be tested to determine the average risk scores it produces, by racial and ethnic group.
2. The risk tool should be evaluated to determine whether it results in more or fewer disparate outcomes than the status quo, i.e., judge decisions made without a risk assessment.
3. The factors the risk tool uses should be examined to determine whether they overlap and hence “double count”. For example, using both arrest and conviction data.
4. All factors should be validated for race neutrality as well as correlation with race and ethnicity.
5. The jurisdiction considering using a risk tool should first determine its goals, i.e., reducing the jail population; reducing racial disparity in the jail population; improving on the judicial decisionmaking and if so, in what regard.
6. The jurisdiction should collect data by race and ethnicity of release decisions made after adopting use of the risk tool, to evaluate for racial impact.
7. The judges using the risk tool should be educated about its development. They need to understand that the risk scores were developed before any pretrial services were available. For example, a defendant’s risk score for failure to appear may be high, but the risk would be mitigated by having court date reminders, or transportation to court, or other pretrial assistance with housing or treatment needs.
8. The jurisdiction should continually monitor the social science research regarding risk assessments and racially disparate outcomes. Integrating a “fairness factor” into the risk tool to reduce racially disparate impact should be considered.

¹² “Risk Assessment in Criminal Sentencing”, Monahan and Skeem, pg. 38, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2662082##

¹³ CrR 3.2 also requires a judge to consider whether the defendant poses a risk to interfere with the administration of justice, intimidate or tamper with victims or witnesses. CrR 3.2 (a). For simplicity and economy of language, this writer subsumes the risk of non-interference with justice under violent re-offense.

