Negotiated Risk: Actuarial Illusions and Discretion in Probation

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Introduction

As an actuarial practice, risk has become embodied in a wide range of correctional and legal processes. It has assumed a central role in the criminal justice and legal sectors, where "just punishment" is increasingly structured by actuarial probability frameworks. Risk has shifted regulatory styles and management initiatives and has produced new types of judicial recommendations, supervision and correctional policy, and treatment initiatives. More than simply a collection of assessments or tests, risk involves a system of logics and goals that are inscribed into official programs, policies, and mandates.

Richard Ericson argues that "risk now serves as the managerial tool for reorganizing power and reproducing order." Risk technologies are framed as superior to unstructured clinical judgment, which involves "the exercise of educated intuition where information items gleaned from interviews, client history, psychometric instruments, and conferences with other professionals are engaged at the discretion of the individual carrying out the assessment." Risk technologies are often characterized as having supplanted much of practitioners' discretionary decision making with structured, quantitatively derived decision-making templates. Some scholars maintain that the transition to risk-based penality has led to the "deskilling," "scientification," and "erosion of professional discretion," or even to the elimination

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of discretion, among criminal justice practitioners. Malcolm Feeley and Jonathan Simon argue that the proliferation of actuarial tools, the rise of incapacitation policies, and the apparent decline of more clinical approaches to offender management signal a new form of penal managerialism, namely "actuarial justice." Yet few scholars have empirically assessed the impact of risk logics and technologies on decision-making practices. A careful assessment of how risk structures criminal justice decisions is needed, particularly in light of the increasing proliferation of risk-based practices.

Initially conceptualized as a way to restructure post-sentence offender management and efficiently deliver correctional treatment, risk logics have expanded and are now considered relevant to policing, bail, and sentencing. Actuarial risk prediction instruments have been modified for use earlier in the criminal justice process in order to streamline decision making and ensure the pro-active management of offenders. Jurisdictions across Canada are increasingly using risk assessments to inform arrest and bail decisions; select candidates for diversion; structure sentencing; and inform police, parole, probation, and customs officers' decision making.

Since 2000, nine of Canada's 13 jurisdictions have adopted risk assessments for the preparation of pre-sentence reports (PSRs), and nearly every provincial and federal penal institution uses some form of risk/need assessment to manage youth and adult offender populations. Many use a version of the Level of Service Inventory (LSI) or similar tools that include a standardized set of criminogenic risk/need factors to aid in determining security classifications, programming needs, and parole or probation supervision. Recently, specialized "shorthand" versions of risk templates have been adopted by police and courts to assist in determining bail and making sentencing decisions. Some police forces also use risk tools to assign

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young offenders to extrajudicial measures and to inform arrest and detention decisions.\(^9\)

At the organizational level, the adoption of the new managerial logic of “effective” correctional intervention and risk/need principles has affected policy by directing (a) how probation officers interact with courts and clients; (b) practices of case management; (c) resource allocation; and (d) program design, delivery, and availability. Yet risk processes are not simply imposed on criminal justice practitioners. Instead, as we will demonstrate below, practitioners actively resist and embrace risk technologies and temper the impact these tools have on their discretionary decision making, with the result that the introduction of risk tools shapes but does not eliminate discretion. This article examines how practitioners use and perceive risk technologies, revealing how the introduction and use of these technologies reflect a continuation, concealment, and restructuring of discretionary judgment. We show how practitioners differentiate between the standardization intended by risk assessments and their own experiences and clinical knowledges. We also discuss how practitioners exercise their discretion in an effort to mitigate the perceived discriminatory effects of the risk assessment. Thus, although risk tools appeal to practitioners because their supposed “objectivity” makes them more defensible to the public, the adoption and use of these tools in the context of professional decision making is much more complex and contradictory than much of the theoretical literature has assumed.

Our analysis is based on 71 semi-structured, open-ended interviews with Canadian correctional workers, including probation officers (\(n = 49\)), senior correctional managers and policy developers (\(n = 12\)), and Crown and defence attorneys (\(n = 5\)) as well as developers of risk-assessment tools (\(n = 5\)). These interviews assessed the purposes and uses of risk/need instruments at key decision-making points in the criminal justice system (arrest, bail, sentencing, probation supervision, institutional placement, and program management). Our analysis is also informed by a detailed examination of the risk/need assessment tools used in the Canadian justice system, along with user manuals and related policy. For illustrative purposes, we focus on the use and interpretation of the widely used LSI group of tools,\(^10\) but our arguments have wider application.

This article is divided into four parts. We first provide an overview of the Canadian correctional context, wherein risk technologies are increasingly restructuring professional discretion along the managerial axis of accountability, effectiveness, and efficiency. In the second part, we analyse why

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\(^10\) Various versions of the LSI are used to assess men, women, and young offenders at most stages of the criminal justice process, guiding pre-sentencing, sentencing, institutional placement and programming, and release decisions. The LSI has undergone several modifications and enhancements, including a name change (the S previously meant supervision) and the proliferation of more than 10 versions of the tool in circulation.
practitioners have accepted practices that appear to limit their professional discretion; we show that risk tools are perceived as offering a layer of protection and "professional risk management" that insulates practitioners and provides them with more defensible decision making. In the third part we closely examine how risk tools shape practitioners' decision making, on the one hand, and how the exercise of professional discretion shapes risk assessments, on the other. We highlight the considerable latitude in how practitioners identify, collect, and interpret information used to assess risks. When matching real-life cases to risk criteria, practitioners tend to modify the strict interpretation of risk criteria and arrive at scores by incorporating their own experiences and their clinical knowledge of offenders. Finally, we consider the role practitioners play in the restructuring of risk tools, suggesting that the field of risk is produced through a negotiated process.

Restructuring the Correctional Field

The reframing of offender assessment and intervention under the risk–need–responsivity (RNR) model has altered discretionary decisions by redefining how practitioners produce, interpret, and apply risk knowledge in the hierarchical management of offenders and by limiting intervention options to programs that target predetermined risk areas. Although practitioners continue to exercise discretion under risk regimes, the field in which they do so has shifted, resulting in changes to discretionary practices. Keith Hawkins suggests that decision making occurs within a complex "decision-making field" defined by legal and organizational mandates as well as by the "interpretive processes the individuals engage in when deciding a particular case."

Introducing actuarially based risk/need assessment and connecting risk/need discourses to notions of "effective correctional treatment" and "just punishment" have altered the decision-making field. With the emergence of risk technologies, practitioners are operating in a different context from the early 1980s. The correctional toolbox now includes a range of actuarial risk/need instruments that practitioners are required to use by policy directives. For example, in Ontario all probation officers must complete an LSI risk/need assessment when preparing a pre-sentencing report for the court to use at sentencing. The requirement that officers use this risk/need instrument clearly transforms how they collect, assess, and interpret data about an offender. It changes, but does not eliminate, how probation officers exercise their discretion. Decisions continue to be shaped by professional ideologies and by personal dispositions, beliefs, and purpose.

Originally developed by Canadian researchers Don Andrews and James Bonta and now popularized and widely endorsed, the RNR model evolved

out of an influential practitioner-driven research agenda that rejects the claim that “nothing works” and seeks to revitalize rehabilitation through the evidence-based “what works” framework, which strategically deploys effective, targeted interventions. The model situates risk, need, and responsivity as the three key principles of assessment and considers them essential to the delivery of “effective” treatment programs (where “effectiveness” is explicitly defined as achieving reductions in recidivism).\textsuperscript{12} The risk principle is an endorsement of the premise that criminal behaviour is predictable and that supervision and interventions need to be matched to an offender’s level of risk; offenders deemed high risk are targeted for the greatest number of interventions, either within institutions or through conditions attached to bail, probation, or parole. The need principle relates to the importance of targeting criminogenic needs and providing treatment to reduce recidivism. RNR researchers maintain that there is a consistent relationship between the type and number of needs that offenders present and their likelihood of recidivism, and, further, that the combined assessment of both risk and needs will improve our ability to predict who is likely to reoffend and who is not.\textsuperscript{13} The responsivity principle requires that correctional treatment be delivered “in a style and mode that is consistent with the ability and learning style of the offender.”\textsuperscript{14} The RNR model’s emphasis on efficient, targeted, effective, evidence-based strategies has underpinned Canadian and international restructuring of correctional services and has produced the “new wave” of actuarial assessment practices (including the LSI), which link offenders’ risk/need levels to intervention and supervision.\textsuperscript{15} Actuarial assessments of risk are juxtaposed to practitioners’ professional judgments of individuals’ behaviour or character. Changes in the correctional field have led some proponents of risk assessment to argue that the use of unstructured judgments of offender risk is not a defensible policy or practice.\textsuperscript{16} Some proponents also contend that there is little justification for the continued use of professional judgment to make decisions related to risk.\textsuperscript{17} This conviction is grounded in the deeply ingrained view that “objective actuarial risk/needs instruments more accurately predict risk and identify criminogenic needs than the clinical judgment of officers.”\textsuperscript{18} Efficient and empirically sound assessments of offender risk (typically, the

\textsuperscript{12} Don A. Andrews and James Bonta, “Classification for Effective Rehabilitation,” \textit{Criminal Justice and Behaviour} 17 (1990), 19.


\textsuperscript{15} This model has also produced a plethora of program-evaluation literature seeking to determine which programs most effectively and efficiently target criminogenic factors.


\textsuperscript{18} Scott VanBenschoten, “Risk/Needs Assessment: Is This the Best We Can Do?” \textit{Federal Probation} 72 (2008), 38.
Risk/need assessments are premised on the assumption that criminal recidivism is predictable and can easily be classified and sorted on the basis of numbers. The assignment of a risk score is a probabilistic calculation tested on aggregate groups. Third-generation assessment tools determine risk by calculating static and dynamic criminogenic risk factors. Static factors are related to past behaviours (e.g., age at first arrest, number of convictions) that are statistically correlated with recidivism but cannot be altered; in contrast, dynamic factors are amenable to intervention. Analysis of dynamic risk factors, or criminogenic needs, is considered to be the "cutting edge" of prediction research. By focusing on criminogenic factors, risk/need assessments reduce the complexity of each offender into a limited number of risk/need items and identify, a priori, characteristics that may predispose an individual to reoffend.

Actuarially based risk assessments also prioritize and target programs "proven" to yield aggregate reductions in recidivism. This reframing of correctional intervention and supervision affects professional discretion by requiring that practitioners direct scarce resources to the highest-risk/need offenders and that interventions narrowly target criminogenic risks. The RNR model makes it harder for practitioners to shape the treatment plan to the needs of the individual as they see fit. The "risk principle" directs practitioners to assign offenders to a limited set of programs that target criminogenic needs and demonstrate an impact on rates of recidivism. For institutions faced with declining resources, risk logics provide a convenient rationale for restricting and streamlining programming options. Thus, risk assessment is more than the management of offenders; it essentially limits the number and range of treatment options available to practitioners.

Practitioners and Professional Risk Management

The representation of efficiency and the calculability of risk by experts play an important role in reinforcing the authority and legitimacy of criminal justice institutions. Although risk templates alter the field in which offenders’ histories and behaviours are interpreted and classified, these processes are not simply imposed or naïvely accepted by probation officers. Rather, probation

19 Researchers developing actuarial tools also make choices about the studies included in meta-analyses, the variables included in risk tables, the weighting of different variables, the wording of questions, and the type and interpretation of statistical analyses. For further discussion of the production of risk tools see Maurutto and Hannah-Moffat, "Assembling Risk"; Kelly Taylor and Kelley Blanchette, "The Women Are Not Wrong: It Is the Approach That Is Debatable," Criminology and Public Policy 8 (2009), 209.

20 Third-generation risk assessments contain static risk factors that do not change (e.g., criminal history) and dynamic risk factors that do change (e.g., employment). Second-generation risk assessments rely primarily on static factors. First-generation risk assessment is non-actuarial, typically reliant on clinical judgment. See Kelly Hannah-Moffat, "Criminogenic Needs and the Transformative Risk Subject," Punishment and Society 7 (2005), 29.
officers embrace and resist risk technologies for different reasons. We found that probation officers have accepted risk technologies largely because they interpret risk assessment as serving their own professional interests. The use of these technologies is routinely equated with "best practices" and is believed to enhance and professionalize their role. Gwen Robinson’s research on the implementation of a risk instrument—the Offender Assessment System (OASys)—in various parts of the United Kingdom and Hazel Kemshall’s research on risk in probation support these findings, noting that practitioners equate the adoption of risk tools with a sense of reassurance or security.21

Our findings reveal that although the support for risk/need instruments and opinions about their usefulness vary among practitioners, the majority claimed that the introduction of risk tools has produced more defensible and accountable practices of assessment. Many respondents acknowledged that risk tools systematically structure professional discretion, but said they welcome this as a positive and progressive advancement. They felt that risk tools ensure that probation officers assess potential areas of concern consistently, thereby increasing uniformity across regions and among officers. Respondents also noted that the tools provide a clear, logical framework for identifying risk factors and assessing both the threat to the community and the need for services. Practitioners felt that risk tools identify "red flag areas" that can then be examined in more detail when developing concrete program recommendations. According to one respondent, the tools are

a lot better than clinical judgment or any form of subjective judgment. You know, it's well researched, empirically based, and so I think it gives the organization and the individual users some comfort that their planning and their risk decision making is based on some evidence. (Interview 280)

Another practitioner similarly indicated that having

a validated needs assessment allows me to feel confident ... it drives my case management system, and then I know that I'm actually dealing with the criminogenic factors. (Interview 395)

Many suggested that the uniform application of objective, empirically based criteria enabled by the risk/need tool makes the reasoning behind the case plan more transparent. In short, it is seen as justifying "what is done"—or, as one respondent put it, "you have some actual meat to your decision making" (Interview 130).

The growth of risk-management strategies in the criminal justice sector is often portrayed as displacing valuable but vulnerable forms of professional discretion in favour of a more defensible process of decision making, and one that produces a paper trail. As one respondent noted, "They back you up if something goes wrong—you can demonstrate that you used a standard

approach that is empirically based” (Interview P001). Another practitioner remarked that the tool “addresses claims of bias or discrimination,” as in cases where parents are concerned that their children are being “picked on” by the system, by providing a supposedly “blind” perspective that is independent of the worker (Interview 230). Our data also reveal that the embrace of, and pragmatic faith in, risk technologies by practitioners is linked to broader concerns about transparency, accountability, and the crime-control demands of the public. Even so, support for risk/need instruments and opinions about their usefulness varied. Some practitioners suggested that risk assessments are simply a “matter of common sense” but that common sense is not persuasive in court or in public perceptions of just and rational decision making (Interview 200). Although some respondents felt that the tools “simply quantified common sense” (Interview 110), their existence and use make many feel less vulnerable to criticism when they are making difficult decisions in high-profile cases or when the offender is “difficult to read” (Interview 240).

Our data suggest that one of the appeals of risk assessments is that they ensure that a decision is defensible while mitigating a portion of the responsibility assumed by the decision maker in a manner that manifests what Michael Power refers to as “secondary risk management.” Power argues that risk management has nothing to do with organizational efficiency, although it will be marketed in this way. Rather it arises from an increasingly defensive mood of agents who previously absorbed risk on behalf of others. These risk management agents . . . have become preoccupied with their own risks, particularly in media and law-intense environments. Coupled to institutionalized assumptions and myths about the manageability of risks, there is an intensification of strategies to avoid blame when things go wrong.

Risk assessments are emblematic of these strategies, as the institutionalization of risk/need assessment insulates practitioners who follow policy guidelines and creates new forms of organizational accountability. Similarly, as Henry Rothstein et al. note, practitioners’ increased transparency and accountability have “transformed” behaviours or actions that previously went unrecorded or were deemed acceptable within particular organizational settings into “recorded successes and failures” that are judged by others. The actuarial illusion created by the risk score mitigates, to some degree, practitioners’ responsibility for their judgments of risk and its consequences. Practitioners who claim that the risk tool allows for a more defensible decision echo this sentiment.

23 Ibid., 42.
Channelling Discretion and Shaping Recommendations: Risk/Need Templates

Proponents of the RNR model, correctional researchers, and senior policy makers clearly acknowledge the ongoing importance of discretion to the assessment of risk/need in practice. For instance, J. Stephen Wormith observes that "[s]ome approaches to risk assessment, commonly referred to as 'structured clinical judgment,' are actually built around the integration of statistical and clinical approaches to risk assessment."25 Further, Andrews and Bonta include professional discretion as a fourth principle of risk assessment that is essential to the operationalization of RNR.26 Thus, professional discretion continues to have a place in risk paradigms. Actuarially derived risk thinking shapes professional discretion, and the exercise of professionals' discretion reciprocally shapes the interpretation of risk.

Risk/need assessments derived from the RNR model appeal to correctional administrators in part because of their focus on "objective," empirically based variables. The criteria contained in tools like the LSI are straightforward, which makes them simple to score for a variety of practitioners and reduces the need for time-consuming narrative assessments by professionally trained clinicians—the latter discredited as subjective and unempirical and as having poor predictive accuracy and high discriminatory potential.27 In contrast, risk tools appear "objective" and "truthful" because of their production of, and reliance on, numerical calculations.28 Indeed, as one respondent noted, risk scores are there in "black and white for [the offender] to see, and they can’t argue about it" (Interview 195). Although risk/need assessment tools are by nature statistical and decidedly structured, below we show how the scoring and interpretation of these tools remain highly discretionary.

Each static and dynamic criminogenic factor listed in a risk/need tool corresponds to a standardized set of categories that are used to score the relevance of a specific factor for each offender. Typically these criminogenic factors include employment, marital/family relations, associates and social interaction, substance abuse, community functioning, personal/emotional orientation, and attitudes. For example, the interview guide for the Youth Level of Service/Case Management Inventory (YLS/CMI), commonly used with young offenders, provides clear categories for the assessment of criteria. The Family/Parenting Relations category is associated with the following indicators, which are to be scored by practitioners:

- Inadequate supervision
- Difficulty in controlling behaviour

26 Don A. Andrews and James Bonta, The Level of Supervision Inventory—Revised (Toronto: Multi-Health Systems, 1995).
27 Andrews and Bonta, "Classification for Effective Rehabilitation"; Andrews and Bonta, Level of Supervision Inventory—Revised.
Inappropriate discipline
Inconsistent parenting
Poor relations (father—youth)
Poor relations (mother—youth)

The practitioner is instructed to determine the relevance of these criteria using a series of probes, including the following:

- How do you feel you get on with your mother/father/guardian? How would you describe your relationship with them/him/her?
- Are there a lot of rules at home? Do you think they are fair?
- How tough are your parents about enforcing the rules?
- What do your parents do when you break the rules? How do they discipline you?
- Do you have any brothers or sisters? How do you get along with them? Is there much fighting at home?
- How do your mom and dad get along?
- Do your mom and dad work? What do they do? Is the family income adequate?
- Is there anything else you would like to tell me about your home life?

These and similar criteria and questions for other categories are used to complete and score the relevance of each category, after which the scores are tabulated and used to predict the likelihood of recidivism and to identify areas for targeted intervention and rehabilitation. The categories and associated questions are intended to guide and control the exercise of discretion by focusing practitioners' attention on a narrow, predefined set of issues considered relevant to the assessment of risk. For example, although an offender’s criminal history is relevant to understandings of risk, the LSI-derived risk tools—all of which follow a similar pattern—de-emphasize the characteristics of the crime and/or the victim, as well as the harm caused by the offence (all static factors that cannot be changed). Actuarially based risk-assessment tools and their accompanying scripts ensure that practitioners collect relevant information and organize this information to allow for consistent and ordered evaluations of risk. Professional discretion is clearly structured by risk tools that focus the practitioner’s gaze on areas of the offender’s life that are statistically associated with recidivism (i.e., “criminogenic”) and downplay other issues. The organized collection of risk information promotes the managerial objective of uniformity and efficiency. If practitioners consistently use the same standardized, empirically based criteria to assess offenders’ levels of risk/need, then the overall management of the offender population is rationalized and the allocation of scarce resources is justifiable. Furthermore, potentially politically contentious decisions (e.g., parole release, treatment provisions, bail, sentencing, lower security classifications, etc.) relating to the management of offenders are rendered defensible.
**Actuarial Illusions: “Black-Boxing” Discretion**

Our analysis of risk-assessment tools suggests that the statistical calculations comprised in the risk score mask a range of discretionary and value judgments. Scales are useful in structuring decision making and ensuring that practitioners are attentive to all “relevant” risk and criminogenic need factors. However, managerial decisions about particular offenders are still heavily influenced by personal judgment, particularly with respect to how practitioners define and rate intangibles such as poverty, social marginalization, and health-care needs. Risk assessments may structure what evidence is recorded and how it is recorded, but considerable discretion is exercised in determining the material collected, the case-file information deemed relevant or significant, and the facts chosen as ideal examples of risk. The exercise of gathering and assessing information and formulating recommendations for the courts or criminal justice institutions involves a range of subjective judgments that are informed by practitioners’ personal knowledge, experience, values, and beliefs, meaning that practitioners may even frame the same phenomena differently. Discretion is not eliminated, but becomes “black boxed” and systematized, through risk calculations.

Our interviews with probation officers revealed considerable latitude in how practitioners identify, collect, and interpret information used to assess risk. Research by Dale Ballucci and by Paula Maurutto and Kelly Hannah-Moffat has similarly demonstrated that assessors’ choice of informants and their interpretation of the authenticity of the informants’ claims determine what information “counts” and becomes part of the “official” record.29 Most respondents indicated that they rely on case files and interviews with the offender. Some, however, emphasized the importance of collateral contacts, typically including discussions with victims, teachers, employers, the police, and family members. Collateral sources may also include reports from other practitioners or institutions that have knowledge of the client and information from the police report and, in some cases, from child welfare agencies, program providers, and mental health professionals (after formal consent is obtained). As one probation office noted,

> I include everything I can get—from schools, employers, victims, police, parents, guardians, spouses, previous jail reports, [and] previous probation reports, as well as the individuals themselves. (Interview 268)

The choice and range of information used to complete the reports remain at the discretion of the probation officer, and yet the sources of information used to complete risk assessments were identified as critical. It is unclear how practitioners make sense of contradictory information. Some respondents argued that one cannot rely on offenders to help assess their risk, because they may not be able to conceptualize their issues or want to disclose them. Others

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referred to the ability of more “seasoned” offenders to manipulate the tools. These respondents identified “a good interview and diligent checking of collateral sources” (Interview 115) as critical. This reflects a commitment on the part of practitioners to traditional casework approaches designed to collect “good” and comprehensive information about the offender.

The evaluation and interpretation of individual risk criteria likewise embody professional discretionary judgments. Although practitioners are trained to follow risk-interpretation scripts, respondents reported that professional judgment is regularly incorporated into the actuarial assessment process. We noted variations in how practitioners rate and assess risk and, in particular, criminogenic need. The vague criteria contained in many of the tools (e.g., “non-rewarding family relations,” “inconsistent parenting,” “inadequate peer interactions,” “attitudes supportive of crime,” “poor social skills,” “underachievement,” “inadequate supervision,” “no personal interests,” “could make better use of time” are found in the Offender Risk Assessment Management System [ORAMS], the LSI, and the Youth Level of Service Inventory [YLSI]) are not consistently interpreted and, moreover, involve substantial speculation and subjective, morally laden assessment. This was most apparent in tools like the ORAMS, which include criteria such as “has drunk alcohol,” “leisure time spent mostly in unconstructive activities (i.e., hanging around arcades, partying, doing crime),” “sexually active,” “has sex with more than one partner (is promiscuous),” “doesn’t take precautions for birth control and safe sex,” “has a child or children,” “past victimizations,” “has tattoos/self-inflicted scars or burns,” and “was uncooperative/belligerent during the assessment.” These risk criteria require a discretionary evaluation of an offender’s behaviour, character, lifestyle, and choices. Such qualitative assessments are not easily quantified in actuarial scales, and practitioners must therefore use their judgment and experiential knowledge to evaluate risk.

Risk tools are framed by policy makers and by certain researchers as neutral, scientific instruments that produce reliable and predictive risk scores. This representation of actuarial instruments obscures the extent to which the risk instrument can be, and is, manipulated when administered. When matching real-life cases to risk criteria, practitioners reported that they tend to modify the strict interpretation of risk criteria and fill out scores by incorporating preconceived and non-actuarial knowledge of offenders. Practitioners told us how they could reduce the overall risk score by choosing to ignore various criminogenic factors or by scoring certain factors as relatively low. They adopt this practice when assessing socially marginalized racial minorities and/or women who had committed relatively minor offences and whose multiple criminogenic needs resulted in disproportionately high risk scores. In such cases, the outcome of final scores is altered to produce a classification level deemed appropriate for the offence committed.

Conversely, in cases of serious sexual and/or violent assault, criteria are evaluated in such a way as to ensure a high-risk designation. In general, risk-assessment tools and criteria pay little attention to violence. Tools like
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the Level of Service Inventory—Revised (LSI-R), for instance, do not record the offence committed or whether it involved any degree of violence. General risk-assessment tools tend to focus on criminogenic criteria such as employment, education, and substance abuse. In some of these areas, violent offenders may score relatively well. Practitioners noted how classification levels can be manipulated by overestimating particular criminogenic needs in order to ensure an outcome that reflects the gravity of the offence.

Although most probation officers agreed that risk assessments can be adequately administered to men, women, and youth, reservations were noted by some who identified how members of ethno-cultural minority groups disproportionately score on the higher ends of the risk continuum. Concern was also raised about the use of the tools with female youth. Some respondents believed that "there [is] a classical double standard" in the subjective assessment of boys' and girls' behaviours by probation officers when completing risk assessments and in managing their cases. According to one respondent, the "girls we see on probation tend to be higher need (as a rule)—the boys tend to be higher risk (as a rule, judges come down harder on girls in terms of longer periods of probation)" (Interview P002). Some practitioners noted the tendency of the tools to over-score female offenders; this perception was connected to the random use of overrides for this population. Further, some respondents felt that the tests do not adequately capture the gender-specific needs of women (including, for example, self-esteem; histories of physical, mental, or sexual abuse; and parental responsibilities), which are important for case management and for understanding antecedents to crime.

A significant body of literature has identified the gendered and racialized aspects of offending and the differential needs for and responses to correctional programs on the part of women and ethnocultural minority groups. This empirical and theoretical research documents the extent to which women's and men's crime are qualitatively and quantitatively different and how this results in differential pathways to violence. These studies also


draw attention to the extent to which women's criminogenic needs differ from men's and underlined the importance of considering "gender-specific needs," not to mention the specific needs of minority women.32 Some of the practitioners we interviewed had a basic understanding of the findings of this literature; they attempted to use this knowledge of gender and crime to assess and contextualize risk.

Many practitioners also identified the over-classification of Aboriginal youth as limit of current risk instruments. Practitioners said that, based on their experiences, risk-assessment tools fail to adequately address the broader socio-cultural context of Aboriginal peoples and their unique issues. Some of their concerns included the tools' characterization and perceived lack of knowledge of Aboriginal histories, extended families, and the different "ways of life that exist on the reserve" (Interview 248). One respondent explicitly commented that probation officers and others need to "avoid imposing our middle-class moral standards on the families" (Interview P003). Some practitioners also believed that risk assessments include criteria that, when applied to certain Aboriginal youth, are discriminatory, given the marginal social and material conditions in which they live.33

Failure to understand and integrate racial and ethno-cultural differences was perceived by practitioners as producing discriminatory effects. In response, practitioners reported modifying and tailoring assessment outcomes in light of perceived discrepancies. One probation officer noted that substance abuse is one category that is regularly excluded from the calculation of final risk scores in his office: "We don't include it ... everyone who comes


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thorough our office has a substance abuse problem; they're all high risk for addiction” (Interview 248). Substance abuse is thus acknowledged as a pervasive problem, but evaluations of it are perceived as unnecessarily elevating the likelihood of a high-risk designation.

Practitioners preferred to adjust the assessment of criteria in order to control the final score, rather than relying on formal overrides. Official overrides are an option that allow for final risk scores to be adjusted for individual cases. In general, risk manuals acknowledge that adjustments may be necessary, but state that these ought not exceed 10% of cases. According to Wormith, “the principle of professional discretion acknowledges that idiosyncratic clients exist, and that clinicians can improve upon the standard ‘cookie cutter’ approaches to offender assessment and intervention.” However, probation officers told us that they are reluctant to rely on formal overrides. Overrides often involve considerable bureaucratic “red tape,” including written justifications that often have to be reviewed and approved by supervisors. The process also places additional responsibility on practitioners, should they wrongly assess offenders.

Some respondents felt that risk/need assessments are most useful for new and less experienced staff, as well as for those who have not yet developed a strong intuitive sense. For example, one respondent, in a jurisdiction that does not routinely use risk tools, noted that

if you supervised thousands of kids, you kind of have an idea as to who is the type of kid who is going to pose a risk, the type of factors. You know what I mean? A brand new staff would not have that. ... [We] stopped using [risk tools] because we had such experienced staff. If that were to change, and we anticipate in the next 10 years having many people retiring, then at that point in time I would find it quite useful. (Interview 200)

For seasoned professionals, respondents considered experiential knowledge and/or “common sense” to be as reliable as actuarial predictions.

When adapting and using assessments and scores to inform recommendations and/or case-management plans, practitioners tended to maintain that risk information constitutes only “a piece of the pie” (Interview 310). Risk assessment was considered supplementary to their own professional assessment of the offenders. Some remarked that risk/need information should be taken “with a grain of salt” (Interview 110); in other words, these assessments are too mechanical and impersonal. As one practitioner noted,

it's just a tool, a recommendation, a guideline. It's a good time to get to know the youth, who they are, where they come from, and what their life experiences have been. (Interview 135)

Risk tools are used by many as “a starting point” (Interview 125) or a “building block” (Interview 180) in a long-term supervisory and quasi-therapeutic

34 Robert D. Hoge and Don A. Andrews, Youth Level of Service/Case Management Inventory (North Tonawanda, NY: Multi-Health Systems, 2002).
relationship wherein the probation officer needs to "get to know" the offender and "earn their trust" (Interview 239). One respondent felt that "getting to know" the offender compensates for an inherent limitation of the tool, that "reducing risk to an empirical factor [is] ludicrous," and that a better approach would be to "convey that you care and gain people’s trust" (Interview 239). Arguably, these claims could be dismissed by suggesting that these respondents underestimate the value of assessment and instead rely on the characteristics of the offender/practitioner relationship. Nonetheless, these comments highlight the extent to which front-line workers emphasize the importance of individualized and contextualized knowledge over actuarial information.

Restructuring the Field of Risk

Often overlooked in the risk-assessment literature is the role played by practitioners in the development and structuring of risk tools. In response to the perceived limitations of risk assessments, practitioners have lobbied for changes to the structure and format of risk tools. Our data reveal how, over time, practitioners have pressured developers of the tools to integrate and allow space for more professional evaluations of clinical and personal client issues that are not strictly actuarial. As their actions point out, risk tools are not simply imposed on practitioners; rather, the field of risk is produced through a negotiated process.

Interviews with developers of the tools have indicated that changes in risk/need assessments were introduced in response to pressure from practitioners who demanded more information on the personal, client-based issues and non-criminogenic factors necessary to assist them with case-management decisions. In response, the latest configurations of risk/need assessments, such as the LSI/CMI that emerged in Canada in the mid-1990s, move beyond sorting for the purposes of supervision and treatment. These tools incorporate sections that allow for more clinically based and practitioner-driven assessments. Professional appraisals of offenders’ personality, character, and strengths, among other factors, are merged with assessments of risk and criminogenic need to provide for a more comprehensive and individualized supervision and case-management plan. Actuarial calculations remain a central feature; however, the tools increasingly encapsulate an individualized and professional evaluation that cannot simply be subsumed under the traditional banner of actuarial risk.

As risk technologies and incumbent practices evolve, new spaces and forms of discretionary decision making emerge. In this way, probation officers can be seen to play a significant role in restructuring the field of risk and the policies and mandates that govern their work. Few practitioners can or will discard actuarial assessment; to do so would result in significant professional

36 Likewise, VanBenschoten, “Risk/Needs Assessment,” acknowledges that if practitioners view current risk/need tools as “fraught with limitations,” they are less likely to accept the tools and use them to manage cases.
risk. Instead, as our data show, practitioners often revise risk regimes in a way that retains professional accountability while shielding their expanded discretionary decision-making potential.

Conclusions

Risk technologies are often characterized as having supplanted much of practitioners' discretionary decision making with structured, quantitatively derived decision-making templates. Our findings reveal a more complex process than described in risk literature. Professional discretion and risk operate in tandem and are interdependent rather than dichotomous. Risk regimes have redefined how discretion operates by stipulating the type of evidence collected and how it is recorded and weighted. Furthermore, risk frameworks have restructured case management and restricted practitioners' options for assigning individuals, in accordance with levels of criminogenic risk, to programs that target predetermined risk areas. Nonetheless, our research reveals that considerable latitude exists in terms of how practitioners identify, collect, calculate, and interpret the information used to assess risk. Practitioners continue to exercise considerable judgment in determining the selection of information, the identification of collateral sources to be consulted, the assessment of criteria, the calculation of risk scores, and the extent to which risk outputs determine recommendations and case management. The practices of gathering and assessing information and of formulating recommendations for the courts and for criminal justice institutions still involve a range of subjective judgments that are informed by practitioners' personal knowledge, experience, values, and beliefs, meaning that practitioners may even frame the same phenomena differently. Discretion is not done away with; rather, it is "black-boxed" and systematized through risk calculations.

The use of professional discretion is particularly salient as a means for tempering the discriminatory effects of risk. Practitioners working with individuals reported that they find it difficult to impose standardized, cookie-cutter approaches that they perceive as producing unjust outcomes. Practitioners rely on their preconceived and non-actuarial knowledge of offenders to ensure that risk-assessment outcomes reflect their understandings of equitable and fair procedures. The complexity of working at the individual level requires their continued use of discretion. Moreover, practitioners have actively lobbied for refinements to risk-classification procedures, in some cases successfully convincing researchers and policy makers to revise risk templates and interview guidelines so as to allow for the incorporation of the experiential knowledge of those who work in the field. This finding reveals that risk regimes are not simply imposed on practitioners and clients; they are negotiated. Actuarial risk calculations remain a central feature of penalty, but risk tools increasingly encapsulate an individualized and professional evaluation of risk that cannot simply be subsumed under the banner of actuarial risk. Our research suggests that past dichotomizations of clinical and actuarial risk, although conceptually useful, are not clearly evident in penal practice.
Résumé

Une « peine juste » est de plus en plus structurée selon le cadre de la probabilité actuarielle. Les technologies du risque actuariel sont souvent considérées comme des procédés ayant, en grande partie, supplanté la prise de décision discrétionnaire de la part des intervenants par des modèles décisionnaires structurés et quantitatifs. Certains savants soutiennent que la transition vers des pénalités basées sur le risque a mené à la « déqualification », à la « scientificité » et à « l’érosion de la discrétion professionnelle », voire même à l’élimination du pouvoir discrétionnaire professionnel de la part des praticiens du droit criminel. Basé sur 71 entrevues semi-structurées et non directives avec des professionnels de la justice criminelle, cet article analyse comment l’introduction des outils du risque façonne la discrétion sans toutefois l’éliminer. Nous soutenons que les outils du risque ne sont pas simplement imposés sur les praticiens de la justice criminelle. Au contraire, les praticiens résistent et utilisent activement les technologies du risque tout en atténuant l’impacte de ces outils sur leur capacité de prendre des décisions discrétionnaires. Nous soutenons que l’adoption des technologies du risque représente une négociation procédurale : les praticiens accueillent les avantages professionnels que ces technologies apportent tout en affirmant l’importance de l’expérience et de la connaissance clinique dans la prise de décision. Nous montrons comment, premièremment, les praticiens font la distinction entre la standardisation de l’évaluation du risque et leurs propres expériences et connaissances cliniques et comment, deuxièmement, ils exercent de la discrétion dans le but de mitiger les effets discriminatoires associés à l’évaluation du risque. Ainsi, bien que les praticiens soient attirés vers les outils du risque par le fait que leur soi-disant « objectivité » les aident à défendre leurs décisions auprès du public, l’adoption et l’utilisation de ces outils dans le contexte de la prise de décisions professionnelles est plus complexe et contradictoire que laisserait croire la littérature théorique.

Mots clés: risque actuariel, peine, probation, discrétion

Abstract

A “just punishment” is increasingly structured by actuarial probability frameworks. Actuarial risk technologies are often characterized as having supplanted much of practitioners’ discretionary decision making with structured, quantitatively derived decision-making templates. Some scholars maintain that the transition to risk-based penalty has led to “deskilling,” “scientification,” and “erosion of professional discretion,” or even to the elimination of criminal justice practitioners’ use of professional discretion. This paper uses data from 71 semi-structured, open-ended interviews with criminal justice professionals to analyze how the introduction of risk tools shapes but does not eliminate discretion. We argue that risk tools are not simply imposed on criminal justice practitioners; instead, practitioners actively resist and embrace risk technologies and temper the impact risk tools have on their discretionary decision making. We maintain that the adoption of risk technologies reflects a negotiated process whereby practitioners welcome the professional advantages that these technologies afford while affirming the centrality of experience and clinical knowledge in decision making. We show how practitioners differentiate between the standardization intended by risk assessments and their own experiences and clinical knowledges, and how they exercise their discretion in an effort to mitigate the perceived discriminatory
effects of the risk assessment. Thus, although risk tools are appealing to practitioners because their supposed “objectivity” makes them more defensible to the public, the adoption and use of these tools in the context of professional decision making is more complex and contradictory than much of the theoretical literature has assumed.

**Keywords:** actuarial risk, punishment, probation, discretion

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