Paving a Path to Informed Sentencing Decisions

Over the last decade, few topics have received as much attention in the sentencing policy community as evidence-based sentencing. Recent efforts, such as those supported by the Pew Center on the States' Public Safety Performance Project, the National Governors Association (NGA) Center for Best Practices, and the National Center for State Courts have emphasized data-driven approaches in sentencing that focus on public safety, holding offenders accountable, and controlling corrections costs. Although this emphasis on data-driven analysis has gained considerable momentum in recent years, the Virginia Criminal Sentencing Commission (VCSC), led by the late Dr. Richard P. Kern, has utilized a data-driven approach for more than a decade that analyzes predictors of recidivism, employs a formal risk assessment instrument to divert offenders from incarceration, and potentially saves millions of dollars by supervising nonviolent offenders in the community rather than in prison.

The idea of risk assessment at sentencing may not seem particularly novel now, but Virginia was the first state to explicitly incorporate a formal risk assessment instrument into the state's voluntary guidelines when the VCSC developed an empirically based instrument starting in 1994 to help guide the diversion of 25 percent of the nonviolent population. In 2001, the VCSC developed a second risk assessment tool for use with sex offenders. Later, in an effort to ensure the risk assessment tools were still valid for their offender populations, Virginia began the detail-oriented process of validating these instruments. In doing so, Dr. Kern recognized the need for the VCSC to be able to access criminal history records outside of his state, as many offenders sentenced in Virginia had prior criminal justice involvement in other states. Accordingly, Kern spearheaded an effort make national criminal history records available to state sentencing commissions. This article reviews the work done by Virginia to implement risk assessment at sentencing and to expand access to the national database of criminal history record information. It also describes how these data-driven initiatives championed by Kern have influenced the continued development of sentencing policy in Maryland as well as other states, and discusses why Kern's emphasis on open communication and his willingness to share lessons learned may be his greatest legacy.

I. Risk Assessment in Virginia

Virginia currently uses two risk assessment tools at sentencing. The first tool was created in response to a budget crunch. After abolishing parole and adopting stricter truth-in-sentencing standards in 1994, Virginia was faced with the prospect of increasing correctional costs. In response to the anticipated increase in the prison population, the Virginia General Assembly directed the VCSC to study the potential use of an empirically based risk assessment instrument to divert 25 percent of an otherwise incarceration bound population without causing increased risk to public safety. The nonviolent risk assessment instrument utilizes an actuarial risk model to suggest how an offender should be sentenced within a voluntary sentencing guidelines framework. The risk assessment tool identifies different offender characteristics that are common among those likely to recidivate. It is an easy-to-complete, brief analysis that assigns points if the offender at sentencing shares certain characteristics with those who were found likely to recidivate. Characteristics include, but are not limited to, offense type, age, marital status, and recent arrests and convictions. If the score is below a threshold, the otherwise incarceration-bound offender is recommended for alternatives to incarceration.[1] If the score is above the threshold, the offender is not recommended. In either event, the risk assessment score offers another tool in the judge's toolbox to help inform the sentencing decision, but does so without limiting the judge's discretion.

In 2001, the VCSC developed a second risk assessment tool for use within the special population of sex offenders to help identify an appropriate range of sentences. The sex offender risk assessment instrument was developed after a retrospective study by the VCSC of sex offenders to identify characteristics common among those who recidivate. Similar to the nonviolent offender risk assessment tool, the sex offender tool is an easy-to-complete, brief analysis that assigns points if the sex offender at sentencing shares certain characteristics with those sex offenders found likely to recidivate. The characteristics include, but are not limited to, age, education, victim–offender relationship, and location of the offense. However, unlike the nonviolent offender risk assessment tool, if the score is above a certain threshold, the guidelines are adjusted upward to suggest a longer sentence, and the guidelines are never adjusted downward for shorter sentences. As with the nonviolent offender risk assessment instrument, the sex offender risk assessment tool helps inform the sentencing process by providing an actuarial assessment about the potential risk an individual offender poses to public safety. The sex offender sentencing guidelines are adjusted

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upward to reflect an increased risk, but the judge is free to use this information as he or she sees fit when making their decision.

II. Kern's Efforts to Make National Criminal History Data Available

The predictive ability of any risk assessment instrument is in large part dependent on the availability of complete and accurate data measuring the individual factors believed to be associated with risk. Central to most criminal risk assessment instruments is some measure of the offender's prior criminal history. Although it is typically easy to access within-jurisdiction criminal history data, national criminal history data has been much more difficult to obtain. Since offenders may commit crimes out-of-state, access to criminal history records maintained at the national level is critical to assessing offender risk. Virginia, for example, recently found that approximately one-third of offenders had an out-of-state arrest or charge.[2]

Until recently, access to the national database of criminal history record information maintained by the U.S. Department of Justice was afforded to the U.S. Sentencing Commission but not to state sentencing commissions. Recognizing that access to national data would benefit not only Virginia but also other states, Dr. Kern, with help from Mark Bergstrom, Director of the Pennsylvania Commission on Sentencing, spearheaded the effort to allow state sentencing commissions direct access to the national database. Kern organized support from other sentencing commissions and sought the legislative assistance of Virginia Congressman Robert C. "Bobby" Scott. In 2010, Congressman Scott introduced H.R. 6412, the "Access to Criminal History Records for State Sentencing Commissions Act of 2010." Following passage by the House and Senate, H.R. 6412 was signed by President Barack Obama on January 4, 2011. This legislation provides state sentencing commissions with direct access to the Federal Bureau of Investigation's national database of criminal history records, affording state sentencing commissions the same access to criminal history information as the U.S. Sentencing Commission. As a result of Kern's efforts, state sentencing commissions now have access to more complete criminal history information, which allows for more accurate evaluation of offender recidivism, and in turn leads to improved risk assessment and more informed sentencing decisions.

III. Kern's Influence on One State's Consideration of Risk Assessment

In the summer of 2010, the Maryland State Commission on Criminal Sentencing Policy (MSCCSP) agreed to undertake a preliminary examination of the utilization of risk assessment at sentencing. This preliminary review was the first phase in a proposed multistage process toward creation of a sentencing risk assessment tool to augment the state's voluntary sentencing guidelines. Phase 1 would include a review of research on risk assessment, a discussion of how other states such as Virginia and Missouri have incorporated risk assessment into the sentencing process, a review of the risk assessment instruments being utilized by other agencies in Maryland, and ultimately the development of a recommendation regarding the use of risk assessment at sentencing. If at the conclusion of phase 1 the MSCCSP determined that it should proceed with a risk assessment instrument to be incorporated at sentencing, the second phase of this proposed plan would include research on whether to adopt a modified version of an existing instrument or develop a new risk assessment tool to fit within the current guidelines. Phase 2 would also likely include a search for funding to support the research activities. Lastly, phase 3 would be implementation of the risk assessment tool throughout the state.

The MSCCSP concluded the phase 1 review in 2011 and agreed to proceed to the next phase with a focus on seeking funding to explore the possibility of Maryland utilizing a risk assessment instrument at sentencing to determine whether otherwise incarceration bound non-violent offenders could be diverted to community-based alternatives without jeopardizing public safety. While the Commission was clear that its decision to proceed was not a definitive commitment that Maryland would start including formal risk assessment in the sentencing guidelines process, the MSCCSP believed that there was enough work being done in the risk assessment field by other agencies in Maryland, as well as in other states, that it made sense for the Commission to take the next step by looking at how risk assessment might be incorporated to augment the sentencing decision. At the writing of this article, the MSCCSP is conducting phase 2 of the multistage plan and is exploring possible funding opportunities to begin research on adopting an existing risk assessment instrument or developing a new instrument to be utilized at sentencing as a complement to the existing sentencing guidelines.

The Maryland Commission's examination of the use of risk assessment at sentencing has been heavily influenced by the work of Dr. Kern and his colleagues at the VCSC. Several years before the MSCCSP initiated phase 1 of their examination of the utilization of risk assessment at sentencing, Kern visited the MSCCSP and provided a detailed presentation on the integration of offender recidivism risk assessment into the Virginia sentencing guidelines.[3] Kern effortlessly described risk assessment in relatable and understandable terms, demonstrating his keen ability to appeal to a diverse audience. For some of the Commissioners present, the presentation provided their first comprehensive look at the nature of criminal risk assessment and how formal risk assessment instruments can be utilized in conjunction with the sentencing guidelines to inform real-world sentencing decisions. For the MSCCSP as a whole, it provided an important initial step toward the Commission's examination of the use of risk assessment at sentencing.

Kern's work on the development of risk assessment instruments in Virginia and the corresponding research on those instruments in large part laid the groundwork for Maryland's consideration of risk. Following Maryland's recent review of how other states have incorporated risk assessment into the sentencing process, particularly Virginia's, several take-away points of note emerged. Chief among them is that utilizing empirically based risk assessment permits more informed sentencing decisions. Judges already informally consider risk at sentencing based on their own professional experiences, and although they are certainly capable of making such assessments, research offers a strong consensus that actuarial risk scoring provides more accurate assessments of risk than clinical judgments based on professional training and experience.[4] The risk assessment instruments in Virginia demonstrate that states can develop tools that are broadly accurate and provide useful additional information to decision makers. Additionally, the work by Kern and his colleagues illustrates that risk assessment can be used to safely divert low-risk offenders from incarceration so that incarceration resources can be reserved for more high-risk offenders.[5] In a time when corrections budgets tend to be shrinking rather than expanding, the utilization of formal tools to assist in the decision to divert offenders seems especially important.

IV. Laying the Foundation for More Informed Sentencing Decisions

Like Maryland, Pennsylvania, and a number of other states, Virginia employs voluntary sentencing guidelines that are designed to guide the sentencing judge in his/her decision while still allowing for sufficient flexibility and discretion. Virginia developed an actuarial risk assessment instrument that could substantially assist judges by providing them with formal predictors of the offender's likelihood to reoffend. Kern often emphasized that the risk assessment instrument in Virginia was a complementary tool to the sentencing guidelines and was not meant to replace judicial discretion. In this sense, risk assessment can be used to help guide judges with the same purpose as voluntary guidelines by helping to inform and influence sentencing decisions without undermining the procedure or substance of the sentencing process.[6]

Pennsylvania and Kentucky are two of the most recent states to follow the lead of the VCSC and are currently working to augment their sentencing processes by providing a formal risk assessment. In 2010, Pennsylvania Governor Ed Rendell signed into law Act 95, which directed the Pennsylvania Commission on Sentencing to adopt a risk assessment instrument to be used in court as an aide in evaluating the risk of re-offense and threat to public safety posed by an offender.[7] Additionally, Act 95 mandated that the risk assessment instrument be incorporated into the sentencing guidelines, used to determine when further assessment and a presentence investigation (PSI) report are warranted, and used to identify appropriate candidates for alternative sentencing. Similarly, Kentucky will start including risk and needs assessments in presentence reports in 2013 so that judges can review a defendant's likelihood of future criminal behavior when considering different sentencing options.[8] As described in the previous section, Maryland is undertaking the initial steps to follow this lead. In all likelihood, each of these planned initiatives to implement risk assessment at sentencing will carefully review the Virginia process. Additionally, the corresponding research and statistical analyses will benefit from the access to national criminal history records granted in 2011 by H.R. 6412. In large part, these states and others are very fortunate that Kern and Virginia laid the framework for how sound data-driven policies can lead to more informed sentencing policy.

Perhaps most importantly, the sentencing policy community has benefited because the Virginia experience was led by an individual who was eager to share the experience of developing and implementing these policies. While Kern's influence in helping to develop a risk assessment instrument to be used at sentencing and tirelessly working to ensure that national criminal history records would be available to state sentencing commissions are substantial contributions by themselves, his greatest contribution to our field may have been his willingness to share with others the details of the process. Kern understood it was not enough simply to build a good model and hope that practitioners would be able to implement it. It was necessary to explain how actuarial risk assessment works, what data elements were included in the model, how the factors were measured, and then openly share how the instrument was scored. It was necessary for those who helped develop these instruments to be willing to clearly explain how the models were developed and answer all questions so that judges, prosecutors, and other criminal justice practitioners could learn to trust not only the science behind the model, but also the rationale for why these processes would lead to better sentencing policy. Whether delivering a presentation about how risk assessment works in Virginia or participating in discussions of sentencing policy at a national conference, Kern always seemed to love the collegial interaction and communication aspect of his job. By fostering communication and the sharing of information among agencies in his own state, and through his willingness to share lessons learned on the details of the process with other states, Rick Kern helped pave a path to more informed sentencing decisions in his state and many others.

Notes

1 Richard P. Kern & Meredith Farrar-Owens, *Sentencing Guidelines with Integrated Offender Risk Assessment*, 16 Fed. Sent'g Rep. 3, 165–69 (2004).
2 Meredith Farrar-Owens, *Re-Validation of the Nonviolent Offender Risk Assessment Instrument: Preliminary Findings*, at the September 2011 meeting of the Virginia Criminal Sentencing Commission (September 12, 2011).
3 Richard P. Kern, *Integration of Offender Recidivism Risk Assessment into Virginia Sentencing Guidelines*, at the September

2007 meeting of the Maryland State Commission on Criminal Sentencing Policy (September 25, 2007).

4 D.A. Andrews & James Bonta, The Psychology of Criminal Conduct (4th ed., 2006).

5 Matthew Kleiman, Brian J. Ostrom, & Fred L. Cheesman II, *Using Risk Assessment to Inform Sentencing Decisions for Nonviolent Offenders in Virginia*, 53 Crime & Delinquency 1, 106–32 (2007).

6 Jordan M. Hyatt, Mark H. Bergstrom, and Steven L. Chanenson, *Follow the Evidence: Integrate Risk Assessment into Sentencing*, 23 Fed Sent'g Rep. 4, 266–68 (2011).

7 Pennsylvania Commission on Sentencing, *Risk/Needs Project, Interim Report 2 on Recidivism Study: Initial Recidivism Information*, *available at* http://pcs.la.psu.edu/publications-and-research/research-and-evaluation-reports/risk-assessment/Report2.-initial-recidivism-information.

8 National Conference of State Legislatures, *Principles of Effective State Sentencing and Corrections Policy: A Report of the NCSL Sentencing and Corrections Work Group* (2011), *available at* http://www.ncsl.org/issues-research/justice/principles-of-effective-state-sentencing-and-c42.aspx.