New York Law Journal

After 25 Years, It Is Past Time To Reform New York's Sex Offender Risk Assessment System: Part II

In a previous article, the author outlined the significant flaws of the sex offender risk assessment instrument. This article explains why these deficiencies are not adequately corrected by court departure determinations.

By **Daniel Conviser** | February 09, 2021

Photo: DenisLarkin

In Part 1 of this article (https://www.law.com/newyorklawjournal/2021/01/05/after-25-years-it-is-past-time-to-reform-new-yorks-sex-offender-risk-assessment-system-part-i/), I outlined what I believe are the significant flaws in the Risk Assessment Instrument (the RAI) New York courts are required to use to assess sex offender risk under the Sex Offender Registration Act (SORA or Megan's Law, Article 6-C of the Correction Law). Under SORA, courts are required to designate offenders as being at low, moderate or high risk to re-offend. The rankings not only determine the length and intrusiveness of sex offender registration and community notification, which often last for life, but vital collateral matters, like whether offenders may live

within 1,000 feet of a school, receive Section 8 housing vouchers or live in public housing. The RAI is primarily designed to measure the risk that a sex offender will re-offend and the harm which would be caused by a re-offense.

As I outlined in Part 1, there is little evidence the RAI, which was created by a state entity, the Board of Examiners of Sex Offenders (the Board) in 1996, has any predictive value. But the RAI is not the final word on court risk assessments. Rather, courts may depart up or down from the presumptive risk level set by the RAI if a court finds there are factors the instrument did not adequately consider. Part 2 of this article will explain why court departure determinations do not effectively remedy the RAI's flaws.

Two sources are repeatedly cited in this article because they cite to numerous additional authorities. The first is a decision I wrote outlining many of these issues in 2010, *People v. McFarland*, 29 Misc.3d 1206 (A) (Sup. Ct., NY County 2010). The second is a report reissued earlier this year by three Committees of the New York City Bar Association which makes many of the same points, the "Report on Legislation by the Criminal Courts Committee, Criminal Justice Operations Committee and Corrections and Community Reentry Committee on legislation to amend the correction law in relation to SORA risk assessments" (the City Bar Report).

The Limits of Departure Jurisprudence

As I outlined in Part 1, the RAI is accompanied by a 24 page "Risk Assessment Guidelines and Commentary" (the Commentary) which outlines how the RAI should be scored and provides background about its development and rationale. The RAI, however, not only outlines how RAI points should be tabulated. It also purports to set the rules *courts* must follow in deciding whether to depart from the RAI's presumptive determinations. Courts, in turn, for 25 years have held that the dictates of the RAI with respect to both its scores and what courts are entitled to do in departing from them must be followed to the letter. Indeed, in my view, although the RAI is neither a statute nor a regulation, it is given greater deference by courts than legislative enactments. Courts have determined that the RAI's literal dictates must be followed even when they lead to obviously unintended results. See, e.g., *People v. Gillotti*, 23 N.Y.3d 841 (2014); *People v. Johnson*, 11 N.Y.3d 416 (2008) (discussed in Part 1, holding that points are properly scored against child pornography defendants if a child in a pornographic image is a "stranger" to the defendant, as the RAI literally requires, even though this scoring parameter was obviously not intended to apply to child pornography offenders).

The rationale which is routinely provided for this extraordinary deference is that the RAI score is only presumptive and courts can remedy any anomalies in scores through departures. That is true. But, in my view, it obscures more than it reveals, for three related reasons. First, as discussed in Part 1, "departures" from presumptive risk levels create significant unjustified disparate outcomes, since the effective point difference for a departure can be, for example, five points or also 30 or 50 points, depending on where an offender randomly falls on the RAI scoring matrix prior to a departure. Second, courts are not free to simply depart when they determine that is appropriate. Rather, the Commentary dictates the circumstances under which courts can depart, magnifying the arbitrary results of the RAI itself. Finally, in the vast majority of SORA hearings courts are not given expert evidence which allows them to make informed risk decisions.

The RAI's Departure Limitation Rules

With respect to court departure determinations, the RAI first provides that since it is an "objective instrument" which "will result in the proper classification in most cases" departures should be "the exception —not the rule." Commentary, General Principles #5. Courts, moreover, are not free to simply depart when they believe that is appropriate. Rather, a departure may only be granted where there "exists an aggravating

or mitigating factor of a kind, or to a degree, that is otherwise not adequately taken into account by the guidelines." Id. #6. Thus, where the RAI considers an issue but simply gets it wrong, as it often does, departures are apparently not authorized.

Courts are well-suited to make departure determinations about harm considerations. Decisions about how harmful criminal conduct is are the same kind of determinations courts are often called upon to make, in imposing sentences for example.

But in the absence of reliable evidence, courts are ill-suited to make risk predictions. SORA determinations are rarely based on expert evidence or testimony by qualified psychologists or psychiatrists who have assessed an offender's risk. Judges are rather asked to make judgments about risk by looking at basic facts about an offender and his offenses, reviewing a couple of pages of information from the Board and a proposed RAI score and hearing arguments from lawyers who are not experts in sex offender risk issues. Assessments about risk, however, are not intuitive or moral decisions. They are not based on whether the hair on the back of your neck stands up when you review an offender's crimes. They are empirical assessments; predictions about how likely it is that future behaviors will occur. They are predictions which should be informed by the decades of studies and science which have been published about the factors correlated to reoffending, discussed in Part 1. But under our system, they rarely are.

Consider age at an offender's release, perhaps the most robust of all actuarial risk factors. See Part 1, discussing the "Static 99R" risk assessment instrument. The RAI suggests that if an offender's point score places him at high risk to re-offend, but "he suffers from a physical condition that minimizes his risk of re-offense, such as advanced age or debilitating illness, a downward departure may be warranted." Commentary, General Principles, #6. Unlike most RAI standards, the wording of this provision is taken from the SORA statute. Correction Law §168-l (5)(d). But in addition to being subject to all of the flaws of suggested departures generally, this misstates the science in two ways. First, the recidivism data about age is not limited to offenders deemed at high risk to reoffend under the RAI, and the SORA statute does not impose that limitation. It applies to all offenders. But more importantly, re-offense risk is not reduced only for the elderly or those with a "debilitating illness" and the SORA statute does not limit the consideration of its risk factors to only statutorily listed variables. As outlined in Part 1, re-offense risk begins to decline for *healthy 40 year old men.*

Case law, however, has consistently upheld the rejection of downward departure motions based on age for offenders in their 50s, 60s and 70s. Usually, the simple assertion that the defendant had not demonstrated his age had "resulted in an over assessment of his risk to public safety" or was an appropriate mitigating factor is made. See, e.g., *People v. Jimenez*, 178 A.D.3d 1099 (2d Dept. 2019), lv. denied 35 N.Y.3d 906 (2020); *People v. Bigelow*, 175 A.D.3d 1443 (2d Dept. 2019), lv. denied 34 N.Y.3d 908 (2020); *People v. Palomeque*, 170 A.D.3d 1055 (2d Dept. 2019), *lv denied*, 33 NY3d 912; *People v. Ramos,* 179 A.D.3d 850 (2d Dept. 2020), lv denied 35 N.Y.3d 907. Sometimes, the evidentiary presentation of the age data is found lacking. *See People v. Rodriquez*, 145 A.D.3d 489 (1st Dept. 2016), lv. denied 28 N.Y.3d 916 (2017). Some departure motions are deemed properly denied because a defendant committed a sex crime at a relatively advanced age. See, e.g., *People v. Saintilus*, 169 A.D.3d 838 (2d Dept. 2019), lv. denied 33 N.Y.3d 907; *People v. Benoit*, 145 A.D.3d 687 (2d Dept. 2016), lv. denied 29 N.Y.3d 902 (2017); *People v. Rivas*, 185 A.D.3d 740 (2d Dept. 2020). Case law has also upheld downward departure denials, quoting the RAI, where they find age was not a "physical condition" which prevented reoffending, or where evidence of health problems was not presented. See, e.g., *Rivas*; *Benoit*. I am not aware that any trial court decision to deny a downward departure based on an offender's age has ever been reversed on appeal.

Age is a particularly salient consideration under SORA. Offenders deemed at high risk to reoffend are subject to the statute's provisions for life. Lifetime coverage also applies, regardless of risk level, to offenders convicted of a wide range of crimes defined under the statute as "sexually violent offenses" or those with a

sex offense conviction prior to a scored offense. Moderate risk offenders are also presumptively subject to SORA for life, but those not convicted of sexually violent or predicate sex offenses can petition for removal after 30 years. Correction Law §168-h.

Arguments that an offender's risk is lessened because the offense was committed against a family member, another factor which indisputably reduces an offender's actuarial risk to reoffend (see Part 1) have fared more poorly. Such circumstances have consistently been held by appellate courts to be aggravating rather than mitigating factors. Those decisions have often apparently been based, at least in part, on the harm courts find are caused in such cases, a perfectly valid consideration under the SORA statute. But they have also been based on assessments that a defendant's actual *risk to re-offend* is increased when a family member is a victim. See, e.g., *People v. Mantilla*, 70 A.D.3d 477 (1st Dept. 2010); *People v. Moore,* 126 A.D.3d 444 (1st Dept. 2015), lv. denied 25 N.Y.3d 908; *People v. Ferrer*, 35 A.D.3d 297, (1st Dept. 2006), *lv. denied,* 8 N.Y.3d 807 (2007).

The intra-familial actuarial risk-reduction argument has also been rejected on moral grounds. As one court explained, in rejecting the argument that an incest offender had a lower re-offense risk than others: "This argument [inter alia] is *repugnant to common decency*, the plain language of the statute, and precedent in this Department. Even if we were to accept defendant's contention that the recidivist rate for incest child molesters is somewhat lower than that for other presumably more common child molesters, we would nonetheless decline to consider a discretionary downward departure." *People v. Rodriquez*, 67 A.D.3d 596 (1st Dept. 2009) (emphasis added). The SORA statute requires that risk guidelines consider "the relationship between such sex offender and the victim" but does otherwise address the issue. Correction Law §168-l(5)(b)(i). As one court accurately summarized the law: "Defendant's assertion that he should receive a [downward] departure because incest offenders allegedly pose a low risk of re-offense is without merit." *People v. Palomeque*, 170 A.D.3d 1055 (2d Dept. 2019), lv. denied 33 N.Y.3d 912.

Risk and harm, the two factors purportedly measured by the RAI, are completely different considerations. The first is an empirical prediction. The second is a moral judgment. Yet just as the RAI mixes and matches these two considerations in ways impossible to decipher, so too do courts depart up or down by combining the two, usually with no explicit explanation of the extent to which either factor (or other factors) were controlling. *McFarland*, 2010 NY Slip Op at 43, citing numerous rulings upholding upward departures.

One final way in which courts defer to the RAI is in the presumption that, since the RAI is a "risk assessment instrument" meant to judge either risk or harm, each scoring consideration is at least intended to measure one or both of those parameters. As partially explained in Part 1, however, some scoring parameters seek to further policy goals not directly related to either risk or harm. For example, Risk Factor #15 adds 10 points if an offender's living or employment situation is "inappropriate". The Commentary explains that these points are assessed, in part, because an "inappropriate" living situation creates a "reduced probability of detection". In *People v. Alemany*, 13 N.Y.3d 424 (2009) the Court of Appeals held that such points were properly assessed under the facts of that case against a defendant because he was homeless. There is no evidence that homeless people are more likely to offend or cause greater harm when offending than identically situated non-homeless offenders. The court held the assessment of these points was proper because homeless offenders were less likely to get caught, (certainly a reasonable inference) then said, without further elaboration, that "a lessened likelihood of getting caught is thought to increase the risk of recidivism." 13 N.Y.3d at 430.

25 Years of Static SORA Risk Assessment Policy

The executive, legislative and judicial branches of New York state government could each take significant steps to improve the current system.

The RAI was created by a state entity, the Board, which is under the jurisdiction of the State Division of Criminal Justice Services (DCJS). Some of the factors the RAI considers are required to be evaluated by the SORA statute and would require statutory changes, but the statute does not mandate any of the RAI's scoring parameters or even require that such an instrument be created. The Board could unilaterally modify the RAI to make it more predictive of re-offense risk at any time. They have failed to do so in any respect for 25 years.

Companion bills have been introduced in the Senate and Assembly to require the Board to develop a "validated risk instrument" under SORA and study how well it predicts recidivism. A-7509 (O'Donnell)/S-4191 (Krueger). The bill did not advance out of Committee in either house in 2020.

Courts which have been confronted in dozens of cases with arguments that the current system is violative of due-process have deferred to the RAI's judgments. The lengthiest rationale for this deference was provided by the court in *People v. Ferrer*, 69 A.D.3d 513 (1st Dept. 2010). There, the Court explained: "Regardless of whether the RAI is the optimal tool of predicting recidivism, or whether another instrument might be better, defendant has not shown that the use of the RAI is unconstitutional. In imposing civil restrictions on liberty based on predictions of future dangerousness, governments have considerable latitude that does not necessarily depend on the research conducted by the psychiatric community" (internal quotation omitted). The court also rejected defendant's claims because courts were empowered to depart from presumptive SORA risk levels.

Every other court which has considered a constitutional challenge to the RAI's risk assessment system in reported decisions has also rejected such claims, almost always summarily. See, e.g., *People v. Bligen*, 33 A.D.3d 489 (1st Dept. 2006), lv. denied, 8 N.Y.3d 803 (2007); *Bush v. New York State Board of Examiners of Sex Offenders*, 72 A.D.3d 1078; *People v. Bailey*, 52 A.D.3d 336 (1st Dept. 2008), lv. denied 11 N.Y.3d 707; *People v. Howard*, 52 A.D.3d 273 (1st Dept. 2008), lv. denied, 11 N.Y.3d 706; *People v. Pendergrast*, 48 A.D.3d 356 (1st Dept. 2008), lv. denied, 10 N.Y.3d 714. Underlying the continuation of the current system is the usually unstated fear that, were the process suddenly changed, many of the 41,000 offenders who have been scored under the current rules would flood the courts with modification petitions, seeking to be evaluated under a valid system. The City Bar Report points out, however, that a more accurate risk assessment system would save money in the long run and that registrants now have the ability to petition for a modification of their risk levels. pp. 12-13.

Conclusion

There is only one way to correct the current system: by using qualified experts, one for each side in a contested SORA proceeding, to make risk assessments; combine that with a system which allows judges to assess the harm an offender would cause by re-offending and have judges make final decisions which incorporate both their value judgments and the science reflected in expert evaluations. If SORA risk assessments are worth doing, they are worth doing correctly. That would require an expenditure of money and could not be done now, given the state's current dire fiscal condition. But over a longer term, it would be a cost worth assuming.

A professional sex offender evaluator would never use an actuarial risk assessment instrument, even a valid one like the Static 99R, to set a presumptive risk level. Sex offenders are as varied and complex as other human beings. Accurate predictions about future behaviors cannot be made simply by consulting a statistical table. If nothing else were done, however, separating the RAI's risk and harm determinations, conforming the harm determinations to the moral judgments made by the Penal Law and replacing the RAI's risk considerations with those of a valid actuarial instrument would help.

When I wrote the *McFarland* decision a decade ago, I ended with the statement: "We can and must do better." For 25 years, however, we have allowed this deeply flawed system to continue. Executive regulators, legislators and courts would all prefer a risk assessment process which made valid decisions. We all want our families and communities to be safe and we all want to provide due-process to convicted offenders. It would not be difficult to do so.

Daniel Conviser *is acting Supreme Court Justice, Manhattan Criminal Term.*
