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## DO RISK ASSESSMENTS PLAY A ROLE IN THE ENDURING 'COLOR LINE'?

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### Abstract

This paper presents some of the arguments that have been put forward to suggest that current risk assessments are inherently biased and disproportionately disadvantage people of color in Western correctional systems. We suggest that this is a key area of concern for all correctional professionals and that new methods of risk assessment and approaches to training are needed. In our view, without this people of color will continue to be misclassified, over-assessed, placed in the wrong rehabilitation pathways, imprisoned and/or supervised longer than needed, and consequently remaining overrepresented in the correctional system.

Key Words: Risk assessment; people of color; overrepresentation; prison; criminal justice

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## Introduction

In 1903, the Harvard-educated African American activist W. E. B. Du Bois predicted that “the problem of the color line” would become one of the most enduring issues of the twentieth century. More than a century later, we are grappling—perhaps more than ever—with the problem of racial disparity across many spheres of life. This is no more visible and pronounced than in the correctional system where, in western countries, people of color continue to be overrepresented despite making up a fraction of the overall population. In America, for example, African-Americans make up nearly 40% of the incarcerated population but only approximately 13% of the general population (United States Census Bureau, 2015). In England and Wales, Black, Asian and Minority Ethnic (BAME) men and women make up 14% of the population but represent 25% of adult prisoner population and over 40% of young people in custody (Ministry of Justice, 2016). Statistics relating to the overrepresentation of Indigenous peoples are even more startling. In Canada, Indigenous adults make up 3% of the population but 25% of the prison population (Government of Canada, Office of the Correctional Investigator, 2017). In Australia, Aboriginal and Torres Strait Islander peoples make up approximately 3% of the population, but account for 28% of the total Australian prisoner population (Australian Bureau of Statistics, 2018), and in New Zealand, Māori and Pacific Islanders make up 15% of the population, but account for more than 50% of the male, 60% of the female, and 70% of the youth justice prison populations (New Zealand Department of Corrections, 2018). These figures are, of course, alarming and highlight how the problem of the color line requires the collective attention of correctional policy makers, practitioners, and researchers around the world. And yet progress has been minimal, with the problem exacerbating rather than being alleviated in most countries. An independent review of the treatment of people of color in the England and Wales criminal justice system, for example, found that the proportion of young adult people of color in prison rose from 11% in 2006 to 19% 2016, and during the same time period the proportion of juveniles of color rose from 25% to 41% (Lammy, 2017). Another inquiry by the Australian Law Reform Commission (ALRC) revealed that the incarceration rates of Indigenous people increased by 41% between 2006 and 2016 compared to 24% of the non-Indigenous people during the same time period (ALRC, 2017).

The focus of this paper is on one central area of correctional practice - the assessment of risk - and how this has the potential to contribute to both problems of overrepresentation and to potential solutions. This is, in our view, an important and pressing issue for the ICPA as an international body that is strongly committed to facilitating dialogue about ethical correctional practice and injustice. We begin by arguing that current approaches to risk assessment often play a direct role in the overrepresentation of people of color, given their contribution to decision-making across the correctional systems (i.e., community-based supervision, security classification, participation in rehabilitation programs, and conditional release). We then identify some inherent biases built within current risk assessment tools, and how these serve to inflate the risk status of people of color. Finally, we outline some steps that could be considered as a means of reducing bias and the harmful consequences of risk assessments on people of color, discussing the roles - and responsibilities - that all correctional professionals have in addressing the problem of the color line.

## So, what explains the phenomenon of overrepresentation?

Views and perspectives about the reasons for the overrepresentation of people of color in criminal justice systems can be polarized and controversial, often relating to basic assumptions about the causes of crime. Criminological theories are relevant here and whether they take a broad, large-scale

and society-wide view of the causes of crime or consider crime from the perspective of individual responsibility. The belief, for example, that people in prison are 'victims of circumstances' will result in a quite different understanding about the drivers of over-representation than the belief that 'people are responsible for their own behavior and life situation'. It is probably fair to say that the theories of crime that contemporary approaches to risk assessment are based on do not adequately consider broader historical, structural and systemic drivers of crime and, by extension, over-representation. For example, Gottfredson and Hirschi's (1990) General Theory of Crime attributes the overrepresentation of people of color in the criminal justice system to a lack of self-control arising from inadequate early parental supervision and guidance. It hypothesizes that people of color are more likely to have a predisposed history of parental criminality which increases their propensity to commit more frequent and serious crimes. A similar proposition is put forward by the Differential Involvement Theory (Blumstein, 1993; Blumstein & Wallman, 2006), which posits that people of color simply commit more crimes than Whites and, therefore, are solely responsible for their own overrepresentation in the criminal justice system. The theory of crime that underpins the delivery of correctional case management in many Western countries (based on the principles of Risk, Needs and Responsivity) is the Personal, Interpersonal, and Community Reinforcement (PIC-R) perspective (Bonta & Andrews 2003; Andrews & Bonta, 2010). This also emphasizes the importance of personal responsibility and the high level of agency that people have over their behavior: "Human beings are active, conscious, and wilful, and they are goal-oriented. ...Their behaviour is under personal control, interpersonal control, and automatic control" (Andrews & Dowden, 2007, p.442).

These theories contrast with those that highlight the importance of structural drivers of crime. From the perspective of Strain Theory (Agnew, 2001), for example, people of color continue to experience subjugation, with risk often manifested through factors such as impoverished communities, exclusion, dispossession, and patterns of poverty, barriers to education, poor prospect of meaningful employment, hopelessness, substance abuse, and dysfunctional families. Similarly, Differential Selection Theory posits that the dominant groups in the western societies have instituted legal systems that protect their own interests, and that this differential bias has resulted in ethnic stereotypes, profiling and harsher punishments (Piquero, 2015). At the core of both theories is the idea that socio-economic and political disadvantages have simply lent themselves to poor criminal justice outcomes for people of color, and that this is reflected by differential policing practices, sentencing outcomes, and explicit and implicit racial bias (see Kamalu, Coulson-Clark, & Kamalu, 2010; McCarter, 2018). Martin (2017) described this as accumulated disadvantages whereby small differences in the treatment of people of color at each stage of the criminal justice process contribute to over overrepresentation in the correctional system.

There have been surprisingly few attempts by correctional professionals who are involved in the development of risk assessment instruments to consider the implications of more sociological theories in their work. Rather, a paradigm for practice has emerged—derived largely from the work of Canadian correctional professionals and researchers—that is predicated on the idea of risk relating to personal characteristics. Structural determinants of crime are occasionally acknowledged (e.g., Bonta's 1997 discussion of what he calls 'criminogenic communities'), but these are typically considered to be outside of the control—or perhaps the remit—of correctional services.

### **But what actually is risk?**

The idea of risk in Western correctional systems has been operationalized through the administration of risk assessments. These typically adopt actuarial (statistical) methods to predict the likelihood of an individual reoffending based on presence of a set of risk markers that have been shown to associate with criminal behavior (e.g., Olver, Stockdale, & Wormith, 2014). Markers of risk are often described in relation to what Andrews and Bonta (2010) have called the 'central eight' risk factors – criminal history, anti-social personality, criminal attitudes, antisocial associates, substance abuse, relationship problems, and disengagement from employment and education (see also Eisenberg et al., 2019). Indeed, many of the available assessment tools have been designed to assess these domains. Examples include the Level of Service Inventory–Revised (LSI-R; Andrews & Bonta, 1995), the Level of Service/ Case Management Inventory (LS/CMI; Andrews, Bonta, & Wormith, 2004), and the Violence Risk Scale (VRS; Wong & Gordon; 2003). A substantial body of empirical evidence is now available that supports the ability of these tools to predict the likelihood of future offending (e.g., Andrews et al. 2004; Lewis, Olver, & Wong, 2013), including in Aboriginal people (Gutierrez, Wilson, Rugge & Bonta, 2013).

### **Color-blindness?**

It may seem reasonable to argue that while risk clearly arises in a context of social disadvantage, correctional services can only attend to the needs of those who are sent to them by the courts and that the central eight risk factors reflect individual traits and characteristics that apply to all sections of the correctional population. Correctional professionals, just like their counterparts in the healthcare and helping professions, can address oppression specifically through a diversity awareness and cultural competency lens (American Psychological Association, 2017; National Association of Social Workers, 2015). This is enshrined in the idea of the 'responsivity principle' (Andrews & Bonta, 2010) whereby risk factors are addressed by tailoring according to the motivation, learning styles, abilities, strengths, personality, and demographic characteristics of participants. Thus, it is the practitioners' ability to attend to cultural difference that will determine the success of correctional efforts to work with people of color in the correctional system.

So what is the problem here—beyond the simple observation that contemporary approaches to assessing risk have been derived from individualistic theories of criminal behavior and have not been developed to consider the specific needs of people of color? Well, for some, a direct consequence of this is that current risk assessment tools—by very virtue of how they have been designed—is disadvantage (e.g., Martel, Brassard, & Jaccoud, 2011; Shepherd, 2016; Webb, 2018). Consider, for example, 'criminal history' which is one of the 'central eight' risk factors. It has been well-documented that a history of involvement with the criminal justice system is related to a range of biases (Chan, 2011) that result in racial profiling and over-policing (Mears, Cochran, & Lindsey 2016), unlawful stops, searches, higher rates of arrest, and charges (Delsol & Shiner, 2015). With these realities, the assumption of 'criminal history' as an independent predictor of future criminal behavior is clearly problematic. That is, people of color will almost inevitably score higher on this item simply because of the net-widening approaches that result from policing practices. This is the position articulated in a recent statement signed by a group of twenty-seven prominent researchers from MIT, Harvard, Princeton, NYU, UC Berkeley and Columbia. They point to robust evidence from US studies that communities of color are arrested at higher rates than their White counterparts, even for crimes that both groups engage in at comparable rates. Compared to similarly situated White people, African

Americans are also more likely to be convicted and more likely to be sentenced to prison in the USA (see Barabas et al., 2019).

Another example is the 'criminal attitudes' risk marker. It is common knowledge that people of color in developed countries have historically experienced considerable injustices with forced relocation, slavery, dispositions of land, discrimination, and other ill-treatments. Consequently, it is well-established that people of color generally tend to mistrust and have unfavorable views of the criminal justice system compared to their White counterparts (e.g., Gramlich, 2019), meaning that 'criminal attitudes' are more likely to be expressed. In other words, these can be better understood as primarily attributable to external factors or personal experience rather than as 'justifications' or 'cognitive distortions' that contribute to risk. Thus, 'criminal attitudes' may not represent the same reality across groups, casting doubt its value as a universal predictor of recidivism.

The bias inherent in risk assessments is even more evident when 'unemployment' is considered as a key predictor. The labour market in most western countries has never been a level playing field, with the majority of people of color faring badly in countries such as the USA (Rodgers, 2019), the United Kingdom (Li & Heath, 2018), and Australia (Australian Bureau of Statistics, 2016). And so, how do we account for - or partial out - the effect of race-based labour market discrimination when unemployment is used to classify the risk of an individual? The other domains of risk assessments relate to lifestyle factors (i.e. substance use, family dysfunction, problematic leisure and recreational activities, antisocial associates), with many arguing that these are rather indicators of socio-economic disadvantages than markers of criminality (e.g., Hannah-Moffat & Montford, 2019; Ward & Maruna, 2007). This suggests that inequalities simply relegate people of color to a higher risk of dysfunctional lifestyles, which places them at a disadvantage when correctional decisions are made based on how they are classified in terms of risk.

When these arguments are considered, it might be expected that current risk assessment tools more readily identify risk in people of color. In fact, there is evidence that actuarial risk prediction is more accurate for 'white' offenders than for those from various ethnic minority/Indigenous groups (see Singh, Grann, & Fazel, 2011; Singh et al., 2014), with Konikoff and Owusa-Bempas (2019) pointing to studies that have shown, for both the LSI-R and COMPAS risk assessment tools, that 'Black' offenders are more likely to be 'overclassified' (i.e., predicted to be rearrested when they actually were not) than those classified as either 'White' or 'Hispanic'. Concerns about inherent racial bias in risk assessment tools have also been raised in relation to the classification of prisoners into one of several security levels (e.g., 'maximum', 'medium', and 'low'), with suggestions that people of color are more likely to be 'overclassified' and kept in more restrictive prison conditions (Bohn & Morreale, 2018). We have refrained from elaborating further on this topic here as it is beyond the scope of this paper.

The broader arguments here, however, rest on the idea that the 'science' of risk assessment for re-offending relies on a set of culturally-biased assumptions that inform the prevailing paradigm about how behavior—and by extension, criminal behavior—should be defined, measured, and judged. The tendency for mainstream research to assume group differences caused by an inherent racial bias as well as the conspicuous omission of concepts and conceptions of othered peoples is evidence of epistemic violence (Held, 2019). An appraisal of the positivist paradigm privileges so-called objective scientific values that are not consonant with the lived experience of many peoples who are subject

to these tools. An appraisal of the paradigm illuminates these biases and the impact on those whom are researched through this lens (Smith, 2012; Wilson, 2008). For instance, from an ontological perspective, current risk assessment tools decontextualize the problem. From an axiological stance, the contemporary practice of risk assessment tool design, administration, scoring and interpretation is informed by an approach that uses empirically-derived, measurable, and correlational variables to reduce a wide array of data into a metric that over-simplifies reality. However, a result of this is that the very term risk loses meaning as the line blurs between making 'predictions' and making 'inferences' (Imrey & Dawid, 2016).

### **But what is the alternative?**

As other peak professional bodies respond to current national and international concerns about systemic racism and professional discrimination, it is instructive to think about the role that the ICPA might play in addressing racial disparity and color blindness in correctional practice. In the US, for example, the American Psychological Association (APA) has committed to addressing the issue on three levels: by broadly communicating psychological science on bias and racism to both its members and the wider community; by developing actionable recommendations through an APA presidential task force related to racial disparities in policing and police-citizen encounters, particularly related to the Black community; and by working to dismantle institutional racism over the long term. At the core of this strategy is education—including in relation to topics such as institutional and occupational cultures, the development of effective training programs, and in understanding key concepts of respect, implicit bias and intergroup relations. A final, but nonetheless, critical commitment involves not only bringing people of color into all levels of professional responsibility but also addressing the long-standing problems in attracting and retaining students of diverse backgrounds. Such changes, it is anticipated, will elevate the voices of Black scholars, diversify the workforce, and ensure that multicultural values and perspectives are prioritized. Quiros, Varghese, and Vanidestine (2019) have, however, also argued that a cultural competency approach is simply not sufficient because it de-emphasizes the significance of key ideas relating to race, racism, and whiteness. They argue that it is not enough to understand how people are 'different' and that practitioners need to examine how categories of race result in differential social power and racism. While many discussions of race and racism exclusively focus on people of color, they often exclude any analysis of whiteness. Distinct from being White, whiteness is a term used to refer to the invisible and hegemonic processes that result in differential laws, policies, and practices that most often benefit those who are constructed as White (López, 2006).

In concluding this discussion, we call for change in two areas as correctional professionals and researchers continue to collaborate to reduce bias and the harmful consequences of risk assessments on people of color:

1. *New methods*: We call upon correctional agencies in most western countries to recognize the need to actively seek out and invest in the development of risk assessment instruments that represent the worldviews, perceptions, experiences, and values of people of color. While making this call, we are reminded of the recent *Ewert v Canada* case in the Supreme Court of Canada which highlighted the inherent limitations of existing risk assessments and the need for new and culturally valid instruments for use with justice-involved Indigenous Peoples in Canada (Hart, 2016). We have been unable to find any published work either from Canada or from other comparable international jurisdictions since

this court case. Thus, the need to develop culturally valid risk assessments cannot be emphasized enough; it is too great an issue to ignore, and these cannot be expected to emerge without the active participation and leadership of correctional agencies. It is also clear to us that current risk assessment tools have, to date, lacked any meaningful involvement from 'stakeholders' or 'end-users' in both development and use—despite the contributions to practice that are likely to ensue from this. We currently, for example, know little about the *experience* of risk assessment and how it affects individuals and families. Therefore, we suggest that the development of culturally informed risk assessments should involve direct and active participation from people of color and/or the peak bodies that represent them. This will not only help to ensure that the experiences and realities of people of color are accounted for, but that they also have input in decisions that impact on their lives. Most importantly—and in light of the literature reviewed here - the role of 'race' as a potential predictor of recidivism needs to be explored and its differential influence on risk status of people of color should be mitigated as part of formal risk assessment processes. This is an area of critical importance for further study.

2. *New training:* Correctional agencies in most western countries have attempted to address the overrepresentation of people of color in the criminal justice system through strategic planning initiatives (e.g., in New Zealand through the Hōkai Rangi strategy, 2019 and in Australia in response to the recommendations of The Royal Commission into Aboriginal Death in Custody, 1991). These highlight the need to strengthen culturally inclusive and responsive correctional practices through the provision of specialist training and programming as well as through the employment of people of color as consultants and/or direct service providers. However, these initiatives have, so far, resulted in little or no effect on the overrepresentation people of color in these criminal justice systems. Therefore, we call upon correctional agencies to re-think current approaches and ensure cultural competency of practitioners who engage in the administration of risk assessments with people of color. It is important to recognise the mere employment of people of color and generic cultural awareness trainings do not equate to cultural competence in any meaningful sense without a deeper understanding of the limitations of risk assessments and the importance of cultural accountability. Facilitating discussions among members about white privilege and white fragility should also be a priority for ICPA and other similar associations. Furthermore, there should be more emphasis on creating healing opportunities for people of color that address cultural trauma and a process of self-determination toward a justice system which values, promotes and requires greater involvement in decision-making, program design and delivery.

Overall, we are strongly of the view that the success of the aforementioned recommendations will depend on the commitment and focused oversight of peak level correctional administrators. The ICPA is also uniquely positioned globally to drive professional practice standards that promote the development, design, and implementation of culturally valid risk assessments as well as to support new training initiatives.

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