

Reaction to: “Risk Assessment Instruments are Inappropriate for Sentence Reform: Real Solutions for Reform Address Racial Stratification”

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Anderson’s note argues that Risk Assessment Instruments (RAIs) are inappropriate tools for sentence reform and offers other suggestions for “real reform” and transformation of the United States criminal justice system. Using Wisconsin’s finding that if the RAI output is only one of many factors considered in sentencing, it does not violate due process protections, the Note sets forth three propositions in support of the assertion that RAIs are inappropriate: (1) the elimination of racial stratification should be a judicial objective because the current system lacks acknowledgment and consideration of the legal system’s role in creating, sustaining and maintaining the current carceral state. The author sets out to persuade the reader that attempts to render criminal sentences based on risk assessment scores without addressing how the legacy of systemic racism is built into the data that is leveraged in determining “risk” is inappropriate because that legacy taints the data outputs of RAIs—overlooking the deeper historical context and social construction of the risk indicators measured by these tools; (2) that the pre-eminent case on the constitutionality of RAIs, *State v. Loomis*, was decided incorrectly; and (3) that RAIs should not be used in sentencing because they cause harm and reinforce the existing racial stratification.

Finally, Anderson offers her own solutions for “real reform to our criminal justice system,” in place of RAIs, which, Anderson concludes, fall short of any such transformation and cause harm. Ultimately, I am not persuaded by Anderson’s three propositions but the underlying premise of the conclusion does resonate: that though data can be utilized to help improve the criminal justice system, the use of data in sentencing in the form of RAIs can also be harmful, reinforcing existing racial stratification and perpetuating the legacy of systemic racism against Black people in the United States.

A fundamental flaw in Anderson’s analysis is her failure to consider the counterarguments and the unsupported assumptions inherent in her approach to critiquing RAIs and their attempt at criminal justice reform. Anderson’s first proposition—that the elimination of racial stratification should be a judicial objective—is followed by providing the historical context of how the legal system has perpetuated racial stratification. This section explores the current theoretical objectives of judicial sentencing as well as the findings of a survey on individual judges’ goals in sentencing. The problem Anderson highlights is clear but not enough engagement or credence is given to the counterarguments that (i) the direct instructions and caveats provided by the risk assessment companies to not use the data for individual sentencing, combined with training members of the judiciary on the limitations of the data, could provide

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enough context to make the continued use of RAIs reasonable, maybe even beneficial, and (ii) that it can both be true that the utilization of RAIs could perpetuate the system's racially disproportionate sentencing *and* that RAIs are an accurate prediction of recidivism, but providing the context which RAIs lack could go a long way in ensuring that the benefits of their use outweigh the harms.

As an example, criminal history and crime severity could be a reflection of over-policing in certain areas of people that fit a specific demographic, but this same data could also, in fact, be a strong indicator of recidivism. For this reason, I am less inclined to believe that RAIs should not be utilized at all. Furthermore, none of the assertions in that section of the note draw out why the elimination of racial stratification should be a judicial objective; they only explain and reiterate that it is not currently one of the objectives. Anderson's interpretation of the *Loomis* case is unconvincing and the third proposition suffers from the same shortcomings as her first proposition.

An equally troubling flaw in Anderson's analysis is her reliance on predominantly moral/emotive (theoretical) reasoning and failure to address the practical considerations of completely transforming the existing criminal justice system to strip it of racial stratification. Though Anderson incorporates some practical considerations into her predominantly theoretical analysis of RAIs by offering her own solutions for reform in addressing the criminal justice system's racial stratification, those solutions are not mutually exclusive with the use of RAIs and she faults RAIs in favor of seeking a potentially impracticable sentencing framework. In other words, by relying predominantly on theoretical reasoning and failing to acknowledge that RAIs could be tweaked to address the concerns she raises, Anderson offers a criminal justice framework that fails to address all practical considerations and realities of the current criminal justice framework to seek a radical approach, which though laudable, could not be achieved in the near future, in lieu of an approach, which no doubt still has flaws, but with some tweaks could be a more accessible route to reform.

Anderson's solutions are idealistic and commendable but unattainable in the current U.S. criminal justice framework—grounded in abstract, speculative notions rather than sensible and attainable considerations. As is common in social movements, this tension represents the all-too-familiar debate between the incremental change that comes with compromise and the urge to reject intermediary approaches in favor of forcing and holding out for the ideal. By failing to give sincere consideration to the practical obstacles in achieving the solutions she offers, Anderson leaves her argument vulnerable to the belief that the framework she offers cannot be carried-out in practice. Consequently, Anderson fails to persuade the reader that her critiques of RAIs offer any practical solutions to replace them in the struggle for criminal justice reform.

Although Anderson's critiques of risk assessment instruments as tools for criminal justice reform are somewhat meritorious, her reliance on predominantly principled and historical reasoning and failure to earnestly engage with predictable issues of practicality and counter-arguments, leave the reader unconvinced that Anderson's suggestions to halt the use of RAIs in favor of more comprehensive and ideal solutions can be practically fruitful.