

REPLY

Hercules and the umpire.

THE ROLE OF THE FEDERAL TRIAL JUDGE

Like the ostrich that buries its head in the sand, Mr. Holder is wrong about data-driven sentencing

August 10, 2014 By RGK in Uncategorized Tags: "immutable" characteristics, Attorney General Holder, risk prediction, sentencing., supervised release 39 Comments



http://herculesandtheumpire.files.wordpress.com/2014/08/2898021822_95279b8d07_b.jpg

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Attorney General Eric Holder, addressing criminal defense lawyers, expressed a concern about the use of empirical data to sentence people. One assumes he has similar concerns about the use of empirical data to to decide how offenders should be supervised when out on the streets on supervised release.

The Wall Street Journal (<http://online.wsj.com/articles/u-s-attorney-general-cautions-on-risk-of-bias-in-big-data-use-in-criminal-justice-1406916606>) wrote the following on August 1, 2014 detailing Holder's remarks:

Attorney General Eric Holder warned Friday that a new generation of data-driven criminal justice programs could adversely affect poor and minority groups, saying such efforts need to be studied further before they are used to sentence suspects.

In a speech in Philadelphia to a gathering of the National Association of Criminal Defense Lawyers, Mr. Holder cautioned that while such data tools hold promise, they also pose potential dangers.

"By basing sentencing decisions on static factors and immutable characteristics—like the defendant's education level, socioeconomic background, or neighborhood—they may exacerbate unwarranted and unjust disparities that are already far too common in our criminal justice system and in our society," Mr. Holder told the defense lawyers. Criminal sentences, he said, "should not be based on unchangeable factors that a person cannot control, or on the possibility of a future crime that has not taken place."

Although I think Holder's point of view is naive and manifestly wrong, we should at least thank the Attorney General for flagging a very important issue. With that acknowledged, let's look a little deeper.

As compared with Holder's concern, there is a movement at the federal level to seriously examine the huge data bases that exist in order to make predictive judgments about how offenders are likely to do in the future and to factor that data driven analysis into the judicial process. Indeed, a former policy analyst for the federal courts wrote three years ago that:

Evidence-based sentencing is based upon social science. Criminological meta-analysis has identified fifteen key variables that are significantly related to recidivism: 1) criminal companions, (2) antisocial personality, (3) adult criminal history, (4) race, (5) pre-adult antisocial behavior, (6) family rearing practices, (7) social achievement, (8) interpersonal conflict, (9) current age, (10) substance abuse, (11) intellectual functioning, (12) family criminality, (13) gender, (14) socio-economic status of origin, and (15) personal distress. If those variables can be used in sentencing, it may be possible to safeguard public safety while reducing the financial and social costs associated with mass incarceration.

J.C. Oleson, Risk Assessment at Sentencing (<http://arizonastatelawjournal.org/risk-assessment-at-sentencing/>), ASU Law Journal (June 20, 2011). *See also* Administrative Office of the United States Courts Office of Probation and Pretrial Services, An Overview of the Federal Post Conviction Risk Assessment (http://www.uscourts.gov/uscourts/FederalCourts/PPS/PCRA_Sep_2011.pdf) (September 2011).

Notice from the foregoing that "immutable characteristics" or "static factors" like race, gender and age are included. If race, gender or age are predictive as validated by good empirical analysis, and we truly care about public safety while at the same time depopulating our prisons, why wouldn't a rationale sentencing system freely use race, gender or age as predictor of future criminality? The same can be said of factors like antisocial behavior, family criminality and other factors that have in the past made us queasy because they were thought to focus too much on the poor.

In my opinion, the use of empirical methods to assess risk at sentencing and upon supervised release is the most important aspect of the present movement toward criminal justice reform. We can and should aspire to depopulate our prisons. We can and should aspire to treat certain offenders less harshly. We can and should do a better job of helping offenders on supervised release. But if we believe that public safety is or should be a central goal of our criminal justice system we ought not to ignore the truth—certain characteristics that we have shied away from in the past because we worried too much about vague notions of “equality” or “fairness” tell us a lot about future danger. The Attorney General was wrong to put his head in the sand like the proverbial ostrich when he suggested those factors be ignored. The rest of us ought not to make the same mistake.

RGK

39 responses

Theresa Haskins says:

August 10, 2014 at 10:40 AM

I agree completely. How will our great Country be able to make changes going forward if we aren't dealing with FACTS concerning the present. Nicely said, Judge.

John Otto says:

August 10, 2014 at 11:05 AM

You're just trying to be provocative judge. You don't really think that race should be a factor considered in sentencing decisions, despite what the “data” may show about the race of people who commit certain crimes. You don't really have the faith in “data” that you pretend to have in your piece above because you are old enough to remember Mark Twain's maxim, “Figures don't lie, but liars do figure.”

RGK says:

August 10, 2014 at 9:19 PM

John,

With respect, I am not just trying to be provocative. Two brief responses.

First, empirically based risk predictions commonly and justifiably use race among other immutable characteristics as part of what scientists call “actuarial” assessments of risk. Everyone who is shocked (including Holder) that immutable characteristics are included should read John Monahan, [A JURISPRUDENCE OF RISK ASSESSMENT: FORECASTING HARM AMONG PRISONERS, PREDATORS, AND PATIENTS](#), 92 Virginia Law Review 391 (2006) to understand how such predictions are properly used. As Professor Monahan suggests, these types of risk assessments *are only part* of what should be considered at sentencing but they should be considered. That is particularly so if our sentencing goals move from looking backward (what does the offender deserve for his or past crime) to moving forward (does the