RISK, RIGHTS, AND RELEASE: LEGAL AND POLITICAL IMPLICATIONS OF RISK ASSESSMENT MECHANISMS IN EARLY CARCERAL RELEASE IN THE US AND UK

LILIA CHNG

E-mail: chnglilia@gmail.com

Abstract - Risk assessment mechanisms are the linchpins of early carceral release decisions in the United States ("US") and the United Kingdom ("UK"). Although each jurisdiction adopts a distinct approach—the US favoring actuarial tools such as the PATTERN algorithm under the First Step Act, and the UK employing a court-like model grounded in clinical judgment—recent reforms have triggered overlapping legal and practical concerns. This article undertakes a comparative analysis of these two frameworks, exposing the key institutional vulnerabilities of the systems.

Keywords - Risk Assessment, Actuarial Tools, Clinical Judgement, Legal Implications, Institutional Vulnerability

I. INTRODUCTION

Risk assessment mechanisms occupy a pivotal role in modern criminal justice systems. This paper explores the recent reforms in relation to the use of risk assessments in early carceral release decisions, focusing on two major jurisdictions – the UK and the US. In the UK, the reforms have been said to "sacrifice fairness for political expediency". In the US, discontent is likewise rife. Tens of thousands have been wrongfully categorized and there exists mounting criticism from experts who argue that "the tool is scientifically unverified, and that the assumptions built into its design encode bias against Black people, Latino people, poor people, un housed people, and people with mental illness".

This paper will undertake a qualitative comparative analysis of each jurisdiction's early release framework, highlighting the convergence in legal and institutional vulnerability. In doing so, the procedural and substantive shortcomings of the current frameworks will first be canvassed, and the immense avenue for politicization will subsequently be discussed.

This article contends that neither system, in its current form, is suitable, sustainable and just. A hybrid model will be proposed such that risk assessments in early carceral decisions integrate actuarial and clinical judgment to ensure the pursuit of public safety is rightfully bridled with regard for procedural justice.

II. PRACTICAL RAMIFICATIONS

This section shall deal exclusively with discontents harbored at the way in which risk assessment mechanisms are implemented in both the UK and the US. The central claim is that both jurisdictions have adopted frameworks that are of poor quality, and the reforms have thus done more harm than good.A plethora of studies, scholarly critics and even government reviews reveal the lack of accuracy in the deployment of the US's PATTERN algorithm. As of late 2020, the National Institute of Justice ("NIJ") report revealed that 14,170 prisoners have been assigned erroneous final risk categories. The 2021 NIJ Report in relation to PATTERN 1.2-R showed that the version contained many errors which resulted in 10.9 percent of males and 9.8 percent of females being given incorrect overall PATTERN risk categories. The same report also revealed that PATTERN has a 6 to 7 percent relative over prediction for Black females on the general recidivism tool, 5 to 8 percent relative over prediction of Asian males on the general and violent recidivism tools, and a 12 to 15 relative under prediction of Native American males and females on the general recidivism tools. Despite the required reviews and revalidation, the presently used PATTERN version 1.3 has been deemed unable to solve these racial bias issues.

The crux of the problem with PATTERN lies with the way in which layers of biases are embedded in its design. Notably, PATTERN estimates the likelihood of rearrest or return to BOP custody following release as opposed to directly predicting recidivism, and the data used to do so are biased. Predictive accuracy is undermined as both the metric applied and the data the algorithm is trained on to determine the correlation between inputs and the outcome are heavily tainted by the politics of policing. The biases implicit in policing cannot be disputed – the racial disparities in policing and police violence rooted in slavery have been sustained by systemic exclusion and discrimination and fueled by both implicit and explicit bias. Notwithstanding efforts to improve PATTERN, biases still very much afflict its use, undermining its veracity.

In contrast, the UK's Parole Board ("**PB**") has enjoyed a stellar track record whereby only 0.5% of prisoners released go on to commit other serious offences. However, several high profile and

controversial decisions by the PB in recent years have sparked massive reforms to parole, which shall be argued to be regrettable.

Then Secretary of State for Justice Dominic Raab ("**Raab**") told members of parliament that reforms were necessary to "ensure that those offenders who present the highest risk to public safety are reviewed more rigorously", and to "reinforce public safety" as the "top priority". Accordingly, since the root and branch review of the Parole System in 2022, significant changes were implemented. This article shall focus primarily on the ministerial check of release decisions, the removal of recommendations and introduction of 'single view' procedures pursuant to the Parole Board (Amendment) Rules 2022, as well as the inclusion of victim personal statements ("**VPS**") at early release hearings pursuant to the Victims and Prisoner Act 2024.

This paper contends that on a balance of probabilities, the reforms implemented through the Parole Board Amendment Rules (2022) as well as the Victims and Prisoners Bill (2024) will severely undermine the quality of decision making. Notably, the 'single view' procedure was implemented. Resultantly, "reports relating to the prisoner should present all relevant information and a factual assessment pertaining to risk, as set out in the paragraphs of Part B of this Schedule, but the report writer must not present a view or recommendation as to the prisoner's suitability for release or move to open prison conditions", and "where considered appropriate, the Secretary of State will present a single view on the prisoner's suitability for release". The reason given was that "separate, conflicting recommendations from within the Ministry of Justice", and that he "[did] not believe it is appropriate to have diverse recommendations on the ultimate and overarching question of release". It is hard to see how the new framework, whereby valuable input and productive discourse by the PB is eliminated and the decision-making powers are overwhelmingly in the hands of an actor with limited experience and expertise in the area, can tenably translate to improved outcomes. In fact, the implementation of 'single view' procedure was subject to a Motion to Regret in 2022, and Baroness Prashar (CB) opined that the changes "may well result in increased risk to the public, as the Parole Board is denied the benefit of expert opinion and the opportunity to see how prisoners respond in conditions of lower security. As we know, having the benefit of expert opinion and proper risk assessment is important to ensure that prisoners are prepared for reintegration into society". In a similar vein, Lord Dholakia (LD) postulated that "it was obviously helpful for the board to receive recommendations from professionals who had particular knowledge of the prisoner because they had worked with him or her on a regular basis during the prisoner's sentences". Hence, rather than promote the stated goal of reinforcing public safety, the removal of recommendations and introduction of the 'single view' procedure is likely to undermine public safety.

Furthermore, the incorporation of the VPS is likely to further undermine the quality of decisions made. It merits emphasis that issues regarding public confidence often arise from a misunderstanding of the role of the PB. It was emphasized by the PB that "sole focus (of the PB), in law, is risk", rather than a re-sentencing exercise as often construed by the media. The purpose of the VPS is to provide the panel with information relevant to questions it may explore with the prisoner for example, the impact of their behaviour, their insight into their behaviour, their remorse, their empathy, appropriate licence conditions if they are to be released, as well as further insight into the relevant offending including its impact on the victim and/or their family. Notably, such factors would have already been taken into account during sentencing, and none of them speak directly to the current risk the inmate poses. In other words, there is wholly no probative value of the VPS to the question of risk being assessed. The immense potential prejudicial effect of the VPS is thus a huge concern, especially in light of findings that a victim testimony is more influential at parole hearings than at sentencing hearings.

III. LEGAL RAMIFICATIONS

The quality of risk assessment mechanisms necessarily encompasses not just the accuracy of the prediction, but also the quality of the procedure through which it was made. It bears emphasis that when using risk assessments to guide early carceral release decisions, the state exercises one of its most important functions – the protection of the public from serious criminal offending – and also its most coercive power – the deprivation of an individual's liberty. Accordingly, in addition to the intrinsic quality of the decision made, the quality of the framework through which decisions are made are equally, if not more, important.

There arguably exists valid grounds to object to the use of PATTERN when examining the body of precedence governing due process in the algorithmic and carceral release context. In Morrissey v Brewer (1972), the Court applied the "grievous loss" test to determine if there was a legitimate liberty interest that warranted due process protections. Specifically, the Court recognized "that the liberty of a parolee, although indeterminate, includes many of the core values of unqualified liberty and its termination inflicts a "grievous loss" on the parolee and often on others", and "the liberty is valuable and must be seen as within the protection of the Fourteenth Amendment. Its termination calls for some orderly

process, however informal".

In determining if a liberty interest exists under the FSA would warrant due process protections, guidance can be sought from the criteria established in Kentucky Department of Corrections v. Thompson (1989). The Court held that a liberty interest is commonly created when 'substantive predicates' are established to govern official decision making and by mandating that outcomes be reached upon a finding that the relevant criteria have been met. This is consistent with what the Supreme Court held in Greenholtz v. Inmates of Nebraska Penal Complex (1979), whereby the court acknowledged that statutory and regulatory language can create an "expectancy of release provided in the statute is entitled to some measure of constitutional protection". It stands to reason that due process in the context of PATTERN implementation is warranted insofar as pursuant to the FSA, eligible federal offenders are to be released upon satisfactory completion of education and treatment programs, and the lack of any further criteria and judgement creates a liberty interest.

Given that due process arguably should exist under the FSA, precedence would dictate that inmates are to be allowed to present individualized information. In State v Loomis (2016), which involved a due process challenge to the use of algorithm to predict the Plaintiff's dangerousness in denying probation, the Court held that affirmed the finding in State v Harris (2010) that "Defendants have a due process right not to be sentenced in reliance on improper factors such as age or gender", and while the consideration of the algorithm was possible, a reliance on it for the purposes of imposing a sentence was not permissible.

Likewise, in Cleveland Board of Education v LaFleur (1974), the Supreme court held that when significant liberty interests are at stake, the government cannot condition that liberty on conclusive presumptions, holding that such an irrebuttable presumption was unconstitutional. The Supreme Court also held that the Government's interest in "speed and efficiency" did not outweigh the right to individualized consideration. Accordingly, the inability to present individualized information under PATTERN arguably forms the grounds for a legitimate legal challenge to its use.

As it now stands, the UK's parole mechanism can likewise be subject to legal scrutiny. Most notably, it can be said to violate the rule against bias (*nemo iudex in sua causa*). The rule of bias is "concerned to ensure that government decision-makers do not have a personal interest in decisions that they take", and is this very principle that underscores the importance of independence of the Parole Board as a quasi-judicial body. The increasing ministerial oversight represents an attack on the separation of power, both in person and function, between the executive, legislature and the judiciary. Pursuant to a paper published by the House of Commons Library on 'The Separation of Power', "[a]ccording to a strict interpretation of the separation of powers, none of the three branches may exercise the power of the other, nor should any person be a member of any two of the branches. Instead, the independent action of the separate institutions should create a system of checks and balances between them.

To this end, the risk that the lack of separation creates avenues for politicization has been aptly captured by a panoply of sources. Andrea Coomber, Chief Executive of the Howard League for Penal Reform highlighted the "danger that these measures will lead to political grandstanding at the expense of fair treatment of prisoners who have served their time". In the same vein, Peter Dawson, the director of the Prison Reform Trust opined that it was "unfair to let an individual's future – however grave their crime – be sacrificed to the electoral calculation of a member of the executive.

The separation of power is a bastion of fairness". Criticism of the 'single view' procedure was significant enough to warrant a Motion to Regret on 18 October 2022. During which, Lord Sholakia (LD) aptly captured the failings of such a system in saying that "[t]his approach is patently nonsensical. It is difficult to see what it has to do with protecting the public or promoting sound decisions. The decision to prohibit these professionals from making recommendations seem to have arisen from the desire of the former Secretary of State, Dominic Raab, to reject recommendations for open conditions in certain cases, specifically cases where he argued that a move to open prison would "undermine public confidence in the criminal justice system". This phrase seems to be shorthand for refusing recommendations in high-profile cases because of a fear of adverse media publicity, even when there is strong evidence of the prisoner's suitability for open conditions".

In the above premises, there may be potential avenues for constitutional objections in light of Article 5 of the European Convention of Human Rights ("**ECHR**"). Specifically, Article 5(4) of the European Convention on Human Rights assigns the role of making decisions about restrictions on liberty to a court, establishing the clear principle that the final decision on the release of prisoners should be a matter for a court or a court-like body – which would be the PB as opposed to a political actor.

When viewed in totality, both jurisdictions' approaches reveal a common legal fault line: when decisions about liberty are overwhelmingly shaped by misguided priorities or flawed algorithms, they risk

transgressing core constitutional and human rights principles.

IV. DISCUSSION

While the UK and the US adopt systems that diverge in form, their approaches converge in relation to a shared vulnerability to biases and politicization. The US's implementation of PATTERN reveals that while the concept of relying solely on actuarial judgement may seemingly eliminate the fallibility of human discretion, biases can still very much plague models due to the policy choices involved. In this case, the past political agendas that shaped policing covertly exert their influence. There is also the undeniable avenue for the overall framework being adjusted to reflect political agendas. For example, a return to law-and-order politics may well translate to the policy choices of decreasing the score needed to qualify for early release or readjusting the algorithm such that it becomes harder to classify as low risk. In the UK, the vulnerability for politicization is created by way of enabling direct ministerial intervention.

In light of the foregoing, there exists an inescapable need for a firewall between early release mechanisms and the shifting tides of political expediency. Risk assessment, whether algorithmic or clinical, must be compatible with the law and anchored in institutional safeguards. To that end, this paper proposes a hybrid model combining actuarial and clinical judgement. Actuarial methods provide expediency in prioritizing standardization and scalability. In contrast, clinical methods rest on the use of discretion, which thus allows for greater means of contextual sensitivity. It is undisputed that each means of judgement offers advantages the other lacks, while simultaneously presenting a unique set of flaws. Navigating the use of either, or even both, thus requires an understanding of the elaborate edifice of intricacies surrounding the decision in question.In the context of early carceral release decisions, actuarial tools can offer a consistent means of a check against clinical judgement – where actuarial inputs have to be taken into account and a deviation from such suggestions justified. Clinical judgement in the context of risk assessments for the purpose of early carceral release remains a necessary counterpart to the extent that it allows the system to assess each case by its merits, acknowledging nuance, context and the dignity of the subject whose liberty is at stake.

V. CONCLUSION

Admittedly, no framework can be fully insulated from bias; regardless of whether clinical or actuarial judgement is applied, policy choices are made and trade-offs are inevitable. Nonetheless, this article posits that a hybrid model—one that integrates actuarial tools with clinical judgment—offers the best path forward. While such a framework, in and of itself, would not necessarily guarantee better outcomes, allowing clinical and actuarial judgement to inform and constrain the other offers a balance between objectivity and individual fairness while recognizing not just the need to safeguard the public, but also the need to protect the rights and dignity of those whose liberty is in the hands of the state.

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