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Juvenile Defense

Juveniles' Competency to Stand Trial

By Juliet Gee

A juvenile's competency to stand trial is separate and apart from his capacity to distinguish right from wrong and be held legally responsible for committing a crime. While minors may understand it is wrong to commit the crime, they may still fail to understand the legal and judicial system or be unable to participate in their own defense, and thus be "incompetent" to stand trial.

Competency to stand trial dates back to English common law. In 1960, the Supreme Court held in *Dusky v. United States* that a defendant must have sufficient mental capacity to understand the legal proceedings he or she is engaged in, and to meaningfully participate in his or her defense.¹ Competence to stand trial is separate from criminal responsibility (*Medina v. California*).² In adult cases, incompetency is usually due to mental illness, or drug addiction, or intellectual disability. If found incompetent, the defendant is referred for "restoration of competence," often in a state mental institution. Once restored, for example through antipsychotic medication, trial proceedings may resume. The adult competency system is well established. Procedures are set forth in most state penal codes.

¹ See *Dusky v. United States*, 362 U.S. 402 (1960).

² *Medina v. California*, 505 U.S. 437 (1992).

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What Juvenile Court Prosecutors Need To Know About Risk Assessment Instruments

By Katie Jerstad

Introduction

Many jurisdictions have adopted risk and needs assessment instruments (RAIs) in their efforts to improve their juvenile justice systems. The use of RAIs at different, various stages of a youth's contact with the system can assist criminal justice professionals make more informed and objective decisions over the life cycle of a case.

From the eligibility for a particular diversion program to the length of time on probation, RAIs can assist in decision-making and be useful tools in the juvenile justice system. Some RAIs are used at early stages of the youth's contact with the criminal justice system, either during the investigation phase by law enforcement partners or at the intake phase with a juvenile court counselor or probation officer. If a youth is detained following an investigation, RAIs can be useful in helping the court, prosecutor or detaining authority determine the propriety of detention or appropriate alternatives to detention for that particular youth. RAIs may be used at or before the time of an arraignment to measure the youth's level of risk for failure to appear at subsequent hearings or level of risk to the community pending adjudication. RAIs utilized at the disposition phase typically measure risk of re-offense and identify the child's

specific needs to tailor a plan for rehabilitation. Of those detained or committed, RAIs can also be helpful in treatment, discharge, or transition planning.

Classifying offenders with the aid of a RAI can help answer these questions:

- Will this individual fail to appear? (APPEARANCE)
- Is this person safe to be on the streets? (DANGEROUSNESS)
- Will this person reoffend? (RECIDIVISM)

Not all RAIs are the same. The RAIs discussed in this article are distinct from the risk assessments used in the adult system and those used in the child welfare system to measure child and adolescent well-being and trauma. Juvenile RAIs are also distinct from threat assessments used by law enforcement, for instance in a school where a youth has made a threat of violence. Even within the juvenile justice system, RAIs used at different stages of the process are not the same. For instance, an RAI designed for screening for diversion will define or categorize risk differently than an RAI designed for transition planning out of a detention or correctional facility. Although different RAIs may be premised upon the same concepts or

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methodology, there are significant differences between RAIs that prosecutors will need to understand whether relying on or discrediting one for a particular argument.

Adoption of a juvenile risk assessment tool won't, by itself, be enough to divert youth from delinquency or prevent recidivism. Only when coupled with evidence-based and needs-based diversion programs (both community-based and residential) will the assessment of risk prove useful. Some data-driven juvenile justice programs that use RAIs have produced results, facilitated diversions and assisted in rehabilitation. In turn, these programs have seen a reduction in the number of juveniles detained, the number of delinquency petitions filed, the number of juveniles committed to juvenile corrections facilities, and the overall juvenile recidivism rate.¹

¹ See *Diversion from Formal Juvenile Court Processing*, OJJDP Literature Review 6 (Feb. 2017), https://www.ojjdp.gov/literature-reviews/risk_needs_assessments_for_youths.pdf (January 2015) (re. Adolescent Diversion Program at Michigan State University and other successful diversion programs reducing recidivism); See also Hoobs, Anne, J.D., Ph.D. & Sommer Fousek, *The Lancaster County Juvenile Reentry Project Follow-up Report* (July 2015), https://www.unomaha.edu/college-of-public-affairs-and-community-service/juvenile-justice-institute/_files/documents/reentry-project-followup.pdf; *North Carolina State-wide Contracts Results First Research Brief* (March 2022), [open \(ncdps.gov\)](https://www.ncdps.gov) (comparing rates of recidivism across four evidence-based programs, Value-Based Therapeutic Environment (VBTE), Cognitive Behavioral Therapy (CBT); Functional Family Therapy (FFT) (court-involved and post release supervision).

What Aspects of the RAIs Are Critical for the Juvenile Prosecutor to Understand?

Over the past twenty-five years, there have been significant advances in research about effective screening tools and interventions in juvenile court. As a juvenile court prosecutor, it is important to be familiar with juvenile justice research and to understand the science behind these instruments being used

RAIs must be reliable, valid, and equitable.

prior to cases getting to court and/or utilized in court. In addition to the information presented in this article, a helpful overview can be found online at: https://ojjdp.ojp.gov/model-programs-guide/literature-reviews/risk_needs_assessments_for_youths.pdf (January 2015)

Nine RAIs were compared in a 2013 study summarized here: <https://www.ojp.gov/pdffiles1/ojjdp/grants/244477.pdf>. This free 2013 article is the result of the U.S. Department of Justice, Office of Juvenile Justice and Delinquency Prevention (OJJDP), funded research.

The article recommends more attention be given to the following areas:

- The RAI must be reliable, valid, and equitable. Evaluation of the RAI, through reliability testing and validation studies, should be a regular component of the practice.

- The Administrators of RAIs would benefit from national standards.
- Keep it simple: the list of factors considered by a RAI should include only those that have a statistically strong correlation with recidivism rather than weak correlation (including dynamic factors and criminogenic needs).

In order to understand the developments in the research since 2013, prosecutors must understand the evolution of the RAI, the scientific principles that gave rise to the RAI, and how they are used in a judicial context, from detention to diversion to disposition/sentencing. This article will discuss the principles of effective interventions (specifically, the Risk-Need-Responsivity framework) and the types of risk (static versus dynamic) and protective factors RAIs measure to determine risk level and to match that to a level of service.

Prosecutors and judges should consider the pros and cons of risk assessment tools when making decisions because the results of an assessment can be a helpful component of an argument to the court. However, the results cannot be relied upon exclusively. While a RAI can provide a program or community with benefits, a RAI also can have limitations. A prosecutor should be aware of the limitations of the RAI being used in their jurisdiction. This article will discuss both benefits and/or limitations of RAIs.

For practical application, this article will also discuss one particular RAI, the Youth Assessment and Screening Instrument

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(YASI), studies of its efficacy in the field and case law discussing it.

Additionally, this article will address the use of RAIs in particularly challenging cases of youth committing sexual offenses.

But beware: just because a risk assessment tool may be used in your jurisdiction doesn't necessarily mean it cannot be challenged in court. Be sure to research the risk assessment tool in your jurisdiction's jurisprudence to see what issues have already been litigated.

Finally, this article will conclude with a guide for how a juvenile court prosecutor,

criminal or deviant behavior. The YLS/CMI [one type of RAI], for example, includes "those items that previous research had indicated were most strongly associated with youthful criminal behavior" and were also based on the "General Personality and Social Psychological Model of Criminal Conduct" (Andrews & Bonta, 2003). Similarly, the COMPAS Youth risk assessment instrument is based on theories of criminal/deviant behavior (Brennan, Dieterich, & Ehret, 2009).³

The fourth and current generation of RAIs is considered a part of an integrated case management plan system. By 2014,

It is important to understand that the percentage gleaned from the actuarial model does not represent that youth's likelihood to reoffend, but the rate at which other youth with the same score reoffended.

Under the **structured professional judgment approach**, the practitioner determines which risk factors to consider, how they should be measured, and then categorizes risk level (involving far more discretion than the actuarial model and allowing consideration of factors not on the list).⁵

II. Principles of Effective Intervention – Risk Assessment Principles and Framework.

Adherence to the Principles of Effective Interventions (PEI) is a critical part of juvenile justice integrated case management plan systems. It is important to understand each element and that they must be used together to understand and measure outcomes for youth and reduce a youth's risk for recidivating.

The principles:

- A. Risk** - determining the youth's risk of reoffending, considering both risk factors and **Protective Factors**, to determine the youth's needs and level of service required
- B. Need** - addressing the youth's presenting issues ("criminogenic needs") associated with offending; can be done through a validated risk assessment instrument
- C. Responsivity** - accounting for youth's individual characteristics⁶

A. The Risk Factor

The first step of an effective intervention is to identify the level of risk presented by a particular youth. RAIs are a valuable tool for this step or to achieve this principle. It can be used by institutions (youth probation, for example) to identify WHO to target with interventions. The risk level designation is meant to help ascertain

*Just because a risk assessment tool may be used
in your jurisdiction doesn't necessarily
mean it cannot be challenged in court.*

if presented with a questionable RAI, can critically assess the tool and effectively cross-examine the professional who administered the assessment if necessary.

I. The Evolution of Juvenile Risk Assessment Instruments

Modern juvenile risk assessment instruments were first developed in the 1970s² and grew out of the adult offender risk assessment research taking place in the 1960s, but some early quasi-clinical risk assessments and objective/empirical-based RAIs date back to much earlier (1920s). The questions asked or factors considered in these juvenile RAIs have evolved since the 1960s starting with an early generation of questions that asked primarily dynamic factors (items that could change). The next generation of RAIs considered actuarial or static factors (items that do not change). Generation 3 and 4 generally ask a combination of static and dynamic questions.

Some generation 3 and 4 instruments incorporate risk factors identified in prior research studies and in one or more theories of

researcher Andrew Watcher found more than 20 different RAIs being implemented as part of integrated case management systems statewide across 34 states in the country, although only 25 states have juvenile probation services that are all or mostly state administered.⁴

By 2015, two types of juvenile RAIs were identified. According to the 2015 Risk/Needs Assessments for Youths Literature Review, the two types are the actuarial model and the structured professional judgment approach.

The **actuarial model** involved scoring items related to reoffending from the assessment tool, then weighing and summing the items before using a statistical formula to calculate a total risk score. This score is cross-referenced with another table that provides an estimate of risk over a specified period such as 5 to 10 years. The estimate, often a percentage, is based on the number of individuals who received the same risk score and recidivated during the development of the RAI.

³ *Id.* at 3.

⁴ Watcher, Andrew, *Statewide Risk Assessment in Juvenile Probation*, JJGPS StateScan National Center for Juvenile Justice (May 2015), Wachter - Statewide Risk Assessment in Juvenile Probation (ncjj.org).

⁵ *Risk/Needs Assessments for Youth*, OJJDP Literature Review, 4 (Jan. 2015), https://ojjdp.ojp.gov/model-programs-guide/literature-reviews/risk_needs_assessments_for_youths.pdf.

⁶ See Andrews, D. A., J. Bonta & R. D. Hoge, *Classification for Effective Rehabilitation: Rediscovering Psychology*, 17 *Crim. Justice & Behavior* 1 20, 35-38 (Mar. 1990), <https://doi.org/10.1177/0093854890017001004>.

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² Baird, Chris, Theresa Healy & Kristen Johnson, *A Comparison of Risk Assessment Instruments in Juvenile Justice*, Office of Justice Programs, 2 (Dec. 2013), <https://www.ojp.gov/pdffiles1/ojjdp/grants/244477.pdf>.

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the probability that a youth will reoffend, based on characteristics that are correlated with delinquency. Risk information is used to classify juveniles for purposes of supervision and to determine the need for control or treatment. Measuring risk, generally, can enable a jurisdiction to:

- Target youth with higher probability of recidivism
- Provide most intensive treatment to higher risk youth⁷

Risk factors may include the following, depending on the RAI used (these can also correlate with Protective Factors, described in more detail below):

- Legal history
- Family supports or lack thereof
- School
- Community/Peers
- Alcohol/Drugs
- Violence/Aggression
- Attitudes
- Skills
- Use of Free Time/Employment

In developing the Risk Assessment Instruments, social scientists have had to take into consideration the historical discrimination and disproportionate minority contact (DMC) that could skew risk factor determination. Youth court practitioners must also consider this history and current reality when assessing a RAI.⁸

⁷ Latessa, Edward, PhD, *Why it's Important to Use Risk Data to Drive Decision Making*, Univ. of Cincinnati/Institutional Corrections Research Network (ICRN), PowerPoint Presentation (April 2017); See also Makarios, Matthew, Kimberly Gentry Sperber & Edward J. Latessa, *Treatment Dosage and the Risk Principle: A Refinement and Extension*, 53 *Journal of Offender Rehabilitation* 5, 334-350 (2014); Bourgon, G. & B. Armstrong, *Transferring the Principles of Effective Treatment into a "Real World" Setting*, 32 *Crim. Justice and Behavior* 1, 3-25 (Feb. 2005).

⁸ For example, the Georgia Comprehensive Risk and Needs Assessment, the RAI used in Georgia in 2013, analyzed as part of a comparative study in 2013, asked the following questions: how many times has the youth been suspended since first grade; how many of the youth's friends are gang-affiliated; and how many of youth's friends have been arrested. In light of the research that black and brown boys experience a disproportionate number of school suspensions (revealing that non-black and brown children are not suspended at the same rate for similar conduct), that black and brown children, due to discriminatory banking and other housing-related practices, are more

Risk assessments generally categorize youth into one of three levels of risk: low risk, moderate risk, or high risk. Low risk means youths are unlikely to reoffend or engage in delinquent behavior in the near future. Generally, they do not need the number of services or the supervision that moderate or high risk youth may require.⁹ It should also be noted that a youth in trouble for the first time could fall into the "low risk" category even when their first offense is an extremely violent offense, like homicide.¹⁰ This is where one must understand the limitations of the risk level determination obtained through a RAI.

These 3 categories of risk do not provide specific probabilities that youth will reoffend; juveniles are

Measuring risk can enable a jurisdiction to identify youth with a higher probability of recidivism and provide more intensive treatment to these higher risk youth.

considered at a specific risk to recidivate when compared to other juveniles similarly situated.¹¹

Some states, after assessing the youth's needs based on the risk level and other evaluations, will prescribe certain treatment or assign certain activities to meet those needs and the youth has to show

prone to live in under-resourced areas where gangs/ crews dominate, and that black and brown boys are more likely to be arrested than white boys for similar behavior, these questions/factors could skew the results of the risk assessment or perpetuate DMC. Consideration of these factors could result in an RAI that assigns black and brown boys higher risk levels which could result in prolonged and unnecessary the involvement of black and brown youth in the juvenile system. Georgia's RAI may have been modified since this 2013 study.

⁹ *Risk/Needs Assessments for Youth*, OJJDP Literature Review (2015) citing Vincent, Gina M., Laura S. Guy & Thomas Grisso, *Risk Assessment in Juvenile Justice: A Guidebook for Implementation*, Models for Change, 4 (2012), <http://modelsforchange.net/publications/346>.

¹⁰ Larsen, Rachel, *Top Four Common Mistakes or Misunderstandings in Juvenile Risk Assessment*, 27 *Juvenile Justice Update* 4, 1-2 (2022); for the free resource see Larsen, Rachel, *Top Common Mistakes or Misunderstandings in Juvenile Risk Assessment*, NDAA-Juvenile Justice Publication (2019) *Common-Mistakes-in-Risk-Assessment-Magazine-FINAL.pdf* (ndaa.org).

¹¹ Vincent (2012)(emphasis added).

completion without regard to a specific number of hours.

To address the DMC problem and to highlight those attributes that reduce a child's risk to re-offend, PEI and RAIs consequently take into consideration Protective Factors.

Protective Factors

Protective Factors are those characteristics of the child, family, and wider environment that reduce the likelihood of adversity leading to negative outcomes and behaviors such as delinquency, including:

- High expectations and positive/resilient temperament
- Social competencies and problem-solving skills

- Healthy/conventional beliefs and commitment to community and school
- Positive family relationships
- Presence and involvement of caring/supportive adults
- Opportunities and rewards for prosocial bonding
- Good relationships with peers/positive peers
- High expectations and above average academic achievement¹²

Among the factors considered by the administrator and the prosecutor, certain "Protective Factors" can be identified as a strength, if already in place, or a goal. Risk/needs assessment tools can take a more strengths-based approach by considering the presence of Protective Factors when estimating a youth's level of risk.¹³ The incorporation of Protective Factors and consideration of responsiveness are a part of the fourth generation

¹² *Protective Factors Against Delinquency*, OJJDP Literature Review https://ojjdp.ojp.gov/sites/g/files/xyckuh176/files/media/document/protective_factors.pdf (Dec. 2015).

¹³ *Id.*

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of RAIs.¹⁴ Generally, the goal of any programming is to decrease risk factors and increase Protective Factors.

With three risk categories, some may assume there would be three distinct levels or combinations of services, three types of supervision or treatment that correlate. But in reality, just because two youths may be determined to be high risk, their Needs will be different so their referrals may not be similar at all. This next section will discuss the Needs part of the RMR framework.

B. The Need Factor

The Need factor or principle identifies WHAT to target with interventions.

***RAIs help track changes in behavior,
promote greater objectivity in decision-making,
reduce bias, and aid in legal challenges.***

In essence, this factor serves to answer the following question: What NEEDS changing for this youth to avoid further contact with the juvenile or criminal justice systems?

The Need principle identifies and defines the attributes of future delinquent behavior that can be changed—such as the **dynamic risk factors**.

There can be **criminogenic needs factors** and **noncriminogenic needs factors**. Here is a helpful description of the difference:

Criminogenic needs factors are related to dynamic risk factors and refer to characteristics of the youth that, when changed, are associated with changes in risk of reoffending.¹⁵ For example, substance use is a risk factor but can also be a criminogenic needs factor if a youth's substance use is related to the youth's delinquent behavior. If that youth's substance use is targeted and treated properly, the youth's risk to reoffend should be reduced.

Noncriminogenic needs factors are dynamic risk factors that may indi-

cate a need for treatment or programming for the youth; however, they are not related to delinquent behavior. Low self-esteem is a prime example of a noncriminogenic factor. Although a youth's low self-esteem may suggest a need for counseling, it is not a risk factor for delinquency, and changing a youth's self-esteem level will not change the likelihood of reoffending.¹⁶

Examples of criminogenic needs may be static (unchanging factors) or dynamic.

Dynamic risk factors are those that can change, and indeed often do change during the course of adolescence (e.g., attitudes, values, beliefs, substance use, truancy, and peers associations). Dynamic risk factors are often identified as

criminogenic needs when they are problematic for the youth. They are potentially malleable and thus may be influenced by intervention.¹⁷ Interventions tailored to identified criminogenic needs factors are associated with changes in risk of reoffending.¹⁸ Thus, it is important to identify these dynamic criminogenic needs factors and tailor the intervention to them to reduce risk of reoffending.

Most of the risk factors listed here associated with criminal conduct can be CHANGED. They are DYNAMIC.

- Antisocial attitudes, values, beliefs and emotional states
- Negative peers/associates
- Antisocial personality patterns conducive to offending
- Family factors including criminality and psychological problems; low

levels of affection, caring and cohesiveness; poor parental supervision and discipline practices; neglect and abuse

- Low levels of personal educational, vocational, or financial achievement
- Low levels of involvement in pro-social leisure activities
- Substance Abuse¹⁹

There may be static risk factors, risk factors that are harder to eliminate, reduce or change, so the focus of the Needs factor is the dynamic risk factors that can be changed, with the right responsivity, the next factor in PEI.

C. The Responsivity Factor

Responsivity factors are non-criminogenic factors that should not be considered when estimating the risk level but are important to consider when determining appropriate treatment and services. They are factors that may affect a youth's ability to respond to treatment and programming, such as motivation to change, cognitive functioning, and access to transportation.²⁰

Put another way, Responsivity is the consideration of HOW to provide the youth with interventions. Responsivity can include removing barriers to treatment, such as making sure the youth has transportation to services, and if the youth does not have transportation, arranging an alternative method or time for the youth to obtain that service. Another example of Responsivity is matching the style and mode of service delivery to key youth characteristics, such as temperament, learning style, motivation, gender and culture.²¹ The Responsivity factor encourages the use of cognitive-behavioral interventions.²²

¹⁹ Edward J. Latessa, Ph.D., Shelley Johnson & Deborah Koetzle, *What Works and What Doesn't in Reducing Recidivism with Youthful Offenders: Understanding the Principles of Effective Intervention*, National Institute of Corrections, PowerPoint Presentation, 11-12 (2014), *What Works and What Doesn't in Reducing Recidivism with Youthful Offenders* | National Institute of Corrections (nic.gov).

²⁰ *Risk/Needs Assessments for Youths* (2015), citing Vincent (2012).

²¹ Andrews, D. A., J. Bonta & R. D. Hoge, *Classification for Effective Rehabilitation: Rediscovering Psychology*, 17 *Crim. Justice & Behavior* 1 20, 35-38 (Mar. 1990), <https://doi.org/10.1177/0093854890017001004>.

²² *Id.* at 37-43.

¹⁴ Baird, Healy & Johnson *A Comparison of Risk Assessment Instruments in Juvenile Justice*, Office of Justice Programs <https://www.ojp.gov/pdffiles1/ojjdp/grants/244477.pdf> at i and 3 (Dec. 2013).

¹⁵ Vincent at 5, 18-19, 23, 25, 31-33, 36 (2012).

¹⁶ *Risk/Needs Assessments for Youth*, OJJDP Literature Review (2015).

¹⁷ Lipsey, Mark, Catherine Conly, Gabrielle Chapman, & Shay Bilchik, *Juvenile Justice System Improvement: Implementing an Evidence-Based Decision-Making Platform*, Center for Juvenile Justice Reform, Georgetown Univ. 6 (Jan. 2017), *Juvenile Justice System Improvement: Implementing an Evidence-Based Decision-Making Platform* (ojp.gov).

¹⁸ Vincent, *Risk Assessment in Juvenile Justice*, at 5, 18-19, 23, 25, 31-33, 36.

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Specific Responsivity factors may include the following:

- Low Intelligence
- Physical Handicap
- Mental Health Issues
- Transportation
- Reading and writing limitations
- No desire to change (motivation)
- Childcare
- Language
- Ethnicity
- Cultural barriers
- History of abuse/neglect
- Interpersonal anxiety

The Responsivity factor is where juvenile justice professionals can apply the unique information about a youth, gathered not just from an assessment tool but through other sources, to the interventions available. Responsivity is an essential part of effective intervention.

III. Benefits and Limitations of the RAIs

The advantages of using risk and needs assessments to guide levels of supervision and treatment planning include:

- Helps track changes in the youth;
- Promotes greater objectivity in decision-making, reducing bias, including working against the racial and ethnic disparities in treatment/adjudications and dispositions;²³
- Helps provide consistency across the state, if adopted state-wide;²⁴
- Aids in legal challenges;
- Helps standardize data collection and provides common measure of effectiveness in interventions used;
- Provides a common language across counties and stakeholder groups;
- Helps formulate treatment and supervision plans;
- Identifies factors that, if changed, can reduce recidivism and lead to enhanced public safety;

²³ See generally, Vincent (2012).

²⁴ Wisconsin Child Welfare Professional Development System, Univ. of Wisconsin – Madison <https://wcpds.wisc.edu/yasi/#why-use-a-risk-assessment-tool>

- Avoids use of expensive programs for youth who do not need them;²⁵
- Helps better utilize resources and assists with case load management.

Research shows that youth who scored “low risk” by a validated assessment and were diverted from the juvenile court system recidivated at lower rates than comparable youth whose cases were formally processed through the court system.²⁶ Therefore, there is a push to keep low level offenders from having to go to court. Alternative methods of holding low risk level youth accountable are emerging across the country, such as diversion and restorative justice programs.

instruments thus provide estimates of the likelihood of detection, apprehension, and prosecution for illegal acts, not involvement in illegal activity. Given the well-documented patterns of selective law enforcement, gender differences in processing, and disproportionate minority contact (DMC), this means that risk/needs instruments might be conflating risk with ongoing biases in the juvenile justice system and enforcing the status quo in juvenile justice processing.³¹

- Risk assessments can help practitioners understand likelihood of

Youth who score “low risk” by a validated assessment and are diverted from the juvenile court system recidivate at lower rates than youth whose cases are formally processed through the court system.

Limitations of risks and needs assessments include:

- General risk assessments are not appropriate for identifying risk for violent or sexual offending;²⁷
- General risk assessments are not mental health assessments and do not diagnosis mental health issues;²⁸
- Risk assessment “tools were not designed to specify the action a court should take. . . they provide additional information, grounded in research, to enhance the decision-making process of the court”;²⁹
- According to some researchers, risk and need assessments may contribute to racial disparities in the juvenile justice system;³⁰
 - A 2013 report from the National Research Council explains: These

²⁵ *Id.*

²⁶ Wilson, Holly A. & Robert D. Hoge, *The Effect of Youth Diversion Programs on Recidivism: A Meta-Analytic Review*, 40 *Crim. Justice & Behavior* 5, 509-511 (2012), http://users.soc.umn.edu/~uggen/Wilson_CJB_13.pdf.

²⁷ Vincent, *Risk Assessment in Juvenile Justice*, at 25; Larsen at 2.

²⁸ Vincent, *Risk Assessment in Juvenile Justice*, at 26.

²⁹ *Id.*

³⁰ *Risk/Needs Assessments for Youths*, OJJDP Literature Review (2015).

re-offense but cannot predict a person’s behavior with certainty;³²

- While some RAIs are in the public domain, other RAIs are proprietary, trademarked products that can be costly to purchase, update, and train/certify those who administer the tool;
- The validity of a particular RAI can be difficult to study for a number of reasons (for example, if an initial pre-screening diverts low risk youth, then a study of the validity of the RAI’s full screening when applied to referred youth will have a disproportionately high number of moderate and high-risk level cases);³³
- One source of variability in RAIs is inter-rater unreliability;
 - Anyone contemplating the adoption of a RAI in their jurisdiction or the reliance on a RAI result needs to consider the degree to which the RAI, when administered by

³¹ National Research Council, *Reforming Juvenile Justice: A Developmental Approach*, Washington, DC: The National Academies Press, 148 (2013), <https://doi.org/10.17226/14685>.

³² *What Is Risk Assessment | Bureau of Justice Assistance (ojp.gov)* p. 148 (2013).

³³ Baird at i:34 (in discussion of Solano County’s use of JSC and Girls Link RAIs).

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different caseworkers faced with the same case information, will reach different scoring and recommendations for key decision thresholds. One must look for a RAI with good inter-rater RELIABILITY (when the case workers reach the same result with the same information).

- Across RAIs and studies of RAIs, measures of recidivism differ;
 - Some define recidivism as another referral received prior to disposition on the first referral or prior to completion of a diversion program. Others define recidivism as a law violation 1 year or 5 years out from the time the first risk level was determined, requiring a look into the adult criminal reports/records. Look for and understand the differences between RAIs when recidivism, as used in the RAI, is defined in different ways.
- To determine if a RAI performs well in a study, make sure there is a statistically significant difference in recidivism across the three risk levels, and make sure there aren't issues of equity.

IV. RAI in Practice: The YASI

The Youth Assessment and Screening Instrument or YASI is the evidence-based screening tool developed by Orbis, Inc., and adopted for use by juvenile court professionals in many states. The YASI evolved from the Washington State Juvenile Court Assessment (WSJCA) instrument designed in the 1990s.³⁴ The YASI was implemented in several states including New York, Illinois and Mississippi in the 2000s and Virginia in 2008.³⁵

The YASI focuses on assessing RISK by considering static characteristics, dynamic characteristics and protective factors. It is a tool generally used to determine risk of recidivism (overall risk to reoffend). The YASI consists of a “pre-screen” assessment that is completed prior to filing a petition into juvenile court and a “full assessment” that is completed prior to the youth entering onto probation. The YASI not only assists in identifying risk levels, assessing needs and devising the appropriate interventions, but it has also

assisted in the management of probation officer caseloads.

The YASI has a “Pre-Screen” (32 items) and a “Full Assessment” (87 items, including pre-screen items). The “Pre-Screen” may be used most frequently prior to entering the juvenile court system whereas the “Full Assessment” may be completed by case managers or probation officers (certified in the use of the tool) after adjudication for purposes of advising the Court at the time of disposition, or it may be used by case managers following admission to a juvenile correctional facility for case planning to increase protective factors and reduce risk of recidivism.

The YASI's 87 items each fall into one of ten domains³⁶:

- Legal History
- Family
- School
- Community/Peers
- Alcohol/Drugs
- Mental Health
- Aggression
- Attitudes (pro-social and antisocial)
- Skills (social and cognitive)
- Employment and Free Time

The 32 pre-screen questions or items are designed to assess youth's risk level while obtaining a brief social and legal history.³⁷ A key component of administering the YASI is motivational interviewing and collecting of collateral information.³⁸ In practice, the styles or techniques or skill of motivational interviewing will differ across practitioners, which is where inter-rater reliability may weaken. The YASI generates a rating of static and dynamic risks and protective factors for each of the ten domains. Using a six-point rating system, scores range from low to high.³⁹

The final component of the YASI is the development of a case supervision plan by juvenile justice personnel that builds on the problem areas identified

in the assessment.⁴⁰ Case planning is where the intervention comes in, often in the form of a “Treatment Package,” or a combination of multiple strategies to be successful. Developing a common goal, communicating well and often, and regularly meeting with the youth can be helpful to reinforce the youth's learning taking place under the plan. These strategies also need to be assessed for their validity, and the youth need to be assessed to see if they are learning through their treatment referral services.

The YASI has been studied and argued about in courts; some of this research and debate has resulted in revision of the instrument. “[A] 2007 study of YASI in the state of New York found only a 3.8% difference in outcomes between moderate- and high-risk cases (Orbis Partners, 2007).”⁴¹ The study results indicated an area under the curve (AUC) value of 0.62 for 12-month and 24-month outcome measures.

The 2013 comparison study looked at the Virginia YASI pre-screen and determined that it produced substantial separation of re-adjudication rates by risk-level. It concluded that the YASI appeared to work better for boys than girls because the moderate-risk girls had higher risks of recidivism than high-risk girls, although this may be attributed to a limited sample size. It further concluded that “[d]evelopment of a 10-item risk instrument significantly improved the level of discrimination attained and produced a balanced distribution of cases across low, moderate and high levels of risk.”⁴²

In a 2016 study, the pre-screen YASI was applied to 464 juvenile offenders on community supervision in Alberta, Canada. Researchers found that the YASI “pre-screen” achieved a high level of accuracy in predicting both general and violent offenses over an 18-month follow-up period, noting that protective factors, or strengths, had a buffering effect in high-risk youth but a relatively lower level of accuracy was achieved in predicting general reoffending amongst females.⁴³

³⁶ *Id.*

³⁷ *Id.*

³⁸ Wisconsin's Plan for Assessment & Case Planning (Sept. 2020), *Wisconsin's Plan for Assessment and Case Planning in Youth Justice Statewide*. See also Wisconsin Child Welfare Professional Development System's explanation of the YASI, Univ. of Wisconsin – Madison, <https://wcpds.wisc.edu/yasi/#why-use-a-risk-assessment-tool>.

³⁹ Baird at 45.

⁴⁰ *Id.*

⁴¹ *Id.* at 4.

⁴² *Id.* at 50.

⁴³ Jones, N. J., S. L. Brown, D. Robinson & D. Frey, *Validity of the youth assessment and screening instrument: A juvenile justice tool incorporating risks, needs, and strengths*, 40 *Law and Human Behavior* 2, 182–194 (2016), <https://doi.org/10.1037/lhb0000170>.

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³⁴ Baird at 45.

³⁵ *Id.*

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A 2019 study examined the predictive validity of risk and strength factors of the YASI and the Youth Level of Service/Case Management Inventory (YLS/CMI) in a sample of 254 justice-involved youth from Ontario, Canada, to specifically look at whether there was a gender difference in predictive validity. The study concluded that both RAIs are viable risk assessment measures for justice-involved males and females.⁴⁴

Another 2019 study conducted by researchers at the University of North Dakota examined the evaluability, or predictive accuracy, of the YASI, adopted by the North Dakota Juvenile Court in 2002, and found that questions still remain regarding the applicability of the YASI to female and Native American youth populations.⁴⁵ An article about this research, first published online in 2020, tells us that the study found a moderate effect for the instrument's predictive accuracy in relation to general reoffending from a random sample of juvenile probationers, but results were notably weaker for females compared to males. The article recommends further research on the RAI's accuracy among African American and Native American youth.⁴⁶

In addition to research, there are appellate cases in which the YASI has been discussed. In a 2019 case, the Supreme Court of Vermont considered Vermont's Department of Children and Families' recommendation that a 20 year-old youth facing aggravated assault allegations be given youthful-offender status by the court based on the YASI's designation of the 20 year-old as moderate-risk and Vermont's statutory framework allowing for those between 12 and 22 years of age

to apply for such a designation if given a low or moderate risk level. The district court, in deciding if the youth should be given youthful-offender status, pointed to the following reasons why the YASI was not persuasive, by itself:

the YASI failed to take into account that there was probable cause for a new violent offense [committed after the aggravated assault incident]; [the answers plugged into the YASI] were based on the youth's own self-report [and that of his (not disinterested) grandmother]; [the YASI] did not consider whether the youth was still using alcohol or heroin; [the YASI] did not take into account the seriousness of the victim's injury in the aggravated assault; and the DCF worker testified that the YASI tool was "flawed."⁴⁷

The Supreme Court of Vermont upheld the district court's departure from the recommendations of the YASI and the consideration of factors not considered by the YASI, such as public safety.

As far back as 1996, Florida's use of the risk assessment has been statutorily required to aid the detention decision. The First District Court of Appeal in *S.W. v. Woolsey*, 673 So.2d 152, 154 (Fla. 1st DCA 1996), provides an insightful history of the risk assessment instrument and outlines its appropriate application by juvenile courts in determining the propriety of detention.

If you are an administrator weighing the pros and cons of a particular RAI for use in your jurisdiction, or if you are a prosecutor compiling information about the results of a RAI to include in a sentencing argument to the Court, you will be well-served by researching the history of the specific RAI just as this article has covered information about the YASI. Be able to answer the following: how it came into existence, what other jurisdictions use it, is there evidence of its predictive validity from more than one jurisdiction, how many studies have looked at its validity for your jurisdiction, whether it has been revised and further studied, and what appellate decisions have considered the RAI and its specific results and recommendations. Also, along with the RAI itself, consider adopting written policies and procedures on its implementation.

⁴⁷ *In re B.B.*, 2019 VT 86, P3, 211 Vt. 272, 224 A.3d 1149 (2019).

Make sure that the adoption of a RAI is not the end all and be all—make sure it is part of a larger risk assessment system, that the results and data are used, and make sure the staff understands that the level of risk doesn't dictate a particular action or decision.⁴⁸

V. Risk Assessments of juveniles who sexually offend

Even if one particular assessment instrument is shown to have predictive validity, inter-rater reliability and equity, that does not mean it is the appropriate RAI for all cases. Youth accused of sexual offenses should be evaluated with a psychological evaluation or specialized risk assessment. "Many youth who engage in a sexual offense will score low on general risk assessment tools because the characteristics associated with general reoffending are not the same characteristics associated with continual sex offending (for example, deviant sexual arousal)."⁴⁹

There are six well-known risk assessment instruments for juvenile sex offenders are: the Juvenile Sex Offender Assessment Protocol-II (J-SOAP-II), Juvenile Sexual Offence Recidivism Risk Assessment Tool-II (J-SORRAT-II), Estimate of Risk of Adolescent Sexual Offence Recidivism (ERASOR), Juvenile Risk Assessment Scale (JRAS), Structured Assessment of Violent Risk in Youth (SAVRY), and Hare Psychopathy Checklist: Youth Version (PCL:YV). In 2015, the two most commonly used instruments were the J-SOAP-II and the ERASOR, both of which are structured and empirically informed instruments.

These can be broken up into two categories, not unlike the two types of RAIs discussed above: actuarial models (based on statistical comparison of static risk factors) and clinical models (based on observation and professional judgment on defined risk factors-static, dynamic and protective).⁵⁰ As for their predictive

⁴⁴ Scott, Terri, Shelley I. Brown & Tracey A. Skillington, *Predictive and Convergent Validity of the Youth Assessment and Screening Instrument in a Sample of Male and Female Justice-Involved Youth*, 46 *Criminal Justice and Behavior* 6 (2019), <https://doi.org/10.1177/0093854819842585>.

⁴⁵ Matz, Adam K. & Adrian R. Martinez, *Juvenile Risk Assessment: Assessing the Evaluability and Predictive Validity of the Youth Assessment and Screening Instrument for use among the North Dakota Juvenile Probation Population*, *Criminal Justice Faculty Publications*, 20 (2019), <https://commons.und.edu/cj-fac/2>.

⁴⁶ Matz, Adam K., Adrian R. Martinez & Elizabeth Kujava, *Assessing Risk in North Dakota Juvenile Probation: A Preliminary Examination of the Predictive Validity of the Youth Assessment and Screening Instrument*, 67 *Crime and Delinquency* 4, 551-573 (2021) <https://doi.org/10.1177/001128720950023>.

⁴⁸ Vincent, Gina, *Screening and Assessment in Juvenile Justice Systems: Identifying Mental Health Needs and Risk of Reoffending*, Washington, D.C.: Technical Assistance Partnership for Child and Family Mental Health, 7-8 (2011).

⁴⁹ Vincent, *Risk Assessment in Juvenile Justice*, at 25.

⁵⁰ Rich, Phil, Ph.D., *The Assessment of Risk for Sexual Reoffense in Juveniles Who Commit Sexual Offenses*, U.S. Dep't. of Justice - Office of Justice Programs, Sex Offender Management Assessment and Planning Initiative (SOMAPI), Research Brief p. 2 (July 2015).

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accuracy, “[i]t has been strongly asserted in both juvenile and adult risk assessment contexts that actuarial assessment has the capacity to predict risk more accurately than clinical assessment.”⁵¹

These tests or tools are often administered as part of a psychosexual evaluation (PSE) court ordered to inform in the dispositional phase. The purpose of PSE is to assist the Court in determining the level of risk to reoffend and the amenability of the offender to treatment (and whether that treatment should be obtained by the offender in prison or the community). Multiple tests or assessment tools may be administered by the psychosexual evaluator for one report. Not unlike juvenile

of character traits.⁵³ “[S]ex offenders are a heterogeneous group with few shared characteristics apart from a predilection for deviant sexual behavior. Furthermore, there is no psychological test or device that reliably detects persons who have or will sexually abuse children.”⁵⁴

Regarding reliably predicting the reoffense of a juvenile sex offender:

The process of risk assessment for juveniles who sexually offend is complicated by the relatively low base rates of sexual recidivism found among juveniles. Juvenile risk assessment is complicated even further by the ongoing development and maturation of youth. Accordingly, risk assessment models and tools need to account for these

arial tools, the Minnesota Sex Offender Screening Tool-Revised (MnSOST-R) and the Static 99, which are tools validated for *adults* who commit sex offenses. The tools were administered earlier in the case when the offender was still a youth. When the admissibility was challenged by the respondent’s attorney, the court referenced an earlier opinion of another judge who found the actuarial instruments admissible as clinical tools in SVPA commitment hearings, without regard for the instruments’ validity when applied to juveniles. This resulted in the remand of the matter for a re-hearing without consideration of those tests’ results.

Although imperfect and there being a need for more research, tests and methods used in a psychosexual evaluation can be enormously helpful information gathering techniques. They must be understood by prosecutors in order to conduct direct or cross-examinations of PSE writers to inform the court of the risks to public safety posed by a defendant and how to mitigate that risk at the sentencing phase. Additionally, tier level designation by the court is guided by the results of these tools, and that tier level designation in turn may mandate a particular disposition or particular conditions of supervision, so prosecutors must be familiar with the sentencing statutes for sex offenses.

In addition, youth court practitioners handling sex-related offenses, and those handling cases against juveniles that have been transferred to adult court, must educate themselves about the juvenile RAIs being used for sexual offending youth, and, depending on whether the courts in that jurisdiction follow the Frye or Daubert test for the admissibility of expert testimony, whether the court would consider the RAI to be based on a “new” or “novel” scientific principle, method, or technique for which an evidentiary hearing would be required (under Frye).⁵⁷

VI. Scrutinizing the RAI and preparing a cross-examination

Checklist for Risk Assessment Cross-Examination

⁵⁷ See *In re Det. of Erbe*, 344 Ill. App. 3d 350, 800 N.E.2d 137 (2003) followed by *In re Commitment of Stevens*, 345 Ill. App. 3d 1050, 803 N.E.2d 1036 (2004) (affirming that the actuarial methods used in a sex offender RAI are admissible without a Frye hearing in Illinois).

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Although they are not perfect, psychosexual evaluations can be enormously helpful in gathering information essential to making determinations in sex offense cases.

RAIs, sex offender RAIs have undergone a similar evolution as far as practitioners understanding of which tools are best: Starting with a preference for unstructured clinical judgment, evolving into a preference for static actuarial RAIs, evolving further into a preference for a combination of RAIs (actuarial and clinical) and even further evolving to where more dynamic risk factors are taken into consideration.

However, there is not agreement on the predictive or empirical validation of all factors identified as “risk factors” in some studies. For instance, one study pointed to a lack of empirical support, or contradiction by other empirical evidence, of the following traits: history of sexual victimization, history of nonsexual offending, sexual offenses involving penetration, denial of sexual offending, and low victim empathy.⁵²

Perhaps more so than other types of risk assessments, the risk assessment tools used for sex offenders are imperfect, but particularly so for juveniles who’ve committed sexual offenses. Sexual offenders of all ages do not exhibit a consistent group

developmental factors in order to accurately estimate risk.⁵⁵

The tools or tests administered to assess adult males must not be confused with those designed to assess juveniles, as has happened in the courts. See *In re J.P.*, 339 N.J. Super. 443, 772 A.2d 54 (App. Div. 2001). Juvenile risk assessment tools take into account the growing development of the child and therefore have a short shelf life (an expiration date) for a juvenile’s assessed risk level or score, either requiring reassessment every six months (J-SOAP-II) or noting that the results cover risk of sexual recidivism up to age 18 (JSORRAT-II).⁵⁶

In the New Jersey case, *In re J.P.*, the appellant was a juvenile at the time of conviction for three sexual offenses, was prosecuted and sentenced at 16, but was an adult at the time of subsequent hearing on the State’s petition for civil commitment under the state’s Sexual and Violent Predator’s Act. At the hearing on the commitment petition, the Court took into consideration the results of the actu-

⁵³ Myers, John, *Expert Testimony in Child Sexual Abuse Litigation*, 68 Neb. L. Rev. 1, 66 (1989).

⁵⁴ *Id.*

⁵⁵ Rich at 1.

⁵⁶ Rich at 2.

⁵¹ *Id.*

⁵² *Id.*

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Preparation

- Research the origins of the RAI: is it public information or propriety?
- Review tool's guidebook to check what factors or questions are asked and if questions are being asked and interpreted appropriately by the administrator of the tool.
- Also, carefully look at the source of information that goes into the RAI. Are there just one source or multiple sources? Is the youth a source? The youth's parents? Teachers? Public records? Was collateral information obtained to administer the RAI?
- Conduct legal research to determine if there is case law in your jurisdiction and/or other jurisdictions that use the tool (see e.g., *Matter of Geraldine*, 2010 N.Y. Slip Op. 53033 (N.Y. Fam. Ct. 2010), finding that the risk assessment tool used at that time impermissibly discriminated against males by awarding a preference to delinquent females in the form of asset points based solely on gender).
- Conduct social science research to determine if there are journal articles about strengths or weaknesses of the tool.
- What credentials are required for the person administering the test? Does the person who administered the test in your case have those credentials?

*Areas to explore with the administrator of the tool*⁵⁸ (whether to ask open ended questions

should be determined on a case-by-case and question-by-question basis):

- Are you trained to administer the test? How frequent is the training for those administering assessments; has there been training recently? Booster trainings?
- Are you certified to administer the tool? How often does the tool require recertification?
- Do you have the credentials/qualifications to administer the RAI?
- Was this RAI/tool validated in this state/normed to specific population in [your jurisdiction]? Is it valid? Does the instrument measure what it is supposed to measure? Accuracy? Predictive validity?
- Is the tool reliable? Consistent across the board? Dependable? Inter-rater reliable?
- Can the tool predict whether the youth is at risk for committing a violent crime or non-violent crime?
- Has the tool been validated recently in your jurisdiction?
- What is the difference between a low, moderate and high risk level result?
- What is the recidivism rate for each of those levels?
- Are the factors considered by the tool biased against a certain ethnicity, certain race, certain gender, certain neighborhood?
- How can you be sure that another PO or LCSW who administers this test won't come up with different results?

Conclusion

The adoption of RAIs and principles of effective intervention in juvenile justice

systems is widespread across the country but not yet present in all fifty states. Of those states where this framework is adopted, no two states' systems are identical. Even within a state, how and when the RAI is put to use can differ from district to district, county to county. But within a state that has adopted a state-wide model, the benefits can outweigh the limitations, as long as it has been assessed as valid in that jurisdiction and the tool can be revised to reflect advancements in the research. Prosecutors in the juvenile space would be wise to ask questions about if and how the RAI is used in their jurisdiction, how it came into effect, and whether it has been assessed. Additionally, because this article covered mostly generalities, prosecutors should carve out time to learn about any cases and studies involving the RAI's validity, reliability, equity and legal history in their particular jurisdiction.

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⁵⁸ See also *Cross-Examination of Juvenile Risk Assessment Administrators*, NDAA-Juvenile Justice Publication (2019) *Cross-Exam-Risk-Assessment-for-All-States.pdf* (ndaa.org).