Introduction

Early legal and criminological research emerged primarily out of organizational and insurance-based risk literatures within sociology and management studies. The work of Ulrich Beck, Mary Douglas and Michel Foucault, for example, strongly influenced the development of this early research. Scholars observed that conventional forms of modernism that focus on protection, rehabilitation and normative correction of offenders were becoming secondary to broader managerial concerns about efficiently identifying and minimizing potential or preventing harms or risks as well as policing and controlling penal populations (Simon, 1988). As the concept of risk became culturally, socially, and psychologically embedded into society, in the early 1980s risk was becoming an increasingly dominant feature of numerous social institutions, including legal institutions and those mandated to enforce the law, such as police (Ericson and Haggerty, 1997), courts (Hannah-Moffat, 2012) and prisons (Feeley and Simon 1992; 1994; Garland, 2001; O’Malley 2004; Hannah-Moffat, 2005), as well as a wide range of security-related regulatory agencies like immigration and customs. Risk was readily used to inform practices and policies to predict and reduce crime (Beck, 1992; Baker and Simon, 2002). Scholars began to reflect on how shifts in the welfare state and perceptions of security were affecting law and the governance of crime and how risk was being seen as a prominent feature of society. Importantly, following Ewald (1991), O’Malley (2004) argued that risk is an abstract technology that is always shaped by specific social and political rationalities and environments. Consequently, law and criminal justice contexts play fundamental roles in shaping understandings of risk and how it should or should not be incorporated into various legal and criminal justice practices.

The term ‘actuarial justice’ was coined by Simon in 1988 (and later Feeley and Simon, 1992) to describe the emergent discourses and practices related to the prediction of crime and/or individual propensities for risky behaviours. It typically involves forms of statistical prediction about the probability of a crime occurring. These probabilistic calculations inform criminal justice policy, law and multiple levels of decision making. The trend toward ‘actuarial justice’ (Simon, 1988) was linked to wider shifts in the ‘culture of control’ that saw a general ‘collapse of the grand narrative’ of crime, and to the modernist penal agenda involving a widespread recognition of the failure of ‘experts’ to change offenders and protect society (Garland, 2003).
The resultant societal disillusionment with the state and penal experts contributed to a problem of governmental legitimacy. In turn, this prompted the decline of welfare-based penal strategies and the rise of neoliberal strategies de-emphasizing state responsibilities, projects of normalization in favour of individual-responsibilization crime prevention (O’Malley, 1992) and the efficient management of populations. In *The Culture of Control*, Garland (2001) argues that the pervasiveness of high crime rates, along with the well-recognized limits of criminal justice agencies, forced governments to create new strategies to cope with the social and political demands of crime control. He describes how the welfare penal mode has been muted in favour of a punitive, expressive, risk-conscious penal mode. As a result, offenders are ‘seen as risks that must be managed rather than rehabilitated. Instead of emphasizing rehabilitative methods that meet the offender’s needs, the system emphasizes effective controls that minimize costs and maximize security’ (Garland, 2001: 175). This logic supported the increased use of incapacitation strategies, redistributions of penal populations, a disinvestment in rehabilitative programming, risk-informed sentencing guidelines, risk-based policing and a host of crime prevention strategies (for example, CCTV, gated communities, zero tolerance, profiling, targeting enforcement) all aimed at producing safer societies and minimizing the risk of victimization.

The trend toward using risk management in new crime control and punishment systems also reflects a broader social phenomenon in which risk information became widely used by public authorities to govern social problems more generally (Baker and Simon, 2003; Ericson and Doyle, 2003; O’Malley, 2004, 2010). Information gathering and sharing became mainstays of doing criminal justice work. In this regard there have been numerous comparisons of ‘actuarial justice’ to insurance and other sectors (see, for example, Ericson and Haggerty (1997) for a discussion about policing becoming less about detection and enforcement and more about the creation and sharing of security knowledge; and Baker and Simon (2002), for essays on insurance and how risk logics impact social justice).

The following will outline some of the key themes in the extensive literature on crime law and risk.

**Predicting and managing crime**

The calculation and application of actuarial risk in law and punishment increased dramatically, with major advances in probability models during the twentieth century. In 1992, researchers Feeley and Simon noted that modern penal policies were shifting away from individualized rehabilitative models (‘welfare’ models) towards more strategic, administrative population management approaches that relied on actuarial techniques of quantifying and assessing the ‘risk’ of certain prisoners. They claimed that the ‘new penology’ did not seek to ‘change’ offenders through ‘targeted interventions’; rather, that policies were concerned with efficiently identifying and managing a person at risk of reoffending, whilst minimizing potential risk to the community (see also Simon, 1993). They also argued that the new penology was characterized by new discourses (for example, the language of risk and systems analysis), new objectives (for example, efficient control and risk management) and new techniques (for example, actuarial profiles and audits) and it could be traced to three important shifts within criminal justice (Feeley and Simon, 1992, 1994). First, new kinds of discourse about the language of probability and risk replaced the reliance on strict clinical judgment. Second, the criminal justice system shifted its focus towards efficient control rather than rehabilitation and crime control. Third, offenders were no longer treated as distinct individuals who could be changed through rehabilitation, but were considered in terms of their membership in certain populations (that is, recidivist, youth, violent and sex offenders). As part of the new penology, which characterizes current penal
systems in many jurisdictions, punishment has been repurposed from diagnosing and rehabilitating individuals to managing offending populations so as to reduce recidivism (Feeley and Simon, 1992).

As a result crime, along with other social problems (poverty, child welfare, health, unemployment, etc.), has come to be viewed as a calculable, avoidable and governable risk. Criminals are now characterized as a risky population to be managed efficiently and prudently – by the state and a host of non-state agencies (O’Malley, 1996, 1998, 2000; Rose, 1996, 1998, 2000, 2002; Ericson and Haggerty, 1997; Stenson and Sullivan, 2001; Ericson and Doyle, 2003; Hornqvist, 2007). Offender populations are routinely subdivided, categorized and classified according to level of risk (high, medium or low) and certain offender groups are perceived as exceptionally risky and thus as requiring special legislative control (that is, sex offenders, those with mental health problems, recidivists, ‘squeegee kids’ and the homeless), a trend that is also linked to expressions of punitive penal populism or laws and policy that ‘get tough on crime’ and are politically positioned as reflections of public sensibilities (Pratt et al., 2005). Central to this logic and mode of policing are assumptions about the subject as a rational actor who is capable of and logically weighing the cost and benefits of a particular action (O’Malley, 1992). Those engaging in crime are thought to perceive the benefits of criminal activity as exceeding the risk of being caught and punished.

**Evidence based decision making**

Identification of risk is a central concern in a legal culture designed to address the underlying problems of offenders. Using formal (actuarially and statistically based tools) and informal (profession discretion) assessment tools to sanction, monitor and therapeutically manage criminalized populations is increasingly associated with best practices in policing, sentencing and probation. Criminological and sociological scholars have studied how risk logics have become embedded in institutional thinking and practice and how psychologically informed risk analysis is increasingly used to predict and prevent crime and enhance security, sentence offenders, manage correctional populations and efficiently respond to various forms of unlawful conduct (Kemshall, 2003; Harcourt, 2007; Hannah-Moffat, 2012). Concerns about risk are now shaping penal policy and offender management and are becoming increasingly important in sentencing reforms that advocate the adoption of ‘smart sentencing’ and ‘evidence-based’ sentences, best practices of correctional intervention, assessment and parole decision making.

Actuarial risk instruments systematically produce and organize a diverse range of information about an offender to guide practitioners through a logical and simple process to itemize and score that information. Practitioner-driven classification, assessment, and management literatures (dominated by psychology) have focused on risk and its identification and management for several decades. In the correctional field, ‘risk/need assessment’ practices were informed by a technical, persuasive and now deeply embedded practitioner-driven research agenda that embraced the rehabilitative ideal and also by a long-standing organizational commitment to correctional programs that were challenged in the mid 1970s as being incapable of reducing crime, reforming offenders and for being ‘soft on crime’. This form of risk research rejects the popularized ‘nothing works’ claim, seeks to determine ‘what works’ and strategically deploys effective, targeted correctional interventions.

The most longstanding method for assessing risk is clinical prediction – the largely unstructured clinical judgment of skilled practitioners. Clinical judgment has been discredited as subjective and unempirical, and has been criticized for its poor predictive accuracy (Andrews et al., 2004; Skeem, 2012). As an alternative, ‘evidence-based’ static risk technologies that relied on statistical
prediction emerged as a response to the perceived shortcomings of clinical judgement. These static risk tools assign a quantitative risk score to an offender by assessing unalterable (for example, static) individual factors (such as history of substance abuse, age at first offence) that have been statistically linked to the risk of recidivism in correctional populations and based on research involving large population samples (typically, of white adult males). Additional forms of risk assessment tools developed from critiques of these tools described that created rigid or fixed risk subjects by relying on static or unchangeable risk factors. These ‘static’ assessment tools neglect the possibility that experiences within the correctional system could change the offender’s risk of recidivism, essentially locking individuals into designated risk categories. Many current risk/need tools incorporate dynamic (changeable) factors (for example, antisocial attitudes, employment, substance abuse) into risk assessment and management, opening up new opportunities for targeted interventions and contentiously aligning ‘risk’ with the notion of ‘unmet needs.’ Risk assessments in practice treat risk as a knowable, objectively determined individual characteristic (Kemshall, 2003). Furthermore, the widely used forms of risk assessments that fuse need with risk produce a ‘transformative risk subject’ and legitimate a ‘new rehabilitationism’ in penal politics and control (Hannah-Moffat, 2004).

Risk scores impart a sense of moral certainty and legitimacy into the classifications they produce, ‘allowing people to accept them as normative obligations and therefore scripts for action’ (Ericson and Haggerty, 1997: 7). However, most scholars agree that our present knowledge about risk does not allow us to make an absolute statement about an offender’s likelihood of recidivism or the timing of potential recidivism, nor can risk scores tell us with certainty how an offender will recidivate: violently, sexually or simply by violating a condition. Moreover, when using a risk tool, prediction error (false positive or false negative) is probable, but not easily determined – a problem that is generating considerable empirical research (see Netter, 2007). Although seemingly objective, moral and subjective assumptions continue to ‘infect pseudo-scientific calculations of probability and the new risk managers do not abandon their old preconceptions’ (Zedner, 2006: 431). Uncritical acceptance of science and related risk technologies can jeopardize due process (Cole and Angus, 2003; Harcourt, 2007; Cole, 2008), generate disparities and discrimination (Morash et al., 1998; Hudson, 2003; Hudson and Bramhall, 2005; Belknap and Holsinger, 2006; Morash, 2009; Hannah-Moffat and Maurutto, 2010; Van Voorhis et al., 2010), undercut proportionality and escalate the severity of sentences (Monahan, 2006; Harcourt, 2007; Netter, 2007).

Castel (1991) identified two major practical and political implications of risk, which can be applied to the use of actuarial risk tools. First, when the role of the practitioner is distanced from the subject, professional expertise operates differently: In these cases practitioners move beyond treatment, in the traditional sense, to ‘administrative assignation’ and management of groups with certain risk profiles. The practitioner’s expert knowledge remains critical for diagnosis and evaluation, but is no longer necessary for modern disciplinary purposes. Castel wrote, ‘In a growing number of situations, medico-psychological assessment functions as an activity of expertise which serves to label an individual, to constitute for him or her a profile which will place him or her on a career (1991: 290). In addition, Castel argued that practitioners have actually been reduced to executants or technicians who are subordinate to administrators. With management strategies taking over preventive technologies, penal administrators enjoy a new, near total, autonomy. In terms of practical consequences, this means that practitioners no longer have a strong voice in preventive policy development.

Theoretically, risk templates are structured to produce a managerial form of defensible, consistent decision making. Practitioners report that they like using risk instruments because the tools standardize decision-making criteria, enhance the defensibility of decisions and ensure
that all the players in the system are working with the ‘same information’, making case files easier to transfer (Hannah-Moffat et al., 2009). Those working in discretionary decision-making contexts consistently reported that they believed actuarial risk scores can neutralize politics – institutionalization of risk can insulate practitioners who follow policy guidelines, scapegoat those who do not and create new forms of organizational accountability (Hannah-Moffat et al., 2009). Regardless of their flaws, risk instruments foster confidence in the system because they appear to be objective, rational and empirical.

Risk security and policing

Similar to the penal field, risk in policing emerges in response to crisis in crime control. The rise of risk thinking has shifted the policing landscape (Ericson and Haggerty, 1997; Stenson and Sullivan, 2001). Discussions about risk/threat in policing are typically situated within the broader context of changes in the management of crime resulting from observable shifts toward actuarial methods of crime control discussed earlier, which stress assessment, prevention and exclusion of risky groups. Ericson and Haggerty (1997) were among the first to identify how the field of policing was transforming and how traditional conceptions of the public police role were shifting and expanding into a comprehensive and intricate risk communication network. Their detailed empirical analysis showed how the police do more than intervene in the daily lives of citizens to help or solve crimes and how they also play a pivotal role in collecting information about risk and producing forms of knowledge that are central to the surveillance, regulation and identification of risk. Ericson and Haggerty (1997) argue that multiple security institutions seek knowledge from the police that will assist them with their own risk management work. The police have thus become ‘knowledge brokers’ and expert advisors in providing other institutions with risk knowledge. This has implications for police use of discretion and community policing.

Central to this logic and mode of policing are assumptions about the subject as a rational actor who is capable of and is logically weighing the cost and benefits of a particular action (O’Malley, 1992). Those engaging in crime are thought to perceive the benefits of criminal activity as exceeding the risk of being caught and punished. Victims and communities are similarly situated (Stanko, 1997) and expected to anticipate, assess and avoid risk and risky situations and take preventative action to maintain their safety. Communities are framed as key police partners and are essential to the minimizations of risk. Some exemplars of risk-based policing are found in the vast literatures of community policing, situational crime prevention, zero tolerance and intelligence-led policing (see Ericson, 1994; Stenson and Sullivan, 2001; Crawford, 2002; Kemshall, 2003). Police and security agencies are expected to be actively ‘planning for the worst’ and in doing so,

discursively transforming uncertainty into apparently manageable risks that are independent of the functional activities they describe [. . . and which] sustain the appearance of maximum security in order to maintain rhetorical control over what are deemed to be highly uncertain and insecure situations.

(Boyle and Haggerty, 2012: 241; emphasis added)

In this sense the police and security agencies are responsible for anticipating risks and devising plans to mitigate threats.

Zedner (2007: 261) argues that the focus on crime as ‘risk competes with and even takes precedence over responding to wrongs done’. This logic stresses the importance of pre-emptive practices and security, which is seen as a marketable commodity, and has involved increasing
numbers of private, commercial, communal, voluntary and individual actors involved in the production of security. Victims and communities are no longer viewed as passive recipients of policing; instead, they are expected to participate in the production and maintenance of security. In this sense, victims and communities are similarly situated (Stanko, 1997). They are expected to anticipate, assess and avoid risk and risky situations and take action to maintain their safety (such as, reporting suspicious people or packages). Communities are framed as key police partners and essential to the minimizations of risk. Some exemplars of risk-based policing are found in the vast literatures of community policing, zero tolerance and intelligence-led policing (see Stenson and Sullivan, 2001; Ericson, 1994; Kemshall, 2003).

**Risk sentencing and punishment**

There is a lack of consensus about the suitability, use and actual role played by actuarial instruments in sentencing. Although the laws, policies and principles of sentencing vary considerably by jurisdiction and country, risk instruments are most frequently used in sexual or violent-offender cases where timing and the severity of offence allow for, and require, detailed consideration of the offender’s future conduct. However, American, Asian, Australian, Canadian, British and European jurisdictions are increasingly mandating or incorporating risk tools into sentencing policy for non-violent offenders (Harcourt, 2007; Warren, 2007; Hyatt, Bergstrom and Chanenson, 2011; Raynor and Lewis, 2011; Hannah-Moffat, 2012).

Institutionally, adopting the new managerial logic of risk and ‘effective’ correctional intervention has affected policy in terms of (a) how probation officers interact with courts and clients; (b) practices of case management; (c) resource allocation and (d) program design, delivery and availability (Hannah-Moffat et al., 2009). Despite awareness of these policy shifts to risk-based penal management, few researchers have examined how they are received by, and affect, individuals working in various penal systems. The available international research reveals complex and nuanced interactions between the adoptions of risk policies and how practitioners use and interpret these policies.

Kemshall (2003) noted that although actuarial tools are increasingly used in probation services to categorize offenders (especially sexual and violent offenders) on the basis of risk, subjective and professional judgments still play an important role, sometimes even overriding actuarially derived risk classifications. She demonstrated that discrepancies between rhetoric and practice occur for a number of reasons, including entrenched occupational cultures and professional values, and ill-defined concepts. Other researchers have found that practitioners actively temper the impact that these tools have on their discretionary decision making by embracing and/or rejecting them. Introducing risk tools, therefore, may shape, but does not eliminate, discretion (Hannah-Moffat et al., 2009; Ballucci, 2012).

With respect to sentencing, although judges routinely make risk-based judgements, international jurisprudence is beginning to critically assess the appropriateness of various forms of risk evidence for judiciary decision making (Hannah-Moffat, 2012). Many American, Asian, Australian, Canadian, British and European jurisdictions are increasingly mandating or incorporating risk tools into sentencing policy for non-violent offenders (Ostrom et al., 2002; Harcourt, 2007; Kleiman et al., 2007; Warren, 2007; Hyatt et al., 2011; Raynor and Lewis, 2011). For example, in 2010 the Pennsylvania Commission on Sentencing mandated the development of a risk assessment instrument to assist the court at sentencing. Presently, several American jurisdictions either use, or are in the process of developing, risk assessment instruments for sentencing. Several international jurisdictions (Maurutto and Hannah-Moffat, 2006; Harcourt, 2007; Cole, 2008; Etienne, 2009; Oleson, 2011) have already incorporated generic risk tools into pre-sentence
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inquiries and new risk-informed sentencing guidelines for non-violent offenders, but little research has been conducted about how the use of actuarial risk instruments can inadvertently affect sentencing decisions and the resulting composition of penal populations. It is essential to consider how this broader movement toward evidence-based sentencing, where judges use actuarial data instead of applying professional judgement, can shift the purpose of sentencing (from retributive to utilitarian) and can produce unintended results. Strict requirements to use and adhere to risk assessments may limit the judiciary’s ability to consider and balance the importance of other sentencing purposes and legal criteria. Moreover, the use of these types of actuarial instruments can generate new ways of understanding risk and the offender, and can in some jurisdictions unduly limit judicial or prosecutorial discretion.

Researchers have also shown that despite receiving training on risk tools and their interpretation, practitioners tend to struggle with the meaning of the risk score and the importance of the items contained in the assessment tools (Hannah-Moffat and Maurutto, 2004). For example, rather than understanding that an individual who obtains a high risk score shares characteristics of an aggregate group of high-risk offenders, the individual is likely to become known as a high-risk offender. So instead of being understood as correlations, risk scores are misconstrued in court submissions, pre-sentence reports and the range of institutional files that ascribe the characteristics of a risk category to the individual. Significantly, these reports follow the offender through the system and can stick with them for the entirety of their institutional careers. This is especially important because risk-based characterizations can have significant effects on outcomes for offenders (for example, classification levels, institutional placement, treatment access, parole release, number and type of conditions, etc.). In practical terms, correlation becomes causation and potential risk is translated into an administratively certain term.

It is becoming evident to many criminology scholars that risk is not a fixed concept or set of categories; it is fluid and very much infused with politics, especially in relation to criminal justice. Some scholars argue that risk is inherently flexible and can be harnessed in multiple ways to produce different, even arguably positive, outcomes (see, for example, how O’Malley, 2004 addresses drug minimization; see also O’Malley, 2008). This literature demonstrates how risk is being interpreted and how actuarial risk is being increasing modified and used as a evidence-based practice to make decisions about correctional resources, management of populations and to make probabilistic assessments of the likelihood of recidivism. Although many are critical and skeptical of these developments, governments and many researchers feel that the introduction of actuarial reasoning into penal practices provides a promising alternative to subjective forms of discretionary decision making.

Risk and diversities

The criminological literature on risk is becoming more focused on risk and diversities. Many scholars argue that risk is a complex, fluid construct that is interpreted through gender, race, socio-economic and regional diversities and has variable effects (Hannah-Moffat and O’Malley, 2007; Hannah-Moffat and Maurutto, 2010), and yet the effect of diversities has been understudied in terms of how risk is constructed. Most research and theory on risk has focused on the official creation of abstract universal ‘gender-‘ and ‘race-neutral’ subjects, such as ‘members of offender risk categories’ and ‘potential crime victims’ who must take preventative steps to protect themselves against disease and predation. Consequently, a more ‘masculinist’ view of risk in both crime and victimhood has emerged (Stanko, 1997; Walklate, 1997), which does not account for the gendered ways that women are made responsible for avoiding criminal victimisation (that is, through instructions to organize their lifestyles in ways that avoid ‘high-risk situations’).
Feminist and critical race scholars have gone beyond these so-called gender- and race-neutral analyses to examine how risk policies and practices are gendered and racialized; some have even noted that the desire for control may have highly gendered value (Hannah-Moffat and O’Malley 2007; Stanko, 1997; Walklate, 1997). The general assumption of ‘sameness’ in risk perceptions and propensities for risky behaviours reveals a lack of regard for, or understanding of, the intellectual breadth and depth of feminist and critical race theory, the sophisticated feminist and critical race critiques of methodology, and the ample empirical and theoretical academic literature documenting how women’s crimes differ qualitatively and quantitatively from men’s crimes, as well as many other axes of difference. Race and gender are complex social constructs that cannot simply be reduced to binary variables and tested for significance (predictive validity and reliability) in risk instruments (Hannah-Moffat, 2012).

When risk logic is unravelled, important theoretical and methodological concerns emerge about the relationships between race, gender, social inequality and specific risk factors. The science supporting risk tools is contested and insufficiently advanced to prove that these tools do not replicate or reproduce forms of systemic discrimination, or worse, as Harcourt theorized, a ‘ratchet effect’ wherein ‘the profiled populations become an even larger portion of the carceral population’ (Harcourt, 2007: 3) with highly determined consequences on their employment, educational, family and social outcomes. Individuals who are racialized, live in poverty, unemployed and/or struggle with mental illness are potentially disadvantaged by dynamic criteria. At present, the debate about the suitability of tools for women and racialized populations is significantly polarized (Van Voorhis, 2012). Given that we are already seeing disparities involving gender, race, class and other diversities with the use of risk technologies, it will be important to continue to study the experiences and perceptions of risk amongst these different groups and how risk can contribute to increases in social fragmentation.

Scholars have also explored how various forms and structures of social inequality, gender and race affect the management and identification of risky and at-risk populations. Critiques of the potential discriminatory basis of empirical risk tools and risk thinking has led to more sophisticated connections between the literatures of racial profiling and risk that illustrate how the policing and punishment of racial minorities is intensified and obscured when risk assessment is used by police and other criminal justice actors. For example, Harcourt (2007) has shown how a reliance on actuarial methods in policing has a negative effect on Black people and how it amounts to a new form of racial profiling that leads to more intensified and discriminatory penalties. Similarly, Hannah-Moffat shows how the uses of risk assessments are gendered and have gendering effects. She shows how populations of female prisoners who were once characterised as ‘at risk’ and ‘high need’ are now seen as risky because of their significant and unmet needs (Hannah-Moffat, 2004; Hannah-Moffat and O’Malley, 2007). Studies of border security and threat of terrorism reveal how discretion and racial profiling are used at borders and how race and nationality inform the production and use of risk knowledge, but are obscured by broader and seemingly neutral processes for risk detection and security (Pratt and Thompson, 2008).

Goddard’s (2012) ethnographic study of the goals and activities of ‘responsibilized’ community-based organizations and local understandings of risk among practitioners at these organizations shows how the surveillance activities of community organizations disproportionately affect and target underprivileged racialized male youth. This growing body of work aptly illustrates how various forms of preventative security and risk-oriented crime prevention differentially affect urban minority youth. On the topic of race and diversities, additional empirical research is required, especially in the composition of tools, the effects of various risk variables on specific populations, the use and effects of risk technologies on the management of offenders, and ancillary system effects.
References


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