

## GUIDING ACTION IN THE AGE OF ARTIFICIAL INTELLIGENCE

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*In 2017, Justice Gordon delivered a speech that addressed the use of risk assessment tools to inform judicial decisions. Her Honour asked: '[i]f society demands that the law should be such that people can and will be guided by it, what does that mean for the form and content of these technological innovations?' That is the question at the heart of this article. I argue that there are two components to the guidance function of the law – that people can understand what the law requires of them ('transparency'), and that it equips them with the chance to toe the line ('opportunity'). I argue that there are good reasons to conclude that policies of risk assessment across Australian corrective services fail to satisfy basic standards of transparency and opportunity – that they fail, in this respect, to achieve the guidance objective at the heart of the rule of law.*

### I INTRODUCTION

In 2017, Justice Gordon delivered a pithy and prescient speech addressing 'Courts and the Future of the Rule of Law'.<sup>1</sup> By 'rule of law', her Honour meant just that 'the law should be such that people will be able to be guided by it'.<sup>2</sup> By 'future', Justice Gordon was principally concerned with the technological evolution of judicial dispute resolution.

One central focus of that speech was the use of predictive algorithms to inform judicial decisions within criminal justice. Algorithms can be designed to extrapolate probabilistic conclusions about (past or future) events from statistical data. These conclusions include the risk of reoffending – the chance that any given individual will commit a(nother) criminal offence. The outputs of these actuarial risk tools inform a range of sentencing and corrective decisions that, according to the jurisdiction in question, may include: the length and type of sentence; security classification; parole; and post-release supervision.

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1 Justice Michelle Gordon, 'Courts and the Future of the Rule of Law' (Speech, Centre for Comparative Constitutional Studies, Constitutional Law Conference Dinner, 21 July 2017).

2 Ibid 2.

Justice Gordon said: ‘[t]hese innovations, and others like them, raise important questions concerning the legality of actions by public bodies, minimum standards of fairness (both procedural and substantive), accountability of government decisions and access to merits and judicial review’.<sup>3</sup> These questions were distilled into one single point of focus: ‘[i]f society demands that the law should be such that people can and will be guided by it, what does that mean for the form and content of these technological innovations?’<sup>4</sup>

That is the question at the heart of this article. I answer it here with a dual focus upon: (i) the Australian context of judicial decision-making; and (ii) those risk assessment tools which have currency across Australian corrective services.

There are at least two components to the notion that ‘the law should be such that people can and will be able to be guided by it’. We can call the first ‘transparency’: what the law requires of us, and what will happen if we fail to conform, should be sufficiently clear. This means communicating legal requirements in a manner that those affected can understand, and (*ex post*) having the means to determine that these requirements have been applied correctly.

We can call the second component ‘opportunity’: it must be reasonably possible for those who are equipped with this understanding to act on it to avoid incurring any burden specified for nonconformity. Thus, the law must identify some action (or inaction) that can be taken by those affected to toe the line. These two requirements were neatly summarised by Joseph Raz: ‘if the law is to be obeyed it must be capable of guiding the behaviour of its subjects. It must be such that they can find out what it is and act on it’.<sup>5</sup>

I begin with transparency, which I deal with in two parts. First, I consider the practice of artificial intelligence (‘AI’) informed judicial decision-making in the context of criminal justice, which Justice Gordon discussed by reference to the well-known case of *State of Wisconsin v Loomis* (‘*Loomis*’) from the United States (‘US’).<sup>6</sup> In *Loomis*, the Supreme Court of Wisconsin (‘SCW’) concluded that the policy of using Correctional Offender Management Profiling for Alternative Sanctions (‘COMPAS’) risk tools to make sentencing decisions was compatible with the transparency requirements of due process, because the court and applicant could each access the risk score (the output of the appellant’s COMPAS assessment) and statistical data supporting the algorithm’s validity.

My goal here is to consider how *Loomis* might or should be decided in the Australian courts, if risk assessment were to become part of the judicial landscape at sentencing. I argue that statistical data would not be enough to satisfy the general common law duty to provide reasons for a judicial decision; courts and litigants would also require access to the variables that inform a predictive output. This, I argue, correlates precisely with the guidance norm of criminal justice – that

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3 Ibid 11.

4 Ibid 12.

5 Joseph Raz, *The Authority of Law: Essays on Law and Morality* (Oxford University Press, rev ed, 2011) 214 (emphasis in original) (‘*The Authority of Law*’).

6 881 NW 2d 749 (Wis, 2016) (‘*Loomis*’).

the subject of any given law be able to determine how they can act to avoid or minimise the burdens that flow from institutional punishment.

Second, I consider how risk assessment tools currently used across Australian corrective services measure up against existing (Australian and US) standards for transparency. I argue that there are good reasons to think that policies of risk assessment may fail to meet even the lower threshold set in *Loomis*; we do not have robust evidence that these tools have predictive validity for significant subgroups of the Australian population, particularly First Nations persons.<sup>7</sup> This conclusion is particularly concerning in light of the stark and well-documented over-representation of these groups within the Australian corrective system.<sup>8</sup>

I turn next to opportunity. The dominant risk tool used across corrective services in Australia is the ‘Level of Service Inventory – Revised’ (‘LSI-R’),<sup>9</sup> which informs decisions about prison placement, a range of therapeutic and other corrective interventions, and parole for several thousand offenders across New South Wales (‘NSW’), Victoria, and the Australian Capital Territory (‘ACT’) each year.<sup>10</sup> This tool captures a range of variables that extend far beyond the characteristics of the offender’s (past or present) criminal wrongdoing, including: financial problems; ‘reliance upon social assistance’ (including disability support); being part of a hostile or violent domestic relationship; having deceased, absent, or uncaring parents; or friends or family involved in crime or drugs.<sup>11</sup> Where present, these variables generate a higher risk score, which in turn lowers the chance of a favourable outcome (eg, transfer to partially or completely open conditions) wherever the LSI-R informs corrective decisions within the Australian criminal justice system.

It hardly bears emphasis that these factors are not easily amenable to influence by the offender to whom they apply. Accordingly, even if an individual could ascertain in advance that (and how) each of these factors will influence corrective decisions, there is very little that they can (or can reasonably be expected) to do about it. In this way, using the LSI-R to make corrective decisions can turn the

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- 7 Holly A Wilson and Leticia Gutierrez, ‘Does One Size Fit All? A Meta-Analysis Examining the Predictive Ability of the Level of Service Inventory (LSI) with Aboriginal Offenders’ (2014) 41(2) *Criminal Justice and Behavior* 196 <<https://doi.org/10.1177/0093854813500958>>; Ching-I Hsu, Peter Caputi and Mitchell K Byrne, ‘The Level of Service Inventory – Revised (LSI-R) and Australian Offenders: Factor Structure, Sensitivity, and Specificity’ (2011) 38(6) *Criminal Justice and Behavior* 600 <<https://doi.org/10.1177/0093854811402583>>; Tracy L Fass et al, ‘The LSI-R and the COMPAS: Validation Data on Two Risk-Needs Tools’ (2008) 35(9) *Criminal Justice and Behavior* 1095 <<https://doi.org/10.1177/0093854808320497>>.
  - 8 Productivity Commission, ‘Socio-economic Outcome Area 10: Aboriginal and Torres Strait Islander Adults are Not Overrepresented in the Criminal Justice System’, *Closing the Gap Information Repository* (Web Page) <<https://www.pc.gov.au/closing-the-gap-data/dashboard/se/outcome-area10>> (‘Socio-economic Outcome Area 10’).
  - 9 Don Andrews and James Bonta, *LSI-R: Level of Service Inventory – Revised User’s Manual* (Multi-Health Systems, 1995).
  - 10 Ian Watkins, ‘The Utility of Level of Service Inventory – Revised (LSI-R) Assessments within NSW Correctional Environments’ (Research Bulletin No 29, Corporate Research, Evaluation and Statistics, Corrective Services NSW, 29 January 2011) 2.
  - 11 Andrews and Bonta (n 9) 5–12.

law from an action-guiding institution into one that makes the allocation of more serious punitive burdens all but inevitable for those affected.

This leaves us with a precise response to Justice Gordon's central question: if the law is to be an action-guiding institution, what should the form and content of the predictive algorithms that are used to make legal decisions be?<sup>12</sup> First, predictive algorithms should be transparent in form: we need to know which variables influence their outputs, and how, in terms that are readily comprehensible. Second, these variables should be compatible with the provision of an adequate chance to be guided by the law – to choose to act (or not) as the law prescribes, to avoid or minimise the burdens that follow from nonconformity. Where existing policies fail to meet these dual standards, there are grounds for meaningful public enquiry into the scope of risk assessment within Australian corrective services.

## II GUIDING ACTION: TRANSPARENCY

For the law to be such that people 'will be able to be guided by it', the things that it requires them to do (or not do) must be clear and comprehensible to those affected.<sup>13</sup> This standard applies equally to published statute and judicial decision-making: since 'it is futile to guide one's action on the basis of the law if when the matter comes to adjudication the courts will not apply the law and will act for some other reason',<sup>14</sup> we must also be able to see and understand how the law has in fact been applied to dispose of individual cases. Call this 'transparency': the rule of law norm that requires clarity of published law applies to the judicial act of law creation and application.

I deal with transparency in two parts. First, I address the decision in *Loomis*,<sup>15</sup> the case chosen by Justice Gordon to exemplify the practice of risk-informed judicial decision-making in the context of AI-driven technological development. In *Loomis*, the SCW concluded that the use of the COMPAS risk tools to inform sentencing decisions was compatible with the transparency requirements of due process, because the court could access and communicate statistical data about the algorithm's performance.

My goal here is to consider how *Loomis* might or should be decided in the Australian courts. I argue that the provision of risk scores, together with information concerning statistical accuracy, is not enough to satisfy the general common law duty to provide reasons for a judicial decision; the variables that inform those scores in any given case must also be readily discernible.

Second, I turn to risk tools that are currently used across Australian corrective services. I argue that there are good reasons to think that policies and decisions that invoke these tools may fail to meet even the lower threshold set in *Loomis*; we do not have robust evidence that these tools generate predictions that are valid for

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12 Gordon (n 1) 12.

13 Ibid 2, citing Raz, *The Authority of Law* (n 5) 217.

14 Raz, *The Authority of Law* (n 5) 217.

15 *Loomis* (n 6).

all groups within the Australian population, including First Nations persons. This is particularly concerning, given the overrepresentation of First Nations persons within the Australian carceral population.<sup>16</sup>

### A Risk Tools and Judicial Decision-Making

In 1979, Joseph Raz articulated eight general principles derived from ‘the basic idea of the rule of law’.<sup>17</sup> The first was that:

The law must be open and adequately publicized. If it is to guide people they must be able to find out what it is. For the same reason its meaning must be clear. An ambiguous, vague, obscure, or imprecise law is likely to mislead or confuse at least some of those who desire to be guided by it.<sup>18</sup>

The focus of this section is upon the particular case and context that drew Justice Gordon’s attention in her Honour’s 2017 speech to the Centre for Comparative Constitutional Studies: I consider the US case of *Loomis*,<sup>19</sup> which addressed, inter alia, the transparency requirements applicable to risk-informed judicial decisions. The question addressed here is: how would and should such a case be decided before the Australian courts, if actuarial risk assessment were to become part of the sentencing landscape in this jurisdiction?

*Loomis* concerned an appeal against the sentence handed down for two charges relating to a drive-by shooting in La Crosse, Wisconsin.<sup>20</sup> A pre-sentence investigation had been provided for the appellant, Loomis, which included algorithmic risk and needs assessments provided by COMPAS. COMPAS is a suite of algorithmic tools used to predict recidivism risk at an individual and population level for a range of purposes, including sentencing and supervision requirements.<sup>21</sup> So-called ‘risk’ and ‘needs’ assessments incorporate a range of facts about the decision-subject, from the nature and frequency of any prior offences to the decision-subject’s family and social circumstances, educational background, and employment status. Loomis’ COMPAS assessments informed the trial court’s conclusion that the ‘high risk and the high needs of the defendant’ warranted a six-year prison sentence with extended supervision.<sup>22</sup>

Following the sentencing decision, Loomis filed a motion for post-conviction relief. Inter alia, Loomis argued that the use of COMPAS obstructed his right to due process, because the algorithm was a trade secret;<sup>23</sup> this, he argued, prevented him from ‘assessing its accuracy’.<sup>24</sup> The trial court denied the post-conviction motion, and the Wisconsin Court of Appeals certified the appeal to the SCW. Giving the majority judgment for the SCW, Walsh Bradley J concluded that the proprietary

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16 ‘Socio-economic Outcome Area 10’ (n 8).

17 Raz, *The Authority of Law* (n 5) 214.

18 Ibid.

19 *Loomis* (n 6).

20 Ibid.

21 COMPAS is designed by Northpointe Inc.

22 See, eg, Eric L Loomis, ‘Brief of Defendant–Appellant’, Submission in *State of Wisconsin v Loomis*, 2015AP000157-CR, 4 December 2015, 10.

23 Ibid 15.

24 *Loomis* (n 6) 757 [34] (Ann Walsh Bradley J).

status of COMPAS did not affect considerations of due process: in her Honour's view, sufficient overall predictive accuracy had been established by statistical 'validation studies'.<sup>25</sup> The judge acknowledged that some studies had concluded that COMPAS assessments 'disproportionately classify minority offenders as having a higher risk of recidivism'.<sup>26</sup> Nevertheless, her Honour felt that this risk could be dealt with by the application of judicial discretion in sentencing.<sup>27</sup> Loomis' motion was denied.

Since 2016, several US courts have dismissed due process challenges to the use of risk tools in cases in which the algorithm's content is not publicly available information. In *State of Iowa v Headley*,<sup>28</sup> the Iowa Supreme Court rejected the argument that the failure to 'identify what factors or criteria are measured' by the state-based risk assessment tool in question invalidated its use,<sup>29</sup> concluding that the output of a validated risk assessment was information 'pertinent' to the goal of protecting the community from further offences.<sup>30</sup> And in *People v Younglove*,<sup>31</sup> the Michigan Court of Appeals rejected the argument that the lack of transparency in COMPAS assessments 'deprived them of the due process of law',<sup>32</sup> concluding that the defendants had not availed themselves of an adequate opportunity to challenge the COMPAS information at sentencing.<sup>33</sup>

Accordingly, where this question has been considered, judges have reached the same conclusion across a range of jurisdictions and algorithmic contexts: where judicial decisions are influenced by algorithmic predictions, the information required to achieve meaningful transparency is: (i) information about the risk output of the algorithm; and (ii) how accurate those outputs are for a given population. It is not necessary to know the 'factors or criteria'<sup>34</sup> that inform those outcomes.

The question here is whether the same conclusion would or should be reached in the Australian courts. It bears emphasis that there is no generalised risk tool approved for use in sentencing in Australia; rather, specific risk tools are used to make post-sentence corrective decisions (including parole) in particular states, to which I turn below. For present purposes, therefore, our question is: if algorithmic

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25 Ibid 762 [58].

26 Ibid 763 [66], 769 [100].

27 Ibid 769 [100]. I have argued elsewhere that this is an inapposite use of judicial discretion; either the algorithm produces results that are predictively valid, or it does not. If it does not, we should not use it to make decisions at all; if it does, we should use it without overriding predictive outputs on an ad hoc basis. See, eg, Tatiana Cutts, 'Supervising Automated Decisions' in Zofia Bednarz and Monika Zalmierute (eds), *Money, Power and AI: From Automated Banks to Automated States* (Cambridge University Press, 2023).

28 926 NW 2d 545 (Iowa, 2019) 551 [11] ('*Headley*'). See generally, James E Baker, Laurie N Hobart and Matthew Mittelsteadt, *An Introduction to Artificial Intelligence for Federal Judges* (Federal Judicial Center, 2023) 90–4.

29 Evan Paul Headley, 'Appellant's Brief and Argument', Submission in *State of Iowa v Headley*, SCT No 18-0594, 4 September 2018, 53.

30 *Headley* (n 28) 551 [10]. See generally, Baker, Hobart and Mittelsteadt (n 28) 90–4.

31 *People v Younglove* (Mich Ct App, No 341901, 21 February 2019) ('*Younglove*'). See generally, John Villasenor and Virginia Foggo, 'Artificial Intelligence, Due Process, and Criminal Sentencing' (2020) *Michigan State Law Review* 295.

32 *Younglove* (n 31) slip op 2, 4.

33 Ibid slip op 5.

34 *Headley* (n 29) 53.

risk assessments were to be accommodated via the pre-sentence report (to use the Australian terminology) at this earlier stage of the judicial process, what type or level of transparency ought to be required within Australian courts? In this respect, there is one pertinent difference between the judicial context of algorithmic decision-making in each jurisdiction, which relates to the duty to give reasons.

Many things are action-guiding: the presence of a busy or hazardous road should give any pedestrian pause to take care when crossing; coming down with the flu is grounds for rest and hydration. Yet, it is the intentional component of any decision, interposed between fact and action, that mediates our behaviour. When we decide to take extra care, or to rest and hydrate, we do so because of the good that we perceive in acting in that way;<sup>35</sup> we aim to stay safe, or to recover our health as quickly as possible. This is the value that we aim at when we conform with the reason for action.

So, it is with judicial decisions. For instance, a sentencing judge might prescribe a carceral sentence because the offence of which an individual has been convicted is violent. The underlying empirical basis of that conclusion is that those who commit violent offences demonstrate a higher propensity towards future offences of that nature. In other words, there is (or is perceived to be) a higher risk to the public posed by the individual's presence within the community. Where it exists, that risk to the public is the reason for prescribing a carceral sentence; the reason for prescribing it to *this* offender is the nature of their offence.

This prompts two questions: must a sentencing judge communicate the reasons for their decision to the offender? If so, what level of detail is required: is it enough for the judge simply to note that the individual (in their view) poses a high risk to the public, or must they also explain *why* they think that risk exists?

In the US, there exists no general constitutional duty to provide reasons for a judicial decision. For instance, in *Connecticut Board of Pardons v Dumschat*,<sup>36</sup> Stevens J concluded that '[j]udges often decide difficult and important cases without explaining their reasons, and I would not suggest that they thereby commit constitutional error.'<sup>37</sup> As Mathilde Cohen has put it, a court 'must enter *some* judgment in order to dispose of a case, but need not necessarily provide an explanation of that judgment'.<sup>38</sup> Certain state constitutions do provide for general reason-giving to the parties,<sup>39</sup> but the Wisconsin Constitution (applicable to the decision in *Loomis*) is not among them; the duty to give reasons is confined to 'any decision regarding the disposition of a victim's right', which must be discharged by delivering those reasons 'to the victim or the victim's attorney'.<sup>40</sup>

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35 See, eg, Joseph Raz, *Engaging Reason: On the Theory of Value and Action* (Oxford University Press, 1999) 67. As Raz puts it, 'normative reasons provide the standard explanations of beliefs and of actions done with an intention or a purpose': Joseph Raz, *From Normativity to Responsibility* (Oxford University Press, 2011) 26.

36 (1981) 452 US 458.

37 Ibid 472.

38 Mathilde Cohen, 'When Judges Have Reasons Not to Give Reasons: A Comparative Law Approach' (2015) 72(2) *Washington and Lee Law Review* 483.

39 For example, Arizona, California and Michigan: see generally, *ibid* 526 n 252.

40 *Wisconsin Constitution* art 1 § 9m.

The Australian context is very different. As Jason Bosland and Jonathan Gill carefully document,<sup>41</sup> a broad view of the judicial duty to give reasons can be identified as early as 1957, in the Victorian case of *De Iacovo v Lacanale* ('*Lacanale*').<sup>42</sup> That case concerned an appeal against a decision of the Rent Appeal Board. Monahan J quoted the following passage from Herbert Broom with approval:

A public statement of the reasons for a judgment is due to the suitors and to the community at large – is essential to the establishment of fixed intelligible rules and for the development of law as a science ... A judgment once delivered becomes the property of the profession and of the public; it ought not, therefore, to be subsequently moulded in accordance with the vacillating opinions of the judge who first pronounced it.<sup>43</sup>

Monahan J considered that the requirement for a public statement of reasons had 'general application to all persons exercising judicial functions'.<sup>44</sup> Less than a decade after *Lacanale*, the duty to give reasons was described as an 'incident of the judicial process' by Mahoney JA in *Housing Commission (NSW) v Tatmar Pastoral Co Pty Ltd*,<sup>45</sup> and by Kirby P in *Osmond v Public Service Board of NSW*.<sup>46</sup>

The scope and nature of the duty has been fleshed out through the years since these early decisions. Notably, the justification and threshold for this requirement was given extensive treatment in *Soulemezis v Dudley (Holdings) Pty Ltd*.<sup>47</sup> McHugh JA wrote that:

The giving of reasons for a judicial decision serves at least three purposes. First, it enables the parties to see the extent to which their arguments have been understood and accepted as well as the basis of the judge's decision ... Thus the articulation of reasons provides the foundation for the acceptability of the decision by the parties and by the public. Secondly, the giving of reasons furthers judicial accountability ... Thirdly, under the common law system of adjudication, courts not only resolve disputes – they formulate rules for application in future cases ... Hence the giving of reasons enables practitioners, legislators and members of the public to ascertain the basis upon which like cases will probably be decided in the future.<sup>48</sup>

Following *Wainohu v New South Wales* ('*Wainohu*'),<sup>49</sup> the judicial duty to give reasons is now established as a constitutional requirement in Australian law – a duty that cannot be abrogated by statute.<sup>50</sup> *Wainohu* concerned the *Crimes (Criminal Organisations Control) Act 2009* (NSW), which conferred the power on judges of

41 Jason Bosland and Jonathan Gill, 'The Principle of Open Justice and the Judicial Duty to Give Public Reasons' (2014) 38(2) *Melbourne University Law Review* 482.

42 (1957) VR 553, 558 (Monahan J) ('*Lacanale*'); *ibid* 496.

43 *Lacanale* (n 42) 557–8, citing Herbert Broom, *Constitutional Law Viewed in Relation to Common Law, and Exemplified by Cases* (William Maxwell, 1866) 152–3.

44 *Lacanale* (n 42) 558.

45 (1983) 3 NSWLR 378, 386 (Mahoney JA).

46 (1984) 3 NSWLR 447, 459 (Kirby P).

47 (1987) 10 NSWLR 247.

48 *Ibid* 279 (McHugh JA). Quoted in both Alan Goldberg, 'When Are Reasons for Decision Considered Inadequate?' (2000) 24 *Australian Institute of Administrative Law Forum* 1, 1–2 and M Weinberg, 'Adequate, Sufficient and Excessive Reasons' in Judicial Commission of New South Wales, *Handbook for Judicial Officers* (2021).

49 (2011) 243 CLR 181 ('*Wainohu*').

50 See generally, Luke Beck, 'The Constitutional Duty to Give Reasons for Judicial Decisions' (2017) 40(3) *University of New South Wales Law Journal* 923 <<https://doi.org/10.53637/CFWR4202>>.

the Supreme Court of New South Wales to declare an organisation to be criminal. The legislation provided that any such declaration would in turn empower the Supreme Court to issue a control order on application by the Commissioner of Police. The legislation also provided that any judge making such a declaration would not be ‘required to provide any grounds or reasons for the declaration or decision’.<sup>51</sup>

A majority of the court in *Wainohu* held that the absence of an obligation to give reasons was ‘repugnant to the judicial function’.<sup>52</sup> In a joint majority judgment, Gummow, Hayne, Crennan, and Bell JJ concluded that the ‘giving of reasons’ was a ‘hallmark distinguishing substantive judicial decisions from arbitrary decisions’.<sup>53</sup> French CJ and Kiefel J in turn described the duty as ‘an essential incident of the judicial function’.<sup>54</sup>

A court which does not give reasons for a final decision or for important interlocutory decisions withholds from public scrutiny that which is at the heart of the judicial function: the judicial ascertainment of facts, identification of the rules of law, the application of those rules to the facts and the exercise of any relevant judicial discretion.<sup>55</sup>

Judges have been clear that the specificity of these reasons can vary according to the level/type of court and subject matter. French CJ and Kiefel J explained that ‘[t]he duty does not apply to every interlocutory decision, however minor. Its content – that is, the content and detail of the reasons to be provided – will vary according to the nature of the jurisdiction which the court is exercising and the particular matter the subject of the decision’.<sup>56</sup>

How, then, does the duty to give reasons apply to the sentencing judge who must account for their decision in a criminal case? In *R v Thomson*,<sup>57</sup> Spigelman CJ put the obligation in these terms:

Sentencing judges are under an obligation to give reasons for their decisions. Remarks on sentence are no different in this respect from other judgments. This is a manifestation of the fundamental principle of the common law that justice must not only be done but must manifestly be seen to be done.<sup>58</sup>

More specifically, a judge ‘should do more than state the general sentencing principles that apply; more important is an explanation of how those principles have been applied’.<sup>59</sup>

In *Porter v The Queen*, the content of this was described by the judge as follows: ‘[t]he person who is the subject of the judgment, as well as the community at large, are both entitled to know *why* a judge has determined to imprison the person and *how* a particular period of imprisonment has been assessed’.<sup>60</sup> Thus, it seems clear that in Australia at least, a sentencing judge must: (a) provide reasons

51 *Crimes (Criminal Organisations Control) Act 2009* (NSW) s 13(2).

52 *Wainohu* (n 49) 192 [6] (French CJ and Kiefel J).

53 *Ibid* 225 [92] (Gummow, Hayne, Crennan and Bell JJ).

54 *Ibid* 215 [58] (French CJ and Kiefel J).

55 *Ibid*.

56 *Ibid* 214–15 [56].

57 (2000) 49 NSWLR 383.

58 *Ibid* 394 [42] (Spigelman CJ).

59 Judicial Commission of New South Wales, ‘Sentencing Bench Book’ (Bench Book) [1–010].

60 [2019] NSWCCA 117, [67] (Hulme J) (emphasis in original).

for the decision in question; and (b) deliver those reasons at a level of specificity that goes beyond the conclusion that the offender poses (for instance) a high risk to the public. The judge must also articulate which facts pertaining to the offender's circumstances place them within the high-risk category.

This brings us back to the use of risk assessment tools within sentencing decisions. If the step were taken to accommodate risk reports at this earlier stage of judicial decision-making within the Australian justice system, it seems reasonably clear that simply meeting the *Loomis* threshold – providing the output of the algorithm (a risk rating), and data pertaining to statistical validity – would not be enough to satisfy the requirement to explain a judicial decision.

Many have argued that the key to providing adequate explanations is unimpeded access to the algorithm itself.<sup>61</sup> For instance, Iñigo De Miguel Beriain argues that 'a genuine right to an explanation' requires 'unrestricted access to the source code and the logic supporting the results obtained by the algorithm'.<sup>62</sup> Erin Murphy argues that '[a]lgorithmic transparency is an expression that captures the value in demanding that developers make public the source code behind their software platforms',<sup>63</sup> and that in all cases involving a 'statistical calculation performed by a computer program', courts should 'insist that the algorithms and formulas used to arrive at that calculation be open to challenge and inspection'.<sup>64</sup>

Yet, there are reasons to reflect carefully upon the basis for and implications of these claims. No doubt, there are circumstances in which ensuring that the 'algorithms and formulas used to arrive at that calculation [are] open to challenge and inspection' will reveal precisely the information that is necessary to understand the decision that they inform.<sup>65</sup> But this will not always be the case. Many algorithms run to several thousand lines of code, access to which will not always yield the sort of information that can help litigants to understand the resulting decision.<sup>66</sup>

The duty to give reasons requires 'a judgment that gives a clear explanation' for the resulting decision – a set of 'adequate reasons' that 'make it clear why the Judge has reached his decision'.<sup>67</sup> This need not require a 'lengthy judgment' reflecting 'every factor which weighed with the Judge in his appraisal of the evidence'; rather, it requires the judge to identify 'those matters which were critical to his

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61 See, eg, Erin Murphy, *Inside the Cell: The Dark Side of Forensic DNA* (Nation Books, 2015) 299. See also Monika Zalnieriute, Lyria Bennett Moses and George Williams, 'The Rule of Law and Automation of Government Decision-Making' (2019) 82(3) *Modern Law Review* 425 <<https://doi.org/10.1111/1468-2230.12412>>.

62 Iñigo De Miguel Beriain, 'Does the Use of Risk Assessments in Sentences Respect the Right to Due Process? A Critical Analysis of the *Wisconsin v Loomis* Ruling' (2018) 17 *Law, Probability and Risk* 45, 52 <<https://doi.org/10.1093/lpr/mgy001>>.

63 Murphy (n 61) 299 (emphasis omitted).

64 *Ibid.*

65 *Ibid.*

66 Cybergenetics Corporation, 'Motion for Reconsideration and Motion for Amended Protective Order of Cybergenetics', Submission in *Commonwealth of Virginia v Watson*, FE-2019-279, 23 September 2020, 9–10 [41]–[45].

67 *English v Emery Reimbold & Strick Ltd* [2002] 1 WLR 2409, 2418 [18], 2434 [118] (Lord Phillips for the Court).

decision'.<sup>68</sup> What we need, therefore, is not access to the instructions according to which a computer operates. Rather, we need information about the variables that influence any given output, and how – in terms comprehensible to those affected.

It bears emphasis that opacity – communicating risk scores without the variables that influence any given output – cannot be remediated by the use of judicial discretion or contextual information appended to the algorithmic conclusion.<sup>69</sup> Either the algorithm makes plain the variables that count towards a conclusion, or it does not. If it does not, it is not enough for the judge to explain that, and how, the output featured as one aspect of judicial decision-making. It is the judge's duty to explain precisely which factors influenced their decision; pointing to the risk score is no adequate shortcut to satisfying that duty.

So, the duty to explain sentencing decisions that depend upon algorithmic risk assessments includes a requirement to identify the factors that influence the risk output with sufficient clarity and granularity to allow those affected to understand how the relevant decision was made. Moreover, the failure to supply this information would constitute an error of law, grounding a concomitant right of appeal.<sup>70</sup>

This conclusion, I argue, aligns precisely with the guidance function of the law. If 'the law should be such that people will be able to be guided by it', there ought to be a duty to provide the sort of reasons that allow people to deduce how they can act so as to avoid or minimise the burdens that flow from institutional punishment. This includes not only acts taken to bring the individual into conformity with the law *tout court*, but also those behaviours which can (in principle) increase the chance of decisions that actualise more favourable outcomes for the individual's corrective journey (eg, that any punitive burdens are non-carceral, or involve partially open conditions). If individuals are only given to understand that an algorithm might characterise them as high risk, but not how or why, there is little that they can do to ascertain this information in advance. And – precisely as Loomis argued before the SCW – there is little that they can do to verify *ex post* that the decision is accurate.

## B Risk Tools and Corrective Decision-Making

The previous section was premised upon a hypothetical: if risk tools were to be used to aid sentencing decisions in Australia, what information would have to be communicable – and communicated clearly to litigants and to the general public – to satisfy the judicial duty to give reasons? I turn now to the present scope and context of risk assessment within decision-making across the Australian corrective system.

Whilst no single risk assessment tool is currently used to make corrective decisions in all Australian states, across all types of criminal offence, the LSI-R<sup>71</sup>

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68 Ibid 2418 [19].

69 This is a point independent from the claim about whether judicial discretion can remediate concerns about predictive validity, on which see, eg, Cutts (n 27).

70 *Fleming v The Queen* (1998) 197 CLR 250, 260 [22] (Gleeson CJ, McHugh, Gummow, Kirby and Callinan JJ).

71 Andrews and Bonta (n 9).

can be singled out as the tool that attracts the most consistent and widespread application.<sup>72</sup> In NSW and Victoria, the LSI-R is used to make risk assessments that form the basis for case planning for several thousand offenders each year.<sup>73</sup>

The LSI-R generates outputs from 54 datapoints that relate to the offender's characteristics and circumstances. Some of these datapoints concern the offender's 'criminal history' (for example, prior convictions, institutional misconduct, and any pattern of violent behaviour).<sup>74</sup> But many do not. For instance, the LSI-R also captures: financial problems; underemployment and dissatisfaction at work; low school performance; frequent changes of address and 'unsatisfactory accommodation'; being part of a hostile, unhappy, indifferent, and/or violent domestic relationship; having deceased, absent, or uncaring parents; social isolation, or having friends or family involved in crime or drugs; and a preference for hobbies that do not involve formal organisation.<sup>75</sup>

The first LSI-R assessment generated for a given offender either forms part of a full pre-sentence report requested by the court, or may be completed whilst the offender is being assessed in court,<sup>76</sup> and is updated periodically during a sentence that has more than six months remaining.<sup>77</sup> LSI-R scores affect security classification and prison placement (eg, within a high security unit), and guide preparation of the pre-release report,<sup>78</sup> which informs decisions about whether and under what conditions an offender should be granted parole.<sup>79</sup>

The LSI-R also influences the administration of a range of '[high] intensity interventions' that aim at therapeutic treatment.<sup>80</sup> For instance, the LSI-R is used explicitly to '[match] services and programs to people's needs' across Victorian corrective services.<sup>81</sup> This includes formal programs of psychological therapy, a graduated handover process between institutional and extra-institutional supervision to 'enhance continuum of care', and multiservice case review meetings.<sup>82</sup>

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72 Others include the HCR-20, the 'Static99', Sexual Violence Risk20, and Risk For Sexual Violence Protocol.

73 Watkins (n 10) 2; Ashley L Dunne et al, 'Validity of the LSI-R:SV, LS/RNR and VRS risk assessment instruments in a sample of male serious violent offenders in Australia' (2025) *Psychology, Crime & Law* 1–25 <<https://doi.org/10.1080/1068316X.2025.2470272>>.

74 Andrews and Bonta (n 9) 5–12.

75 Ibid.

76 Victorian Auditor-General's Office, *Managing Community Corrections Orders* (Report, February 2017) 25.

77 Unless a current and valid LSI-R already exists: see 'Risk Assessment: Information How Prison Staff Decide What Kind of Risk a Prisoner Is', *Victoria Legal Aid* (Web Page, 17 March 2025) <<https://www.lawhub.vla.vic.gov.au/risk-assessment>>.

78 New South Wales Law Reform Commission, *Parole Question Paper 3: Discretionary Parole Decision-Making* (Question Paper, September 2013) 14 [3.43]–[3.46] ('*Parole Question Paper 3*').

79 Ibid.

80 Alessandra Raudino et al, 'The Community Triage Risk Assessment Scale (Community TRAS): A Statistical Model for Predicting Recidivism among Community-Based Offenders' (Research Bulletin No 38, Corrections Research Evaluation and Statistics, Corrective Services NSW, October 2018) 4; State of Victoria Department of Justice and Regulation, *Offending Behaviour Programs: Service Delivery Manual* (Manual, April 2015).

81 State of Victoria Department of Justice and Community Safety, *Correctional Practice Framework* (Framework, October 2024) 35.

82 Ibid 45.

The degree of latitude accorded to legal officers with LSI-R assessments in hand can vary according to the nature of the corrective question. In NSW, LSI-R results inform the pre-release report and parole recommendation produced by Community Corrections, which in turn form part of what the State Parole Authority ('SPA') terms an 'instinctive synthesis' assessment of the risks posed by an offender.<sup>83</sup> By contrast, offenders with an LSI-R score of medium or above will automatically receive 'enhanced community supervision' if they are granted parole.<sup>84</sup> In Victoria, the LSI-R report compiled by Corrections Victoria provides the basis for prisoner classification and placement,<sup>85</sup> and a given risk rating automatically qualifies an offender for a range of supervisory, behaviour management, and prisoner programming interventions.<sup>86</sup> In the ACT, '[t]he level of supervision required to be administered under parole is determined by the LSI-R risk score' (calculated as close as possible to the parole release date).<sup>87</sup>

I focus here upon parole, which is one of the most significant contexts in which risk tools are used to make determinations that affect the course of an individual's corrective journey within the Australian criminal justice system. There are grounds for conceptualising a given parole authority as a body that performs 'judicial functions'<sup>88</sup> for the purposes of applying the common law duty to give reasons. For instance, substantively, and though the timing differs from the sentencing decision, parole determinations have a clear impact upon the duration of an individual's criminal punishment. Formally, they comprise, inter alia, judicial members: the ACT Parole Board contains three (of 11) judicial members, and the NSW SPA includes four 'judicially qualified persons'.<sup>89</sup> Moreover, in the case of serious offenders, public review hearings are held in open court, to allow victims and the state of NSW to make a submission before parole is decided.<sup>90</sup>

Nevertheless, parole authority practice has not been to communicate reasons at any level of specificity that might aid the offender in understanding precisely which risk factors feed into an output that informs the parole decision. For instance, the *Crimes (Administration of Sentences) Act 1999* (NSW) requires the NSW SPA to make a determination only if it is 'satisfied that it is in the interests of the safety of the community'.<sup>91</sup> In considering whether it is in the 'interests of the safety of

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83 *Parole Question Paper 3* (n 78) 15 [3.46].

84 James Beaufils, Chris Cunneen and Sophie Russell, 'Exploratory Research into Post-Release Community Integration and Supervision: The Experiences of Aboriginal People with Post-Release Parole Supervision and Reintegration in NSW' (Research Report, Jumbunna Institute for Indigenous Education and Research, 2021) 23 [1.4.2].

85 Auditor General Victoria, *Addressing the Needs of Victorian Prisoners* (Audit Report, 19 November 2003) 30 [3.13].

86 State of Victoria Department of Justice and Regulation, *Offending Behaviour Programs Branch: Program Suite* (Pamphlet, April 2015).

87 Efty Stavrou, Suzanne Poynton and Don Weatherburn, 'Parole Release Authority and Re-offending' (2016) 194 *Crime and Justice Bulletin: Contemporary Issues in Crime and Justice* 1, 10.

88 *Lacanale* (n 42).

89 *Crimes (Administration of Sentences) Act 1999* (NSW) s 183(2) ('*Crimes (Administration) Act*').

90 'Process for Serious Offenders', *NSW State Parole Authority* (Web Page, 6 May 2025)

<<https://paroleauthority.nsw.gov.au/parole-in-nsw/serious-offenders/process-for-serious-offenders.html>>.

91 *Crimes (Administration) Act* (n 89) s 135(1).

the community’, the SPA must take into account, inter alia, risk to the public, the nature and circumstances of the offence, the offender’s criminal history, ‘any other report in relation to the granting of parole to the offender that has been prepared by or on behalf of the Review Council or any other authority of the State’, and ‘any other matters that the Parole Authority considers to be relevant’.<sup>92</sup> Notice must be given of the decision to refuse parole, and what the offender can do about it.<sup>93</sup> But there is no specific duty regarding the content of the decision. Whilst the SPA has in fact undertaken to publish Parole determinations, these are hardly specific: most simply state that it is in the ‘interests of the community’ to make the determination in question.<sup>94</sup>

How, then, does the LSI-R fare against the lower threshold applied in *Loomis* – that there be evidence to suggest that a risk tool has statistical validity for the population to which it is applied? At best, this evidence is contested. In particular, a range of measures have been used to show that the LSI-R, which was developed on the basis of datasets that did not include or did not disaggregate Indigenous populations, may have lower predictive value for Native American persons in the US and Canada, and Aboriginal and Torres Strait Islander persons in Australia, ‘than when used with dominant culture offenders’.<sup>95</sup> Thus, the tool, which measures ‘relatively poor[ly]’ against ‘standard discrimination indices’ may not ‘be a cross-culturally fair risk assessment instrument for Australian individuals’.<sup>96</sup> These concerns go to the predictive power of the LSI-R overall, and to the predictive power of particular correlation coefficients – the variables that correlate with criminal activity.<sup>97</sup>

In this respect, it bears emphasis that specific variables captured by the LSI-R may lack cultural relevance for communities that do not conform to dominant culture norms.<sup>98</sup> For instance, under ‘Leisure/Recreation’, the LSI-R assesses whether the offender ‘could make better use of time’ spent in social settings.<sup>99</sup> Indicative

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92 Ibid s 135(3).

93 Ibid s 139.

94 See, eg, NSW State Parole Authority, ‘Parole Determination Richard Relator’ (19 November 2024) 1: ‘[h]aving considered all the material before it, the Authority was satisfied releasing Relator on parole with a robust post-release plan, electronic monitoring and while living in a supported facility, is in the interests of protecting the safety of the community’.

95 Andrew Day et al, ‘Assessing Violence Risk with Aboriginal and Torres Strait Islander Offenders: Considerations for Forensic Practice’ (2018) 25(3) *Psychiatry, Psychology and Law* 452, 453 <<https://doi.org/10.1080/13218719.2018.1467804>>; Yilma Woldgabreal et al, ‘An Empirical Test of the Factor Structure of the Violence Risk Scale and Its Measurement Invariance Across Time and Cultural Groups’ (2022) 49(9) *Criminal Justice and Behavior* 1255 <<https://doi.org/10.1177/00938548221084984>> (in the context of broader discussion about the use of risk assessment within corrective services); Zachary Xie et al, ‘The Criminal Reimprisonment Estimate Scale (CRES): A Statistical Model for Predicting Risk of Reimprisonment’ (Research Bulletin No 35, Corrections Research Evaluation and Statistics, Corrective Services NSW, May 2018); Wilson and Gutierrez (n 7); Hsu, Caputi and Byrne (n 7). See also Watkins (n 10).

96 Linda J Ashford et al, ‘The Cross-Cultural Fairness of the LS/RNR: An Australian Analysis’ (2022) 46(3) *Law and Human Behavior* 214, 214, 224 <<https://doi.org/10.1037/lhb0000486>>.

97 Wilson and Gutierrez (n 7); Hsu, Caputi and Byrne (n 7); Fass et al (n 7).

98 Hsu, Caputi and Byrne (n 7).

99 Andrews and Bonta (n 9) 9.

‘highly rewarding’ activities are listed as: stamp collecting; weightlifting; martial arts; dances; weekend BBQs; and active engagement in a formal organisation (union; service club; sports club or team; church).<sup>100</sup> Researchers have argued that these activities, which demonstrate poor cross-cultural application, lack predictive validity for Aboriginal and Torres Strait Islander subpopulations.<sup>101</sup>

These concerns are even more acute in the context of behavioural indicia captured by the LSI-R. An individual who ‘rejects the underlying values of society’, and/or ‘expresses acceptance of the common rationalizations or justifications for law violations’ (eg, ‘the cops were always on me for something’)<sup>102</sup> is treated as high risk under ‘Attitudes/Orientation’, whilst ‘hostility’ is listed as an ‘emotional/personal’ red flag.<sup>103</sup> As the Australian Institute of Criminology (‘AIC’) has highlighted, to the extent that some First Nations groups experience a ‘deep mistrust’ of police that can manifest as ‘hostility’,<sup>104</sup> there may be good reasons for these responses that have both historical and contemporary currency.<sup>105</sup> The AIC lists some of these reasons: the role of police in implementing former government policies including those relating to child removal; a history of conflict between police and First Nations communities; policies that concentrate policing resources upon First Nations communities; and the role of police in First Nations deaths in custody.<sup>106</sup> In light of these practices and ongoing attempts to mitigate their fallout and the impact upon community relations for those groups deeply affected, the use of ‘mistrust’ as a variable that attracts harsher corrective treatment seems both profoundly inapposite and directly contrary to the goal of reconciliation.

The application of outputs generated by other risk tools to First Nations persons has been directly challenged for a lack of forensic validity. In *Director of Public Prosecutions (WA) v Mangolamara* (‘*Mangolamara*’),<sup>107</sup> the WA Director of Public Prosecutions (‘DPP’) sought an order of continuing detention or a supervision order under the *Dangerous Sexual Offenders Act 2006* (WA) before the Supreme Court of Western Australia.<sup>108</sup> The respondent, a young Aboriginal man, challenged, inter alia, the use of evidence derived from certain risk tools, including the ‘Static99’, Sexual Violence Risk20, and Risk For Sexual Violence Protocol. Hasluck J concluded that ‘little weight should be given to those parts of the reports concerning the assessment tools’ because, ‘having regard to the

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100 Ibid.

101 See Ching-I Hsu, Peter Caputi, and Mitchell K Byrne, ‘Level of Service Inventory–Revised: Assessing the Risk and Need Characteristics of Australian Indigenous Offenders’ (2010) 17(3) *Psychiatry, Psychology and Law* 355, 362 <<https://doi.org/10.1080/13218710903089261>>. ‘[I]ssues concerning constructive leisure time were relevant for all Indigenous offenders, but not for non-Indigenous offenders’: at 355.

102 Andrews and Bonta (n 9) 11.

103 Ibid.

104 Ibid.

105 Australian Law Reform Commission, *Pathways to Justice: An Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples* (Final Report, December 2017) 360 [11.52].

106 Ibid.

107 (2007) 169 A Crim R 379 (‘*Mangolamara*’).

108 See generally, Hannah McGlade and Vickie Hovane, ‘The *Mangolamara* Case: Improving Aboriginal Community Safety and Healing’ (2007) 6(27) *Indigenous Law Bulletin* 18.

admissions made under cross-examination that the tools were not devised for and do not necessarily take account of the social circumstances of indigenous Australians in remote communities'.<sup>109</sup>

Beyond Western Australia, judges have been less persuaded by the risk posed by a lack of cross-cultural validation. For instance, in *The Attorney-General of the Northern Territory v JD (No 4)*,<sup>110</sup> the judge considered the decision in *Mangolamara* and evidence to the effect that the relevant risk tool ('HCR-20') 'had not been validated or proven to relate to Aboriginal offenders', and nevertheless concluded that he 'failed to see why it would not be relevant to Aboriginal populations'.<sup>111</sup> Thus, the respondent 'did not ultimately establish much relevance in the fact that HCR-20 had not been specifically validated for Aboriginal people', or that it was inappropriate for psychological experts to utilise the tool to assess the risk of reoffending.<sup>112</sup>

Whilst specific common law provisions provide the legal foundation for courts to capture a nuanced range of individual circumstances,<sup>113</sup> powerful arguments have been made that we still lack a meaningful way to reflect cultural and social heterogeneity within the actuarial risk assessments that inform corrective decisions in Australia.<sup>114</sup> Where I have focused upon Indigeneity, no doubt there are other groups within the Australian population for whom the algorithmic enquiry simply is insufficiently nuanced to hold predictive validity. As Kelly Hannah-Moffat has put it:

[E]mpirical analyses of risk tools, including the LSI-R, reveal that the criteria for establishing levels of risk routinely pay little attention to gender, racial, or ethnic differences, or to the differing social, economic, and political contexts in which these tools are deployed. Risk assessment *does not* account for these variables.<sup>115</sup>

Indeed, within the First Nations population, these concerns may be particularly acute for certain individuals, including women.<sup>116</sup>

If these concerns hold water, then it seems that we fail to satisfy even the basic transparency threshold set in *Loomis*, and the limited information currently supplied by the SPA: we can neither know nor communicate that the risk output

109 *Mangolamara* (n 107) 406 [165]–[166]. In *Director of Public Prosecutions (WA) v GTR* [2007] WASC 381 [111]–[112], McKechnie J came to a similar view to Hasluck J. A different conclusion was reached in *Western Australia v Woods* [2007] WASC 320. In *Director of Public Prosecutions (WA) v Moolarvie* [2008] WASC 37, Blaxell J concluded that 'the use by each psychiatrist of the "Static-99" tool does not detract from the reliability of his assessment': at [86].

110 [2019] NTSC 82.

111 *Ibid* [20].

112 *Ibid* [21]. For LSI-R, researchers have argued that there may be racial bias in probation assessments: see Evan M Lowder et al, 'Racial Bias and LSI-R Assessments in Probation Sentencing and Outcomes' (2019) 46(2) *Criminal Justice and Behavior* 210 <<https://doi.org/10.1177/0093854818789977>>.

113 *R v Fernando* (1992) 76 A Crim R 58; Thalia Anthony, 'Sentencing Indigenous Offenders' (Brief No 7, Indigenous Justice Clearing House, Department of Justice and Attorney General, State of New South Wales, March 2010). See also Richard Edney, 'The Retreat from *Fernando* and the Erasure of Indigenous Identity in Sentencing' (2006) 6(17) *Indigenous Law Bulletin* 8.

114 Day et al (n 95) 455.

115 Kelly Hannah-Moffat, 'Actuarial Sentencing: An "Unsettled" Proposition' (2013) 30(2) *Justice Quarterly* 270, 279 <<https://doi.org/10.1080/07418825.2012.682603>>.

116 I am very grateful to my first anonymous referee for raising this point.

in question supports the conclusion that it is ‘in the interests of the community’ to make the determination in question.

Let us return to our central question: ‘[i]f society demands that the law should be such that people can and will be guided by it, what does that mean for the form and content of these technological innovations?’<sup>117</sup> I have argued that there are two components to the notion that the law should be ‘such that people can and will be guided by it’ – that people can understand what the law requires of them, and that it equips them with the chance to conform.

The first component has been the focus of this part. I have argued that: (i) sentencing decisions must be accompanied by reasons that indicate which variables affect risk outputs, so that (in principle at least) individuals can understand what is required of them to minimise the burdens of carceral punishment; and (ii) Australian risk tools may fail to satisfy even the lowest threshold for transparency – to provide the risk output and validation data justifying the conclusion that an affected individual poses a high risk to the public. Without this information, we have poor grounds to support the conclusion that parole guidelines that emanate from statutory and judicial law are implemented as they have been publicly articulated.

I turn in what follows to the second component – that individuals be equipped with an adequate chance to conform to the requirements of the law, properly understood.

### III GUIDING ACTION: OPPORTUNITY

I have argued that there is a second component to the notion that ‘the law should be such that people are able to be guided by it’: those whose action would be guided by the law in question must have a meaningful chance to act (or not act) on the law as they are given to understand it, so as to avoid or minimise the institutional consequences that flow from nonconformity. In this part, I argue that there is a powerful case for thinking that risk tools used in the Australian corrective context are not compatible with this opportunity. This claim goes not just to the form of technological innovation, but also to its content – to the nature of the variables (however communicated) that count towards a risk output.

One of the key goals of criminal punishment, to keep people safe and their property secure, is achieved via a mechanism that subjects some people to a burden – which may be relatively small (eg, demerit points) or life-changing (eg, incarceration) for those affected. There are different kinds of reason to want the opportunity to avoid or minimise burdens of this nature – to secure, for instance, a shorter or lower security prison sentence for less serious wrongdoing, or early release for good behaviour during incarceration.

The most obvious are instrumental:<sup>118</sup> criminal punishment in any form is unlikely to make things go better for offenders, and can involve the loss of social, political, and economic rights and privileges that play a key role in their ability to thrive as part of society.<sup>119</sup> Making sure that these choices are sufficiently (instrumentally) valuable requires safeguards – as above, a set of clear rules published widely in advance of enforcement, and background conditions that provide those affected with opportunities to live a meaningful life on the right side of the law.<sup>120</sup>

But we also have non-instrumental reasons to want criminal punishment to turn on the actions that we take when we have meaningful choices about what to do. Giving individuals the chance to avoid criminal punishment by choosing appropriately signals that they have a certain sort of rational competence; they can (whether or not they do) guide their actions in accordance with the rules. By contrast, if we deny these opportunities to some people (eg, by applying punishment to them regardless of their choices) we signal the opposite – that these people are less capable of making the choices necessary to stay within the bounds of the law. This can be objectionable on its own terms, and where these judgments have the effect of creating unjustified differences in status, by signalling that some people are simply more deserving of the burdens that flow from failure to comply with the law.<sup>121</sup>

For the LSI-R, we have already seen that risk scores for individual offenders are generated from a range of facts that go far beyond the criminal history of an offender, encompassing circumstances that fall (wholly or partly) outside the sphere of their rational competence. This includes, inter alia: financial problems; ‘reliance upon social assistance’ (including disability support); ‘unsatisfactory’ accommodation and frequent changes of address; being part of a hostile or violent domestic relationship; having deceased, absent, or uncaring parents; being shy or withdrawn; or having friends or family involved in crime or drugs.<sup>122</sup> The presence of any one of these factors decreases the chance of a favourable corrective environment, or a successful parole application.

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118 Thomas M Scanlon, *What We Owe to Each Other* (Harvard University Press, 1998) 251–2; Emmanuel Voyiakis, *Private Law and the Value of Choice* (Bloomsbury Publishing, 2017) 119 n 9.

119 There is very little evidence that those burdens play a positive short or longer-term role in the lives of those who suffer them, and a good deal of evidence to the contrary. See, eg, Francis T Cullen, Cheryl Lero Jonson and Daniel S Nagin, ‘Prisons Do Not Reduce Recidivism: The High Cost of Ignoring Science’ (2011) 91(3) *Prison Journal* 48S <<https://doi.org/10.1177/0032885511415224>>. Even for those who are not unusually vulnerable, incarceration can cause long-term detriment to economic opportunity, social integration, psychological wellbeing, and physical health: Lauren Brinkley-Rubinstein, ‘Incarceration as a Catalyst for Worsening Health’ (2013) 1 *Health and Justice* 3:1–17 <<https://doi.org/10.1186/2194-7899-1-3>>.

120 Moreover, the choice itself should not require unreasonable sacrifice; a valuable choice to avoid the burdens of criminal punishment is not one that requires us to think, speak, or behave in a manner that leaves insufficient room for the maintenance of other valuable relationships and activities. For instance, the chance to avoid criminal punishment by eschewing friends or family, or by engaging in a limited range of prescriptive activities, may not be one that we have reason to value.

121 As Mill put it, enfranchising women would eliminate an ‘unworthy stigma’ obstructing the social and professional advancement of women: John Stuart Mill, ‘On the Admission of Women to the Electoral Franchise’ (Speech, House of Commons, 20 May 1867).

122 Andrews and Bonta (n 9) 5–12.

Thus, even if an individual could ascertain in advance how these factors will influence corrective decisions, there is very little that they can do (or can reasonably be expected) about it. The child whose parents are absent or uncaring cannot, however they may wish to, bring their parents back or change their behaviours; the individual who suffers violent abuse at the hands of their partner cannot, or cannot be expected to, avoid that harm. In this way, the use of the LSI-R to make corrective decisions can turn the law from an action-guiding institution into one that makes the allocation of more serious punitive burdens all but inevitable for those affected.

It bears emphasis that these concerns are not limited to the practical inevitability of the punitive burden. Suppose that it were possible for individuals to determine that they could reduce the duration or severity of criminal punishment by severing links with certain friends, by leaving their partner, or by taking on a job with poor conditions but better pay. Even so, it is not clear that these are the sorts of choices that they have reason to want. So, the point is not just that policies that use the LSI-R to make corrective decisions may deny those affected any chance to avoid or minimise the burdens of criminal punishment; rather, it is that these policies deny those affected the sort of chance that they have reason to value.

This has clear instrumental ramifications for offenders, who may be subjected to a range of more extensive criminal sanctions than they would were those opportunities made available to them. And it has a broader symbolic effect for those who are singled out in this way. When our decisions about criminal punishment turn on facts that fall outside the sphere of an offender's rational competence (eg, poverty, underemployment, the criminality of friends or family etc) we signal that those who have these 'criminogenic' characteristics simply are more criminally inclined – less able to resist the sort of poor choice that leads to punitive consequences.

This is objectionable per se, and where it tends to reinforce those stigmatising differences in status which can lead to the unjustified exclusion of individuals from benefits throughout their personal and professional lives. When we punish someone simply because they lack financial means or a stable source of income, we send certain troubling messages: poor people make bad choices and may find it harder (for want of alternatives, or some defect of character), to resist the lure of crime. It is a short step from here to the conclusion that they also make bad employees, professional associates, and social partners. This tends to perpetuate precisely those cycles of disadvantage that can make it more difficult to create and sustain the conditions that enable people to live 'a satisfactory life within the law'.<sup>123</sup>

For the law to guide our actions, it must not merely be possible to identify what it requires of us; we must also have sufficiently valuable opportunities to act (or not to act) as it prescribes. Policies that use the LSI-R to shape the corrective journey

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123 Scanlon (n 118) 264. This phenomenon has been examined extensively by Devah Pager in the context of racialised variables: the 'association between race and crime', she argues, can trigger the 'activation and application of stereotypes' that weaken 'any incentive to give a young black man the benefit of the doubt': Devah Pager, *Marked: Race, Crime, and Finding Work in an Era of Mass Incarceration* (University of Chicago Press, 2007) 101.

make this either difficult or impossible for certain offenders, by generating risk scores from facts that they cannot, or cannot reasonably be expected to, influence. Thus, these policies create a meaningful risk that we will deny those affected the opportunity to be guided by the law – to adopt a course of action that allows them to avoid or minimise the burdens that flow from criminal wrongdoing. For at least some people, policies that use the LSI-R treat offenders as if they are not – indeed, never were – capable of making the choices that would bring them into conformity with the law, and prescribe their punishment accordingly.

#### IV NEXT STEPS

Let us return to our opening question: ‘[i]f society demands that the law should be such that people can and will be guided by it, what does that mean for the form and content of these technological innovations?’<sup>124</sup> I have argued that the action-guiding function of law requires access to comprehensible information about the variables that inform individual risk assessments across corrective services. And I have argued that these variables ought to be compatible with the provision of an adequate chance to avoid or minimise the burdens of criminal punishment. There are reasons to doubt whether risk tools used within the Australian corrective system satisfy either component.

Where does this leave us? Elsewhere, I have argued that there may be merit to statewide public investigation into the use of specific risk assessment tools within the Australian context, for which there exists recent and relevant precedent.<sup>125</sup> For instance, the NSW Law Enforcement Conduct Commission (‘LECC’) recently concluded ‘Operation Tepito’, an investigation into the Suspect Targeting Management Plan (‘STMP’).<sup>126</sup> The investigation was launched in 2018, in response to concerns about the use of algorithmic risk scores to single out ‘targets’, some as young as ten, for intensive policing surveillance.<sup>127</sup> Operation Tepito was informed by research that highlighted some profound inequalities in the application of the STMP to Aboriginal and Torres Strait Islander populations, including youth populations.<sup>128</sup> The LECC concluded that the program could have an ‘unreasonable, unjust, oppressive or improperly discriminatory’ impact on children and young people, and might meet the threshold for serious misconduct.<sup>129</sup>

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124 Ibid 12.

125 Tatiana Dancy, ‘Algorithmic Risk Assessment in Australian Corrective Services’ (2025) 49(1) *Melbourne University Law Review* 38.

126 Ibid.

127 Steve Yeong, ‘An Evaluation of the Suspect Target Management Plan’ (Crime and Justice Bulletin No 233 (revised), NSW Bureau of Crime Statistics and Research, February 2021).

128 Vicki Sentas and Camilla Pandolfini, *Policing Young People in NSW: A Study of the Suspect Targeting Management Plan* (Report, 25 October 2017).

129 Law Enforcement Conduct Commission, *An Investigation into the Use of the NSW Police Force Suspect Targeting Management Plan on Children and Young People: Operation Tepito* (Final Report, October 2023) 133.

The STMP was decommissioned in December 2023.<sup>130</sup> Operation Tepito provides a helpful template for broad enquiry into the nature and scope of algorithmic decision-making in criminal justice, across various stakeholders.

Of course, this sort of investigation is only apposite *ex post*. One significant criticism of the STMP is that these steps, which had no statutory foundation, were therefore taken without any transparent or accountable decision-making *ex ante*.<sup>131</sup> When police or judicial practice evolves to adopt risk tools like the STMP or the LSI-R, *that* is the moment for robust and accountable enquiry into the values served by doing so, and the costs for those affected. This would include any decision to take the significant step, contemplated by Justice Gordon's consideration of *Loomis*, of allowing risk tools to influence sentencing decisions in the Australian criminal justice system.

## V CONCLUSION

This article has framed discussion of risk assessment tools within the Australian criminal justice system by reference to law as it was conceived by Justice Gordon in her Honour's 2017 speech to the Centre for Comparative Constitutional Studies<sup>132</sup> – law as an action-guiding institution. Our central question has been, as her Honour put it: '[i]f society demands that the law should be such that people can and will be guided by it, what does that mean for the form and content of these technological innovations?'<sup>133</sup> I have argued that the action-guiding function of law has two components: transparency (codified law and judicial decisions must each be clear and comprehensible to those affected); and opportunity (those affected must have an adequate chance to act according to that understanding, so as to avoid the institutional consequences of nonconformity).

With respect to the first component, I have argued that any judicial use of risk assessment should be such that the variables used to make predictions can be ascertained and communicated to those affected. And the present widespread use of risk tools within the corrective environment should be attended by robust evidence for their validity across subgroups of the Australian population. With respect to the second, I have argued that the content of risk assessment should be such that the variables captured are compatible with the provision of an adequate chance to be guided by the law – to choose to act (or not) as the law prescribes.

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130 Ibid 148.

131 Ibid 13: 'police may have exercised powers without having the appropriate statutory basis to do so'.

132 Gordon (n 1).

133 Ibid 12.