Civil Rights & Pretrial Risk Assessments
A Critical Issue Briefing
SAFETY + JUSTICE CHALLENGE

Supported by the John D. and Catherine T. MacArthur Foundation

Upturn
Roadmap for today

- 0 - **Background:** Algorithms to rescue?
- 1. **Why the opposition** from civil rights advocates?
- 2. If not **risk assessment**, then what?
- 3. Where RAIs remain in use, how can we build trust?
Background: Algorithms to the Rescue?
America Is Waking Up to the Injustice of Cash Bail

Seventy percent of people in jail haven’t been charged. They just can’t afford bail.

By Bryce Covert

Federal Judge Strikes Down Houston-Area Bail System

The Dangerous Domino Effect of Not Making Bail

mostly traps low-level offenders who can’t afford trial.

By Cameron Langford

We Can’t End Mass Incarceration Without Ending Money Bail

By Udi Ofer, Deputy National Political Director and Director of Campaign for Smart Justice, ACLU

TAGS: Smart Justice
People released pretrial on felony cases in 75 largest counties, 1990-2009

Number of convicted and non-convicted people in local jails, 1983-2014

99% of the total jail growth from 1999 to 2014 was in the detention of people who are legally innocent

Source: Stephanie Wykstra. Bureau of Justice Statistics

Source: Peter Wagner/Prison Policy Initiative
How to Upgrade Judges with Machine Learning

Software that helps judges decide whether to jail a defendant while they await trial could cut crime and reduce racial disparities amongst prisoners.
<table>
<thead>
<tr>
<th>Risk Factor</th>
<th>Pretrial Outcome</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Age at current arrest</td>
<td>FTA</td>
</tr>
<tr>
<td>2. Current violent offense</td>
<td>NCA</td>
</tr>
<tr>
<td>2a. Current violent offense and 20 years old or younger</td>
<td>NVCA</td>
</tr>
<tr>
<td>3. Pending charge at the time of the offense</td>
<td></td>
</tr>
<tr>
<td>4. Prior misdemeanor conviction</td>
<td></td>
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<tr>
<td>5. Prior felony conviction</td>
<td></td>
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<tr>
<td>5a. Prior conviction</td>
<td></td>
</tr>
<tr>
<td>6. Prior violent conviction</td>
<td></td>
</tr>
<tr>
<td>7. Prior failure to appear pretrial in past 2 years</td>
<td></td>
</tr>
<tr>
<td>8. Prior failure to appear pretrial older than 2 years</td>
<td></td>
</tr>
<tr>
<td>9. Prior sentence to incarceration</td>
<td></td>
</tr>
</tbody>
</table>

FTA = Failure to Appear; NCA = New Criminal Activity; NVCA = New Violent Criminal Activity
In the last six years, close to 700 new enactments have been passed which summarize trends in criminal justice. Therefore, the American Council of Chief Defenders, Gideon’s Promise, the National Association for Public Defense, the National Association of Criminal Defense Lawyers, and the National Legal Aid and Defenders Association strongly endorse and call for the use of validated pretrial risk assessment in all jurisdictions, as a necessary component of a fair pretrial release system that reduces unnecessary detention and eliminates racial bias, along with the following checks and balances:
Figure 4 - Non-financial release rates over time for all defendants

Note: This figure shows the fraction of defendants who are granted non-financial release over time. From left to right, the vertical lines indicate the date HB 463 was introduced as legislation, the date it was implemented as law, the date the PSA was adopted, and the date it was modified.

Figure 6 - Release within 3 days

Note: This figure shows the fraction of defendants who are released within 3 days of booking. From left to right, the vertical lines indicate the date HB 463 was introduced as legislation, the date it was implemented as law, the date the PSA was adopted, and the date it was modified.
More than 100 Civil Rights, Digital Justice, and Community-Based Organizations Raise Concerns About Pretrial Risk Assessment

Beyond the Algorithm
Pretrial Reform, Risk Assessment, and Racial Fairness

by Sarah Picard, Matt Watkins, Michael Rempel, and Ashmini Kerodal
My take on the science, and my primary worry

Pretrial risk assessment instruments cannot safely be assumed to reduce the epidemic of needless human caging, or to mitigate the longstanding racial disparities in pretrial justice.*

* And the embrace of this technology might displace other reforms that would achieve these goals.
1. Why the opposition?
Risk assessment tools learn from, predict, and reinforce long-standing racial disparities.
Racial bias

Prediction Fails Differently for Black Defendants

<table>
<thead>
<tr>
<th></th>
<th>WHITE</th>
<th>AFRICAN AMERICAN</th>
</tr>
</thead>
<tbody>
<tr>
<td>Labeled Higher Risk, But Didn’t Re-Offend</td>
<td>23.5%</td>
<td>44.9%</td>
</tr>
<tr>
<td>Labeled Lower Risk, Yet Did Re-Offend</td>
<td>47.7%</td>
<td>28.0%</td>
</tr>
</tbody>
</table>

Overall, Northpointe’s assessment tool correctly predicts recidivism 61 percent of the time. But blacks are almost twice as likely as whites to be labeled a higher risk but not actually re-offend. It makes the opposite mistake among whites: They are much more likely than blacks to be labeled lower risk but go on to commit other crimes. (Source: ProPublica analysis of data from Broward County, Fla.)
These instruments cannot forecast dangerousness or flight risk.
Risk assessment instruments insulate moral choices from public input and scrutiny.
<table>
<thead>
<tr>
<th>FTA 1</th>
<th>FTA 2</th>
<th>FTA 3</th>
<th>FTA 4</th>
<th>FTA 5</th>
<th>FTA 6</th>
</tr>
</thead>
<tbody>
<tr>
<td>NCA 1</td>
<td>NCA 2</td>
<td>NCA 3</td>
<td>NCA 4</td>
<td>NCA 5</td>
<td>NCA 6</td>
</tr>
<tr>
<td>ROR 11.8% of population</td>
<td>ROR 7.7% of population</td>
<td>PML 1 11.7% of population</td>
<td>PML 2 6.4% of population</td>
<td>PML 3 0.1% of population</td>
<td>Release Not Recommended 0.5% of population</td>
</tr>
<tr>
<td>ROR 0.5% of population</td>
<td>ROR 6.9% of population</td>
<td>PML 1 8.8% of population</td>
<td>PML 2 6.0% of population</td>
<td>PML 3 2.9% of population</td>
<td>Release Not Recommended 0.9% of population</td>
</tr>
<tr>
<td>PML 1 2.0% of population</td>
<td>PML 1 8.8% of population</td>
<td>PML 1 1.5% of population</td>
<td>PML 2 3.5% of population</td>
<td>PML 3 4.8% of population</td>
<td>Release Not Recommended 1.5% of population</td>
</tr>
<tr>
<td>PML 1 0.6% of population</td>
<td>PML 1 1.5% of population</td>
<td>PML 2 2.0% of population</td>
<td>PML 3 2.4% of population</td>
<td>PML 3 + EM/HD 2.4% of population</td>
<td>Release Not Recommended 0.1% of population</td>
</tr>
<tr>
<td>PML 2 0.0% of population</td>
<td>PML 2 0.4% of population</td>
<td>PML 3 0.3% of population</td>
<td></td>
<td></td>
<td>Release Not Recommended 1.8% of population</td>
</tr>
</tbody>
</table>

Marie VanNostrand, INTRODUCTION TO THE PUBLIC SAFETY ASSESSMENT AND DECISION MAKING FRAMEWORK: NEW JERSEY (on file with the authors).
Reformatted for this report.
Emphasis on failure — rather than the much more likely prospect of success — erodes the presumption of innocence.
Figure 18: Measuring Perceptions of Uncertainty

**STATEMENT**

- Almost Certainly
- Highly Likely
- Very Good Chance
- Probable
- Likely
- Probably
- We Believe
- Better Than Even
- About Even
- We Doubt
- Improbable
- Unlikely
- Probably Not
- Little Chance
- Almost No Chance
- Highly Unlikely
- Chances Are Slight

**Perceptions of Probability**

- Assigned Probability (%)

- Assigned Probability

*created by @zonnation*
Nonappearance risk levels

- **PSA**
  - FTA (Low): 9%
  - FTA (Medium): 17%
  - FTA (High): 32.10%

- **PTRA**
  - FTA (Low): 1%
  - FTA (Medium): 3%
  - FTA (High): 4.60%

- **COMPAS**
  - FTA (Low): 9%
  - FTA (Medium): 16%
  - FTA (High): 15.60%
In many cases, it is unclear how a tool was developed or is being used.
The benefits of supportive services are largely ignored in today’s risk estimates.
The difference in FTA rates between the comparison group and any treatment arm is significant at the 1% level (p<0.01).
2. If not risk assessment tools, then what?
Significantly narrow who is eligible to be jailed before trial, and ensure robust hearings soon after arrest.
Provide new supportive services that minimize the risks created by the pretrial process.
Ensure that the vast majority of accused people are eligible for presumptive or automatic release with no conditions.
3. Where RAIs remain, how can we build trust?
Expansive transparency—early and ongoing

- Share exactly what is planned and what data will be used (including exact time periods, sources, and mechanics)
- Collaborative, public process to design and test the tool
- Disclose factors and weights in the tool
- Disclose outcome(s) that will be forecast
- Work with community to decide how tool will be used — decision-making framework
- Publish ongoing outcome data, disaggregated in a privacy-preserving way by race, gender and other factors.
Community oversight and governance, aimed at decarceral and racially equitable outcomes.
Ensure decisions to detain are rare, deliberate, and independent of risk assessment instruments.
Sample: Dallas County Policy

Accordingly, my office will adopt the following guidelines when recommending bail amounts:

- **Misdemeanors**: There shall be a presumption of release without pre-trial conditions subject to the below exceptions.

- **State Jail Felonies**: There shall be a presumption of release without pre-trial conditions for all people charged with a state jail felony who have no criminal convictions within the last five years.

- **Exceptions to misdemeanor and state jail felony presumption**: If a prosecutor believes by clear and convincing evidence that the accused will fail to appear and/or is a danger to the community or victim, then a risk assessment shall be requested to determine what, if any, conditions of release are appropriate to ensure return to court and community safety. The risk assessment shall be used to determine specific conditions that will aid return and protect community safety, not as a determinant of release.
Sample: Dallas County Policy

- **All other cases:** The prosecutor’s recommendation is based on an assessment of risk. While a tool will be used, it is not dispositive, rather, it will be used as a guide for developing appropriate conditions of release. The prosecutor’s presumption should be that, unless individuals pose a serious safety risk or flight risk, release remains appropriate, but with the least restrictive conditions imposed to ensure community safety and return to court.

Monetary conditions should never be requested by a prosecutor unless there has first been an ability to pay determination, and then the amount requested should be based on what a person can afford. High bonds should not be used as a form of preventive detention. Instead, people should only be preventively detained if they meet the statutory guidelines for preventive detention, and there is an articulated reason that the person poses a specific danger to the community.
Thanks!

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