"Risk Assessment" Policy Statement

Key Points on Risk Assessment

- **"Risk Assessment" Is Really "Needs Assessment."** "Risk assessment" tools, as typically defined, predict pretrial success absent some kind of assistance or intervention. Across the country, however, a variety of techniques can increase success rates – phone calls, text messages, or pretrial supervision where necessary. For this reason, "risk assessment" may guide our selection of appropriate supports, but risk assessment tools do *not* accurately assess success rates when such services are provided.

- **"Risk Assessment" Tools Have Empirical Limitations.** "Risk assessment" tools have limited efficacy in predicting trial appearance generally, but even the best studies predict nonappearance rather than intentional flight. Because intentional flight is so rare, the algorithms cannot purport to predict this phenomenon. The same is true of violent crime: Violent crime is so infrequent among pretrial individuals that "risk assessment" tools cannot produce meaningful conclusions. Furthermore, extreme variations in defining "violent crime" mean that the resulting predictions are often unhelpful. "Violent crime" must be defined consistently and very narrowly. And, if an algorithm is forecasting intentional flight and violent crime, the algorithm must decouple the two by providing separate predictions.

- **"Risk Assessment" Tools Do Not Tell Us What We Need to Know.** These limitations mean that "risk assessment" algorithms do *not* tell us what we want to know. Nonappearance is frequently due to issues that pose no risk – lack of transportation, lack of adequate notice and reminders, mental health issues, drug addiction, forgetfulness, lack of calendar reminders, jobs with no leave, childcare problems, medical problems, mistrust of the court, or inadequate resources for court-appointed counsel. Intentional flight and violent crimes most concern the public. In having this conversation, we should understand what these tools can do – and what they cannot.

- **"Risk Assessment" Tools Do *Not* Address Values Judgments.** "Risk assessment" tools cannot answer the values question underlying this enterprise – how much risk should we tolerate? Even at their best, "risk assessment" tools can only predict whether someone with certain characteristics will complete an action: here, not appearing in court. But what risk percentage justifies jailing an individual who is presumptively innocent? his question is political and moral, not scientific. For some prosecutors, a 95% chance of success – a 95% chance that someone will appear at trial – may justify detention. For other prosecutors, understanding the extreme costs of incarceration, a 51% chance of success may justify release.

  Jurisdictions may respond differently to the core questions involved, but the important point is that they understand the tradeoffs. Above all, they must understand that there is a choice to be made. Labeling defendants as "low risk" or "high risk" can mask the question of how much risk is acceptable. When presenting data to the courts and the public, "risk assessment" tools must openly and transparently reflect the political choices on which those labels are based.

- **"Risk Assessment" Tools Often Reflect Systemic Bias.** "Risk assessment" tools frequently use data that is tainted by systemic racial and economic bias. Prior convictions and failures to appear reflect a system that unfairly arrests, prosecutes, convicts, sentences, and mistreats many individuals, *especially* low-income individuals and racial minorities, while failing to discover and prosecute crimes that are committed by the dominant class. This double-standard skews risk profiles in two directions. The data overestimates risk for racial minorities and poor defendants, given their likelihood of facing traffic stops, financial audits, and raids, while underestimating risk for white and rich arrestees.

  In discussing "risk assessment" tools, we must acknowledge that many of the inputs – arrests, prosecutions, convictions, and missed appearances in court – reflect race-based and class-based discrimination. We must ensure that our policies address rather than entrench this underlying injustice.

Policy Recommendations on Risk Assessment

- **"Risk Assessment" Tools Should Include Other Risks.** Current "risk assessment" tools generally measure whether someone will miss a court appearance. *Not* included are the risk of assaults and other injuries in jail, including from jail overcrowding. "Risk assessment" models should include how detention may affect jail crimes, assaults, deaths, and future crime. Because pretrial detention increases crime in the future, both during and after prison, the risk of these crimes should be included.

- **"Risk Assessment" Tools Should Be Used Narrowly.** Given the limitations of "risk assessment" tools, courts should use them in a narrow fashion. Judges should use algorithms only to identify those people who can be released immediately – within a matter of minutes or hours – and those people who require services. This, we believe, is the utility of "risk assessment" tools: They may provide evidence-based backing for the reality that most people are *not* risky and *can* be quickly and safely released within hours of arrest.

- **"Risk Assessment" Tools Should Refocus on What Matters.** If "risk assessment" tools are going to be used, they should focus on the harms that we care about most – intentional flight and commission of extremely serious crimes. Because these events are low-incidence, this may require a new approach to the underlying algorithms.

- **"Risk Assessment" Tools Should Be Consistently Updated and Validated Locally.** If used, "risk assessment" tools should be consistently updated and validated locally, excluding any predictive factors that are highly correlated with race or poverty. This means examining if an algorithm is having a disparate impact on racial or class minorities. A validated tool must continually be updated using new data from the local jurisdiction, so that the tool can be improved. Also, "risk assessment" tools must select a baseline that includes provision of pretrial services, rather than predicting success when such services are *not* provided.

- **"Risk Assessment" Tools Cannot Replace Individualized Assessments.** Where cases are eligible for pretrial detention, an individualized assessment – an assessment not relying on an algorithmic risk assessment tool – is required. And even these cases should carry a strong presumption of release *unless* the government meets its heavy burden of proving that no condition or combination of conditions,

short of complete incapacitation, could sufficiently prevent specifically identified risks of harm jeopardizing another person or persons.

- **"Risk Assessment" Tools Should Only Inform Judicial Discretion.** "Risk assessment" tools must never be the sole cause of pretrial detention. The results of risk assessments may inform the court's discretionary decision whether bail is appropriate, but may not supplant the individualized determination required by our Constitution. Other factors, including the current charge and individual circumstances, should remain relevant. Blind use of algorithms, without an individualized determination, will likely trigger successful litigation.