

CIVIL RIGHTS AND PRETRIAL RISK ASSESSMENT INSTRUMENTS

BY DAVID G. ROBINSON AND LOGAN KOEPKE

Jurisdictions across the United States are considering or starting to implement pretrial risk assessment instruments, yet many civil rights advocates argue that such instruments should play no role at all in pretrial administration.

They further argue that, where pretrial risk assessment instruments remain in use, such instruments be carefully circumscribed in order to be made legally, morally, and practically defensible.

This brief answers two questions. First: Why do many in the civil rights community oppose the use of pretrial risk assessment instruments? Second: What concrete reform strategies are available that would avoid risk assessment instruments, or would sharply limit their role? With or without pretrial risk assessment instruments, there are powerful policy levers available that can address mass pretrial incarceration, replace the for-profit bail industry, and make progress toward racial equity.

Today's pretrial systems evolved out of a long history in which African Americans were categorically denied the equal protection of the laws. America's historical treatment of other people of color reflects similar patterns of injustice. The pervasive racial disparities in today's systems cannot be understood apart from this history. Understood from this point of view, pretrial risk assessment instruments often appear to function as a substitute for broader or more fundamental changes.

The racially inequitable criminal legal system that still exists today is also the source of the data upon which pretrial risk assessment instruments are based. Advocates are concerned that risk assessment tools learn from, predict, and reinforce long-standing racial disparities.

Advocates have also argued specifically that:

- The instruments cannot forecast dangerousness or flight risk.
- Pretrial risk assessment instruments insulate moral choices from public input and scrutiny.
- By emphasizing the prospect of failure upon release — rather than the much more likely prospect of success — these tools erode the presumption of innocence.
- 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 pretrial risk estimates.

Those who oppose pretrial risk assessment instruments prefer alternative ways of managing risk, and attend to a broad spectrum of risks in the pretrial context. Such risks include not only the risks that the accused may commit serious violence, further traumatize victims, or abscond prior to case disposition, but also the risks of assaults and injuries while in jail, lasting harm to children whose parents are jailed, the criminogenic potential of pretrial detention, and the risk of unconstitutional jailing.

Opposition to pretrial risk assessment instruments is not an endorsement of the status quo, or the for-profit money bail industry. Instead of focusing reform efforts on actuarial pretrial instruments, advocates argue for policies that:

- Ensure that the vast majority of people accused of crimes are eligible for presumptive or automatic release with no conditions
- 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 and reduce the harms created by the pretrial process.

These steps represent a fundamental alternative to existing money bail regimes, and can be implemented independently of actuarial methods.

At the same time, jurisdictions have already adopted pretrial risk assessment instruments, often as part of a political bargain to obtain changes similar to the ones listed above. Understanding this, many advocates — and even technical experts — have outlined specific steps that can be taken where such tools remain in use, to maximize the extent to which these instruments can be made

consistent with civil rights, and with the aim of ending mass incarceration and its attendant human suffering. These include policies that ensure:

- Expansive transparency throughout design and implementation.
- Community oversight and governance to promote decarceral and racially equitable outcomes
- Decisions to detain that are rare, deliberate, and not dependent solely on pretrial risk assessment instruments.

Advocates maintain that there can be no substitute for direct engagement and partnership with the community wherever a pretrial risk assessment tool is considered for adoption. The lived experiences of people and families who have been directly impacted by mass incarceration, as well as by violence, must be carefully understood and reflected for reform to succeed where it is most needed.

Understanding civil rights critiques of pretrial risk assessment tools may help all stakeholders more effectively coordinate to address the crisis of mass incarceration.



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

www.SafetyandJusticeChallenge.org