



**STATEMENT OF THE AI NOW INSTITUTE AND NYU LAW’S CENTER ON RACE,
INEQUALITY, AND THE LAW ON THE PENNSYLVANIA COMMISSION ON SENTENCING’S
REVISIONS TO THE PROPOSED SENTENCE RISK ASSESSMENT INSTRUMENT
AUGUST 14, 2019**

In June and November of 2018, the AI Now Institute (“AI Now”) and NYU Law’s Center on Race, Inequality, and the Law (“Center”) submitted public comments regarding the Pennsylvania Commission on Sentencing’s (“Commission”) proposed Sentence Risk Assessment Instrument. The Commission has attempted to address the concerns and objections raised by advocates, criminal justice stakeholders, legislators, and the general public regarding the efficacy and value of using a risk assessment instrument at sentencing.¹ It has done so, in part, by proposing that any individual who is deemed a high or low risk by the Commission’s proposed instrument be subjected to a risk-needs-responsivity (“RNR”) assessment that will yield a report to assist the sentencing determination.

At the outset, we recognize that, in fashioning an appropriate sentence, it is appropriate to assess one’s needs, and the barriers individuals face to living a life free of involvement with the criminal legal system. However, despite the Commission’s efforts, defects remain in the proposed instrument, while the introduction of an RNR raises new concerns about the propriety of the sentencing risk assessment enterprise. In light of our previous objections—that risk assessments used in sentencing perpetuate racial bias, inappropriately shape judge’s perceptions of individual cases, and fail to reduce incarceration or improve public safety—we respectfully submit the following comments in opposition to the Commission’s Revisions to the Proposed Sentence Risk Assessment Instrument.²

¹ Samantha Melamed, *Pa. Officials Spent 8 Years Developing An Algorithm for Sentencing. Now, Lawmakers Want to Scrap it.* The Philadelphia Inquirer, (Dec. 12, 2008) <https://www.inquirer.com/news/risk-assessment-sentencing-pennsylvania--20181212.html>.

² The foregoing comments do not purport to represent the views of New York University School of Law or New York University.

The primary policy goals for any effort by the Commission on Sentencing should be to reduce the profound and unwarranted racial disparities in Pennsylvania’s criminal legal system and to lower the population of currently incarcerated people statewide. The Commission has failed to demonstrate that its proposed Sentence Risk Assessment Instrument, with the modifications to the November 3, 2018 proposal as set forth in Commission’s July 12, 2019 publication, meets either of these policy goals. Critically, efforts undertaken to ensure the accuracy of the proposed tool in forecasting what the Commission has defined as recidivism have done nothing to assuage the concern that the recommendations made by the tool will simply reflect the status quo, rather than disrupt it in ways that fundamentally advance racial justice and fairness for those facing sentencing. Accordingly, the Commission should take no further action until it analyzes whether the tool will work to reduce, and eventually eliminate, unwarranted racial disparities at sentencing and will help to reduce Pennsylvania’s incarcerated population. Notably, our comments of November 2018 urged the Commission to focus on these policy goals. We do so here, once again. Until the Commission’s work is aligned with these policy goals, the Commission should reject the use of the Sentence Risk Assessment Instrument.

The potential for racial bias to taint the sentencing process through the proposed tool and the RNR is significant.

Our November 2018 comments described how one of the proposed instrument’s most significant factors—prior criminal history—serves as a proxy for race.³ We also detailed how, in other cases of risk assessment in criminal justice, the correlation between prior criminal or arrest records and race “has proven devastating to African-American communities.”⁴ The continued reliance on prior criminal history reinforces the false perception that Black people are more dangerous than their White

³ We explained that predictions based on historical policing data, which is the source of criminal history, perpetuates the racial bias that already exists throughout the criminal justice system. Kristian Lum & William Isaac, *To Predict and Serve?*, Significance 13, no. 5 (October 1, 2016): 14–19, <https://doi.org/10.1111/j.1740-9713.2016.00960.x>. This is especially true of recidivism prediction. Since the police arrest Black people more frequently than White people for crimes that are committed at similar rates, the perceived population of “risky” defendants who recommit crimes is disproportionately Black. For example, arrests for drug crimes are higher for Black and Latinx people than White people, even though rates of drug use are similar. “From Prohibition to Progress: A Status Report on Marijuana Legalization,” Drug Policy Alliance (2018), http://www.drugpolicy.org/sites/default/files/dpa_marijuana_legalization_report_feb14_2018_0.pdf.

This disproportionate representation of risk is also driven by biased police practices, most recently evidenced in the consent decree monitoring reports of the Philadelphia Police Department. See Plaintiffs’ Eighth Report to Court, *Bailey v. City of Philadelphia*, No. 10-5952 (E.D. Pa. 4, 2019) https://www.aclupa.org/download_file/view_inline/3275/198

⁴ Bernard E. Harcourt, *Risk as a Proxy for Race: The Dangers of Risk Assessment*, Federal Sentencing Reporter 27, no. 4 (2015):237-243, <https://papers.ssrn.com/abstract=1677654>.

counterparts, and obscures reality: that recidivism rates reflect differential treatment by criminal justice actors, not racial differences in criminal activity. These concerns have not yet been addressed by the Commission.

The implementation of the RNR raises additional concerns regarding racial bias. While 58 of the Commonwealth's 60 counties use risk/needs assessment of some sort, there is neither uniformity regarding that assessment nor clarity about the factors that those assessments consider.⁵ To the extent those factors correlate with race, they provide another entry point for bias to taint the forecasts made by the tool. For example, Philadelphia's probation focused risk assessment reportedly weighs zip code as a risk factor.⁶ That factor can serve as a proxy for residential segregation and policing patterns, each of which are shaped by race. To the extent that such tools lack transparency in the factors they consider or how they arrive at particular scores, there is no way to determine how ingrained racial bias might be in the tool.

We previously urged the Commission to reject the use of risk assessments that are developed and validated on inherently biased data, and do so again. We further recommend that the Commission engage in a rigorous racial impact analysis of the proposed Sentence Risk Assessment and the secondary RNR tools used throughout the Commonwealth.

Repurposing RNR tools that were not developed for sentencing purposes is bad policy

Notwithstanding our concerns regarding risk assessment instruments, they are developed to operate at a particular stage of a criminal proceeding—pre-trial risk assessments are used to inform pretrial decisions; sentencing risk assessments are used to inform sentencing determinations; risk assessments used by probation and parole officials are used to inform supervision by those actors. The Commission noted that “recent surveys of county adult probation and parole offices found that all but two counties were using a risk/needs assessment, that the assessments were most often used to determine probation and county parole caseloads. . . .”⁷ In Philadelphia, the purpose of the risk/needs tool was to “help the financially strapped probation department tailor their officers' caseloads to the risk level of probationers.”⁸

This example is instructive for several reasons. First, a tool that is developed to shape caseloads may weigh factors and considerations in a much different manner than one that is exclusively developed to inform the appropriate sentence an

⁵ “Proposed Sentence Risk Assessment Instrument,” Pennsylvania Commission on Sentencing, (July 12, 2019) at 7 <http://pcs.la.psu.edu/guidelines/proposed-sentence-risk-assessment-instrument/proposed-sentence-risk-assessment-instrument-published-july-20-2019>.

⁶ Nancy Ritter, *Predicting Recidivism Risk: New Tool in Philadelphia Shows Great Promise*, National Institute of Justice Journal, no. 271 (Feb. 2013) at 5 <https://www.ncjrs.gov/pdffiles1/nij/240696.pdf>

⁷ Pennsylvania Commission on Sentencing, *supra* note 5, at 7.

⁸ Ritter, *supra* note 6, at 6.

individual should receive.⁹ Second, RNR tools undoubtedly carry with them risks of erroneous predictions. Those risks may be less of a concern for those being judged by the tool when such judgments are undertaken to inform caseload management, than they are to inform a sentencing decision. The practice of repurposing RNR tools fails to properly account for those risks, undermining their predictive value.

To the extent that RNR Reports are to inform the sentencing process, the preparation of such reports must be fully funded

We have detailed here and in our previous submissions our deep concerns about, and opposition to, the use of an actuarial risk assessment at sentencing, and the repurposing of RNR instruments to aid that process. Notwithstanding those concerns, to the extent that RNR Reports are to inform the sentencing process, they should be fully funded, and the implementation of the Sentence Risk Assessment Instrument should be conditioned on such funding.

In theory, the RNR Report mechanism provides some measure of qualitative analysis that informs sentencing proceedings by providing stakeholders with information beyond the quantitative score produced by the proposed Sentencing Risk Assessment. Failing to fully fund the RNR Report process virtually ensures that the reports envisioned will not be completed, which will frustrate efforts to contextualize the qualitative scores produced by the Sentencing Risk Assessment and the Commission's purported goals in adopting a risk assessment at sentencing.

Conclusion

We once again encourage the Commission to take a different approach to sentencing—one that foregoes the use of a risk assessment tool. In consideration of the policy goals underlying the statute—promoting public safety, mitigating bias, and reducing incarceration—the Commission should consider shifting the focus of an assessment away from the question of risk to the question of how to provide people with the supports they might need to successfully transition out of the criminal legal system and how to account for the biases that influence sentencing. Addressing those biases and the underlying causes of contact with the criminal legal system would not only reduce incarceration, but would also protect the public by reducing the likelihood of future criminal justice involvement. Furthermore, by shifting away from the nebulous reference point of “risk”—which, due to decades of over-policing in communities of color, can never be truly extricated from presumptions of racialized criminality—the Commission would be taking a very meaningful step towards actually reducing the profound bias in the criminal justice system.

⁹ For example, a tool focused on probation or parole caseloads provides forecasts after someone has been sentenced, and presumably weighs factors that account for any time spent incarcerated, whereas the concern to be addressed by RNR's in the scheme proposed by the Commission is what sentence is appropriate to begin with.

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