ARGUING THE ALGORITHM: PRETRIAL RISK ASSESSMENT AND THE ZEALOUS DEFENDER

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I. Introduction

Housing an estimated 750,000 individuals on any given day, local jails in the United States are increasingly recognized as a key driver of both mass incarceration and racial and economic inequities in the criminal justice system more broadly.[1] Strikingly, an estimated two out of three people in local jails have not yet been convicted of a crime—their confinement is often due to an inability to post cash bail.[2] Concerted efforts made by states and localities across the country to reduce reliance on financial release conditions increasingly include the adoption of pretrial risk algorithms, which rely on criminal history data to make statistical predictions about an individual defendant's likelihood to appear in court or avoid re-arrest. Indeed, between 2012 and 2015 alone, 20 laws in 14 states were enacted that create or regulate the use of risk assessments tools during the pretrial period.[3] More recently, significant reductions in the use of pretrial detention in New Jersey have been widely attributed to the statewide adoption of one risk assessment tool, the Public Safety Assessment ("PSA").[4] The idea that animates the use of pretrial risk algorithms is that judges will use statistical risk estimates—rather than professional discretion alone—

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1 Megan T. Stevenson, *Distortion of Justice: How the Inability to Pay Bail Affects Case Outcomes*, 34 (4) J. L., Econ, & Org., 51–42 (2018); Zhen Zeng, Bureau of Justice Statistics, Jail Inmates in 2016 (2018).

2 Brandon P. Martinez, Nick Petersen & Marisa Omori, *Time, Money, and Punishment: Institutional Racial-Ethnic Inequalities in Pretrial Detention and Case Outcomes*, Crime & Delinquency (2019), https://journals.sagepub.com/doi/10.1177/0011128719881600.

3 Amber Widgery, *Trends in Pretrial Release: State Legislation,* Nat'l Conf. on St. Legislatures (March 2015) http://www.ncsl.org/portals/1/ImageLibrary/WebImages/Criminal%20Justice/NCSL%20pretrialTrends_v05.pdf.

4 Chloe Anderson, Cindy Redcross, Erin Valentine & Luke Miratix, MDRC, Evaluation of Pretrial Justice System Reforms that Use the Public Safety Assessment: Effects of New Jersey's Criminal Justice Reform (2019), https://www.mdrc.org/sites/default/files/PSA_New_Jersey_Report_%231.pdf.

to decrease decision bias and increase consistency regarding the conditions of pretrial release.[5] While proponents of pretrial risk assessment envisage the practice as a credible and actionable corrective to the cash bond system and a mechanism for reducing the use of pretrial detention, a growing body of research calls this vision into question. For example, a 2016 examination of the use of the COMPAS risk assessment tool to inform pretrial decisions in Broward County found that the tool was unfairly punitive to black defendants, placing them in higher risk categories at twice the rate of white defendants who were just as likely to be rearrested when released.[6] Separately, research on the effects of pretrial risk assessment on judicial decision-making strongly suggests that simply providing judges with statistical risk assessments may not change outcomes. For example, George Mason University law professor Megan T. Stevenson and Texas A&M University professor Jennifer L. Doleac found that judges in Kentucky and Virginia frequently override algorithms when the recommendation was either pretrial release or diversion.[7]

In the wake of these studies, debate about the use of algorithms to inform pretrial decisions has grown increasingly polarized. In a 2019 statement addressing the concerns about the technical limitations of and racial bias in risk assessment algorithms, for example, 27 researchers from the Massachusetts Institute of Technology, Harvard University, Princeton University, New York University, University of California Berkeley, and Columbia University concluded that "[t]hese problems cannot be resolved with technical fixes. We strongly recommend turning to other re-

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[5] *See* Robyn M. Dawes, David Faust & Paul E. Meehl, *Clinical Versus Actuarial Judgment*, 243 SCIENCE 1668–74 (1989); Paul Gendreau, Tracy Little & Claire Goggin, *A Meta-Analysis of the Predictors of Adult Offender Recidivism: What Works!*, 34 CRIMINOLOGY 575–607 (1996); Nathan R. Kuncel, David M. Klieger, Brian S. Connelly & Deniz S. Ones, *Mechanical Versus Clinical Data Combination in Selection and Admissions Decisions: A Meta-Analysis*, 98 J. APPLIED PSYCHOL. 1060 (2013).

[6] *See generally* Julia Angwin, Jeff Larson, Surya Mattu & Lauren Kirchner, *Machine Bias*, PROPUBLICA (May 23, 2016), https://www.propublica.org/article/machine-bias-risk-assessments-in-criminal-sentencing; Jennifer L. Skeem, and Christopher Lowenkamp, *Risk, Race, & Recidivism: Predictive Bias and Disparate Impact* (June 14, 2016) https://ssrn.com/abstract=2687339.

[7] MEGAN T. STEVENSON & JENNIFER L. DOLEAC, AM. CONSTITUTION SOC'Y, THE ROADBLOCK TO REFORM 3 (2018), https://www.acslaw.org/wp-content/uploads/2018/11/RoadblockToReformReport.pdf ("The median judge in Kentucky grants release without monetary bail to only 37% of defendants with low or moderate risk status. In other words, the median judge overrules the presumptive default associated with the risk assessment about 2/3 of the time.").

forms."[8] This statement was quickly followed by a vision for pretrial justice signed by over 100 civil and human rights organizations that "[r]esist[s] the use of algorithm-based 'risk assessment' tools, which exacerbate racial biases surrounding the conditions of release and detention decisions."[9]

Simultaneously, the field is witnessing exponential growth in the number of jurisdictions adopting (or considering) risk algorithms to address overincarceration, the criminalization of poverty, and other injustices at the pretrial stage. Indeed, by 2018, over 600 jurisdictions had expressed interest in Arnold Venture's Public Safety Assessment ("PSA") alone,[10] buoyed in part by studies in New York City, Washington State, and New Jersey that support the potential for risk assessment to reduce the unnecessary use of pretrial detention without compromising public safety.[11] However, given the overall dearth of methodologically rigorous research regarding the application of risk assessments to practice, proponents remain in a largely defensive position. "Risk assessment tools and the promise they hold to improve on judges' and magistrates' current decision-making processes should not be dismissed simply because they aren't yet perfect."[12] Several professors argue against a recent op-ed defending the use of pretrial risk assessment algorithms in response to mounting criticism.[13] Finally, taking a mid-

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[8] Martha Minow, Jonathan Zittrain & John Bowers, *Technical Flaws of Pretrial Risk Assessments Raise Grave Concerns*, BERKMAN KLEIN CTR. FOR INTERNET & SOC'Y (July 17, 2019), https://dam-prod.media.mit.edu/x/2019/07/16/TechnicalFlawsOfPretrial_ML%20site.pdf.

[9] THE LEADERSHIP CONFERENCE, VISION FOR JUSTICE 2020 AND BEYOND: A NEW PARADIGM FOR PUBLIC SAFETY 11 (2019), http://civilrightsdocs.info/pdf/reports/Vision-For-Justice-2020-SHORT.pdf (last visited April 27, 2020).

[10] *Arnold Foundation Launches Expansion of Public Safety Assessment Tool*, CRIME REP. (Apr. 25, 2018), https://thecrimereport.org/2018/04/25/arnold-foundation-launches-expansion-of-public-safety-assessment-tool/ (600 jurisdictions inquiring about the PSA).

[11] *See, e.g.*, ANDERSON, *supra* note 4; CLAIRE M. B. BROOKER, PRETRIAL JUSTICE INST., YAKIMA COUNTY, WASHINGTON PRETRIAL JUSTICE SYSTEM IMPROVEMENTS: PRE- AND POST-IMPLEMENTATION ANALYSIS (2017), https://justicesystempartners.org/wp-content/uploads/2015/04/2017-Yakima-Pretrial-Pre-Post-Implementation-Study-FINAL-111517.pdf; CMTY. JUSTICE EXCH., AN ORGANIZER'S GUIDE TO CONFRONTING PRETRIAL RISK ASSESSMENT TOOLS IN DECARCERATION CAMPAIGNS 14 (2019), http://bit.ly/PretrialRATGuide; INSHA RAHMAN, VERA INST. OF JUSTICE, NEW YORK, NEW YORK: HIGHLIGHTS OF THE 2019 BAIL REFORM LAW (2019), https://www.vera.org/downloads/publications/new-york-new-york-2019-bail-reform-law-highlights.pdf; Jon Kleinberg, Himabindu Lakkaraju, Jure Leskovec, Jens Ludwig & and Sendhil Mullainathan, *Human Decisions and Machine Predictions,* 133 Q. J. ECON. 237 (2017), https://www.cs.cornell.edu/home/kleinber/w23180.pdf.

[12] Sarah Desmarais, Brandon Garrett & Cynthia Rudin, *Risk Assessment Tools Are Not a Failed 'Minority Report'*, LAW 360 (July 19, 2019, 5:50 PM), https://www.law360.com/articles/1180373.

[13] *Id.*

dle-ground position, a recent report from the Center for Court Innovation concludes that the onus is on practitioners to reach "beyond the algorithm" and use decarcerative policies to mitigate inherent racial bias in risk assessments in lieu of their wholesale rejection.[14]

Without diminishing the importance of this debate, this article addresses an urgent and *concurrent* need to improve the current state of risk assessment practices on the ground (as the debate draws on).[15] With an eye toward the here and now, we seek to address a gap in the discourse on pretrial risk assessment: the role of the defender. Strikingly, there has been little attention paid to the unique potential defenders possess to both mitigate the harms, and maximize the decarcerative yield of risk assessment algorithms.[16] Specifically, this article contends that defenders are in a position to effectively challenge the imperfect data science that undergirds risk assessment systems and to use the implementation of a risk assessment as a lever for renegotiating the "going rates"(i.e., the default rules that expedite the disposition of cases and drive the plea-bargaining process in a particular jurisdiction). Additionally, focusing on recent pretrial reform efforts in New York and New Jersey, the article underscores the potential of defenders to influence broader policy debates that ultimately affect practice on the ground.

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14 *See* Sarah Picard, Matt Watkins, Michael Rempel & Ashmini G. Kerodal, *Beyond the Algorithm: Pretrial Reform, Risk Assessment, and Racial Fairness*, CTR. FOR CT. INNOVATION (July 2019), https://www.courtinnovation.org/publications/beyond-algorithm.

15 *See* Julian Adler, Sarah Picard-Fritsche, Michael Rempel & Jennifer A. Tallon, *Empirical Means to Decarcerative Ends?*, *in* SMART DECARCERATION: ACHIEVING CRIMINAL JUSTICE TRANSFORMATION IN THE 21ST CENTURY 210–30 (Matthew W. Epperson & Carrie Pettus-Davis eds., 2017).

16 *See* SARAH L. DESMARAIS & EVAN M. LOWDER, Safety & Justice Challenge, PRETRIAL RISK ASSESSMENT TOOLS: A PRIMER FOR JUDGES, PROSECUTORS, AND DEFENSE ATTORNEYS (2019), http://www.safetyandjusticechallenge.org/resource/pretrial-risk-assessment-tools-a-primer-for-judges-prosecutors-and-defense-attorneys/ (Besides a handful of general primers designed for judges, prosecutors and defenders, there are not many publications providing specific guidance to defenders about how to use risk algorithms and resulting data in their arguments for pretrial release.); RASHIDA RICHARDSON, JASON M. SCHULTZ, & VINCENT M. SOUTHERLAND, AI NOW INST., LITIGATING ALGORITHMS 2019 US REPORT: NEW CHALLENGES TO GOVERNMENT USE OF ALGORITHMIC DECISION SYSTEMS (2019), https://ainowinstitute.org/litigatingalgorithms-2019-us.pdf (There are some resources outlining litigation that has cast doubt on certain risk assessment tools, but a paucity of specific, actionable guidance on how to use the tools and the resulting re-arrest/failure to appear data to argue for release or reduced conditions of supervision.).

II. PRELUDE: A NEW-OLD NORM

In a recent article on participatory defense practice, Cynthia Godsoe, a professor at Brooklyn Law School, offers a disquieting observation about the state of advocacy in the American criminal justice system:

> [H]umanizing the accused and contextualizing their actions in a society plagued with racism and poverty . . . should not be, but is, disruptive; in a just (and sane?) criminal legal system, this would be a regular part of the process. In our current vast system of social control, however, focusing on the people in the system as anything other than numbers or "bad actors" is often not the norm, even by the attorneys defending them.[17]

Despite the general paucity of basic defense representation across the justice landscape, defenders have nonetheless been a central, humanizing voice in the evolution of the contemporary justice reform movement. Admittedly, there have been long-standing tensions between defenders and some broad reform efforts like problem-solving courts.[18] In that context, the defense critique has turned on a perceived abrogation of due process protections.[19] Acknowledging that this concern is not unfounded, some have argued that defenders' staunch resistance to problem-solving courts led to missed opportunities to realize both the benefits of zealous representation *and* alternatives to the already dehumanizing traditional case processing and adjudication.[20] The point here is that zealous-

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17 Cynthia Godsoe, *Participatory Defense: Humanizing the Accused and Ceding Control to the Client*, 69 MERCER L. REV. 715, 715 (2018), https://brooklynworks.brooklaw.edu/cgi/viewcontent.cgi?article=2001&context=faculty.

18 *See, e.g.*, Paul Holland, *Lawyering and Learning in Problem-Solving Courts*, 34 WASH. U. J. L. & POL'Y 185 (2010), https://openscholarship.wustl.edu/cgi/viewcontent.cgi?article=1056&context=law_journal_law_policy; Ben Kempinen, *Problem-Solving Courts and the Defense Function: The Wisconsin Experience*, 62 HASTINGS L. J. 1349 (2011), https://repository.uchastings.edu/cgi/viewcontent.cgi?article=1303&context=hastings_law_journal; Robin Steinberg & Skylar Albertson, *Broken Windows Policing and Community Courts: An Unholy Alliance*, 37 CARDOZO L. REV. 995 (2018), http://cardozolawreview.com/wp-content/uploads/2018/08/STEINBERG.ALBERTSON.37.3.pdf.

19 *See, e.g.*, John L. Koepke & David G. Robinson, *Danger Ahead: Risk Assessment and the Future of Bail Reform*, 93 WASH. L. REV. 1725 (2018), https://digitalcommons.law.uw.edu/wlr/vol93/iss4/4; Eric Lane, *Due Process in Problem Solving Courts*, 30 FORDHAM URB. L. J. 955 (2003), http://scholarlycommons.law.hofstra.edu/cgi/viewcontent.cgi?article=1386&context=faculty_scholarship; Chelsea Barabas, Karthik Dinakar & Colin Doyle, *The Problems With Risk Assessment Tool*, N.Y. TIMES (July 17, 2019), https://www.nytimes.com/2019/07/17/opinion/pretrial-ai.html.

20 *See* Julian Adler & Brett Taylor, *Minding the Elephant Criminal Defense Practice in Community Courts*, 51 JUDGES J. 10 (2012), https://www.courtinnovation.org/sites/default/files/docu-

ness need not and should not be confined to the repertoire of traditional criminal defense practice; *a fortiori*, given the increased use of pretrial risk assessment algorithms in jurisdictions across the country, it simply can't be the case.

Accordingly, this paper represents a new variation on an old theme: realizing defenders' fundamental professional obligations in the emerging, and potentially dehumanizing, space of algorithmically-informed pretrial practice. These commitments include representing the client's interests to the court and acquiring the knowledge, skill, analysis and preparation required to do so effectively.[21] Above all, defenders are expected to be relentlessly and zealously diligent in pursuing the most favorable outcome for their clients.[22] In the context of criminal justice reform, we argue that such diligence must walk with a willingness and flexibility to transpose the old norms of zealous representation to new or appreciably modified contexts. Specifically, we elucidate four strategies for defenders confronting pretrial risk assessment inside and outside of the courtroom: (1) demand transparency; (2) deepen the context; (3) renegotiate the "going rates;" and (4) challenge policy.

III. Demand Transparency

Historically, many jurisdictions that have implemented risk assessment instruments have turned to proprietary algorithms for which the risk factors, factor weightings and scoring methods are not publicly available.[23] It is difficult, if not impossible, to assess—let alone cross-examine—the fairness or potential efficacy of proprietary algorithms.[24] In a context where pretrial risk assessment is being used or considered, the first order of business for defenders and other advocates is to demand that the underlying algorithm

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ments/JJ_SP12_AdlerTaylor-1.pdf (Arguing that contrary to the familiar objections, community courts can actually enhance defense practice by providing opportunities for heightened advocacy and individualized case resolutions that go beyond the traditional sentencing options of jail and fines.).

21 Model Rules of Prof'l Conduct r. 1.1, 1.2 (Am. Bar. Ass'n 1980).

22 Model Rules of Prof'l Conduct r. 1.3 (Am. Bar. Ass'n 1980).

23 *See generally Algorithms in the Criminal Justice System: Pre-Trial Risk Assessment Tools*, Electronic Privacy Info. Ctr., https://epic.org/algorithmic-transparency/crim-justice/ (last visited April 27, 2020).

24 *See, e.g.*, Kirsten Martin, *Ethical Implications and Accountability of Algorithms*, J. Bus. Ethics 160, 835–850 (2019), https://doi.org/10.1007/s10551-018-3921-3.

and research used to develop the tool be open to professional and public scrutiny.

Guidelines on the basic tenets of transparency are offered by the Leadership Council on Civil and Human Rights in their *Vision for Justice 2020*[25] and other resources meant to guide the creation and implementation of risk assessment tools.[26] First and foremost, transparency requires that tool designers provide system players with a complete and accessible description of the design and validation process.[27] At minimum, this would include an enumeration of all the input factors tested in developing the tool, the process for inclusion or exclusion of potential factors, and the methods for assigning final weights ("risk points") to each of the factors in the final model.[28] If the tool is predicting more than one distinct outcome, for example failure to appear and new arrest, algorithms for each outcome should be separately developed and explained. Where designers are recommending specific risk thresholds or risk categories to practitioners, these recommendations should be explained and rationalized empirically.

However, even where the underlying mechanics of a risk assessment are open to scrutiny, defenders and other civil rights advocates should be clear on the specific questions to be asked regarding the potential negative tradeoffs of the assessment, and where and when to challenge the risk assessment or advocate for changes. As the leadership council writes: "the accused person's counsel must . . . be given an opportunity to inspect the specific inputs. . .along with an opportunity to challenge any part—including non-neutral value judgements and data . . . ."[29] In practice, where might such non-neutral value judgments show up and what might be done to challenge them?

One example is violence. The aforementioned statement by 27 researchers points up the common use of violence flags in pretrial risk assessment, this despite the statistical challenges of accurately predicting incidents of pretrial violence.[30] "If these tools

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[25] *See generally Vision for Justice 2020 and Beyond: A New Paradigm for Public Safety,* LEADERSHIP CONF. EDUC. FUND, http://civilrightsdocs.info/pdf/reports/Vision-For-Justice-2020-SHORT.pdf (last visited Apr. 27, 2020).

[26] *See generally Pretrial Risk Assessments*, LEADERSHIP CONF. EDUC. FUND, http://civilrightsdocs.info/pdf/criminal-justice/Pretrial-Risk-Assessment-Full.pdf (last visited Apr. 27, 2020).

[27] *See generally id.* at Principle 4.

[28] *Id.* at 7.

[29] *Id.* at 7.

[30] Jan Chaiken, Marcia Chaiken & William Rhodes, *Predicting Violent Behavior and Classifying Violent Offenders*, *in* 4 UNDERSTANDING AND PREVENTING VIOLENCE 217 (1994), https://

were calibrated to be as accurate as possible," observe the authors, "then they would predict that every person was unlikely to commit a violent crime while on pretrial release."[31] To wit, in Cook County, Illinois, between October 2017 and December 2018, less than 1 percent of defendants flagged for violence by the risk assessment tool were rearrested.[32] In fact, in the dataset used to build the Public Safety Assessment ("PSA"), "92% of the people who were ?agged for pretrial violence did not get arrested for a violent crime and 98% of the people who were not ?agged did not get arrested for a violent crime."[33] Conceivably, these statistical limitations are fodder for defense argument, especially where the court is leaning toward detention in light of a violence flag. Defenders who have a strong grasp of these kinds of re-arrest percentages are in a stronger position to leverage this aggregate data when arguing for the release of specific individuals who are assessed as "high risk."[34] Another example of non-neutral value judgments is the inherent limitations of criminal history data. In addition to potential flaws and biases in the data itself,[35] static data points can be oversimplifying and even misleading. Here, the defender is advised to temper the risk assessment with nuance and details about the individual and their circumstances.

A. *Deepen the Context*

In a recently updated joint statement on pretrial risk assessment instruments, five national defender associations proffer a slate of recommendations that includes "[a]ny proceedings before

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www.nap.edu/read/4422/chapter/5#224 (Arguing "The prediction of violence is exceptionally difficult, and no one seems to have done it well.").

31 Minow et al., *supra* note 8.

32 Ethan Corey, *How a Tool to Help Judges May Be Leading Them Astray*, APPEAL (Aug. 8, 2019), https://theappeal.org/how-a-tool-to-help-judges-may-be-leading-them-astray/.

33 Minow et al., *supra* note 8.

34 NLADA, RISK & NEEDS ASSESSMENTS: WHAT DEFENDERS AND CHIEF DEFENDERS NEED TO KNOW (2015), http://www.nlada100years.org/sites/default/files/NLADA_Risk_Needs_Assessments.pdf (Arguing that "once an instrument has been implemented, data must be maintained on the impacts and outcomes of the use of the instrument.").

35 *See, e.g.*, Minow et al., *supra* note 8 (Arguing that "[d]ecades of research have shown that, for the same conduct, African-American and Latinx people are more likely to be arrested, prosecuted, convicted and sentenced to harsher punishments than their white counterparts," thereby skewing criminal history data.); DAVID G. ROBINSON AND LOGAN KOEPKE, Safety & Justice Challenge, CIVIL RIGHTS AND PRETRIAL RISK ASSESSMENT INSTRUMENTS 4 (2019), http://www.safetyandjusticechallenge.org/resource/civil-rights-and-pretrial-risk-assessment-instruments/.

a judicial officer in which a risk assessment instrument is utilized should be an adversarial hearing which provides due process protections for the accused,"[36] and that defense counsel should be afforded "the time, training, and resources to learn important information about the client's circumstances that may not be captured in a pretrial risk assessment instrument and adequate opportunity to present that information to the court."[37] In Hudson County, New Jersey, a state currently held up by proponents of risk assessment as the model for effective pretrial reform,[38] Mary Ciancimino, Deputy Public Defender of the Hudson County Trial Region, makes it clear that both of these conditions have been indispensable for the effective implementation of the Public Safety Assessment ("PSA").[39]

With respect to adversarial hearings and due process protections, Deputy Ciancimino emphasizes the importance of "looking behind"[40] the risk score and, where appropriate, challenging it based on a closer examination of the criminal history data that populates the algorithm, as well as by presenting relevant information and considerations beyond the four corners of the rap sheet.[41] Deputy Ciancimino recounts a case where a visiting judge detained a client due to a high score on the risk assessment instrument. The judge had disregarded her office's argument on the record that the high-risk score generated by the algorithm was neither reflective of the client's criminal history (including the absence of any prior felony charges) nor other protective factors such as his gainful employment.[42] "We made the record and the visiting judge ignored it," Deputy Ciancimino explains, "so we appealed it and they reversed him."[43] She adds: "And not only did they reverse him, they

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[36] Joint Statement on Risk Assessment Instruments from 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 & Defender Association (March 2019), https://www.nacdl.org/getattachment/c80216bf-84e0-429d-9750-9e49f502913d/joint-statement-on-pretrial-risk-assessment-instruments-march-2019-.pdf (last visited Apr. 27, 2020).

[37] *Pretrial Risk Assessments*, LEADERSHIP CONF. EDUC. FUND, https://civilrights.org/edfund/pretrial-risk-assessments/ (last visited Apr. 27, 2020) (Principle 3).

[38] *See, e.g.*, Diana Dabruzzo, *New Jersey Set Out to Reform Its Cash Bail System. Now, the Results Are In*, ARNOLD VENTURES (Nov. 14, 2019), https://www.arnoldventures.org/stories/new-jersey-set-out-to-reform-its-cash-bail-system-now-the-results-are-in.

[39] Telephone Interview with Mary Ciancimino, Deputy Public Defender of the Hudson County Trial Region and Johnny Cardona, Assistant Deputy Defender of the Hudson Trial Region (Oct. 24, 2019).

[40] *Id.*

[41] *Id.*

[42] *Id.*

[43] *Id.*

ordered that the case be assigned to a different judge on remand . . . a pretty bad smack in the face."[44] Defenders appealing judicial pretrial decisions, regardless of whether the judge followed the recommendation from the decision-making framework or departed from it, serves as a reminder to judges that the risk assessment is just one component of a pretrial release decision and judicial discretion must be transparent and made explicit on the record.

Beyond the judge's decision to detain or release a defendant pending trial, Deputy Ciancimino further describes zealous representation regarding whether and to what extent a client will be released with any court-imposed conditions, most typically pretrial supervision.[45] "Once the judge decides to release a client, our attorneys are in there arguing for release on recognizance," she explains, "[w]e are advocating every step of the way."[46]

To the National Defender Associations' recommendation that defenders be afforded the necessary resources and opportunity to present facts not captured by a risk assessment algorithm, First Assistant Deputy Defender Johnny Cardona of the Hudson Trial Region is unequivocal that "it is not just the risk assessment here."[47] As per his office's standard operating procedure, "we put tons of arguments on the record that are outside of the [risk assessment], including any employment, and childcare, medical, and housing issues."[48] This practice is supported by the judge presiding over almost all detention hearings in Hudson County, who "will absolutely take that [prosocial circumstance relevant to risk] into account when determining release or detention."[49]

Lastly, defenders should remind the court of the circumstances and context *not* considered within a risk assessment algorithm, such as policing bias when determining risk of re-arrest and personal and structural conditions when assessing risk of failure to appear.[50]

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44 *Id.*

45 Telephone Interview with Mary Ciancimino, Deputy Public Defender of the Hudson County Trial Region and Johnny Cardona, Assistant Deputy Defender of the Hudson Trial Region (Oct. 24, 2019).

46 *Id.*

47 *Id.*

48 *Id.*

49 *Id.*

50 Personal and structural conditions impacting risk of failure to appear may include employment, childcare issues, safety concerns in traveling through certain neighborhoods, challenges with transportation, etc.

B. *Renegotiate the "Going Rates"*

Although rarely discussed in these terms, the process of implementing a risk assessment instrument affords defenders a rare opportunity to explicitly renegotiate the "going rates" in their respective jurisdictions. These are the default rules and shared assumptions that expedite the disposition of cases and drive the plea-bargaining process with reference to "the worth of a case." In his seminal analysis of the lower criminal courts in New Haven, Connecticut, University of California Berkeley law professor Malcolm M. Feeley captures both the significance and elusiveness of this process:

> By establishing the worth of a case, both the prosecutor and defense attorney know how to treat it. If it is "serious" or "heavy" the arrestee may have to plead guilty and even serve time in jail, but if it is "not worth very much," or if, in more colloquial terms, it is "garbage," "bullshit," or a "meatball," then the defendant may receive a nolle . . . . Although prosecutors and the defense attorneys tend to become inarticulate when pressed to specify how they evaluate the "worth" of a case, they claim to know it intuitively.[51]

As Rutgers University Professor of Political Science Milton Heumann further observes, "[w]hen one examines the pleas received for similar sentences across jurisdictions, it becomes clear that no one 'price' is right for any particular crime. . . . [T]he 'going rates' for crimes seem to exist simply because that's what they always were."[52]

Adding a risk assessment score to the universe of key considerations at the pretrial stage has the potential to disrupt this entrenched status quo. The mechanism for this renegotiation is the development of a decision-making framework or matrix, a grid which operationalizes a new set of default assumptions (e.g., release on recognizance, intensity of pretrial supervision) based on the charge and the risk score.[53] As a 2019 evaluation of the Public

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[51] MALCOM M. FEELEY, THE PROCESS IS THE PUNISHMENT: HANDLING CASES IN A LOWER CRIMINAL COURT 158–59 (1992).

[52] Milton Heumann, *Plea Bargaining: Lessons Learned, Issues Outstanding* HARVARD L & POL'Y REV., https://harvardlpr.com/2018/07/24/plea-bargaining-lessons-learned-issues-outstanding/ (last visited Apr. 27, 2020).

[53] ANDERSON ET AL., *supra* note 4; CINDY REDCROSS ET AL., MDRC, EVALUATION OF PRETRIAL JUSTICE SYSTEM REFORMS THAT USE THE PUBLIC SAFETY ASSESSMENT: EFFECTS IN MECKLENBURG COUNTY, NORTH CAROLINA (2019), https://www.mdrc.org/sites/default/files/PSA_Mecklenburg_Brief1.pdf; *Guide to the Pretrial Decision Framework*, PUBLIC SAFETY AS-

Safety Assessment ("PSA") in Mecklenburg County, North Carolina makes clear, the decision-making framework is inextricably linked to the potential impact of the risk assessment instrument itself.[54]

Unlike the creation of a risk assessment algorithm, however, the process for developing a decision-making framework is not an exercise in data science. It is a policy negotiation, i.e., the province of lawyers. In fact, it is "absolutely non-scientific," observes Cherise Fanno Burdeen, Chief Executive Officer of the Pretrial Justice Institute.[55] A recent primer created for practitioners echoes the point: "Although the results of pretrial risk assessment tools speak to the likelihood of failure to appear and re-arrest, the interpretation of a defendant's risk level is a policy decision, not a scientific one.[56] The primer goes on to suggest that prior to implementation, "judges and other stakeholders should . . . be engaged in the process of selecting a pretrial risk assessment tool, as well as the development of local policies and guidelines."[57]Defenders should always rely on recent data when advocating for changes to the decision-making framework. Currently, those individuals deemed the highest risk under the PSA tool still have a 74% likelihood of success (i.e. 74% likelihood of not being re-arrested during the pendency of the current case).[58] Defenders should push against the value of labeling this group as "high risk," and contemplate whether this label is misleading to judges, without an accompanying explanation of the percentages of likely success versus re-arrest. As authors Koepke and Robinson suggest:

> What's ultimately important is for jurisdictions to track changing patterns of risks and outcomes. . . . The jurisdiction can then either recalibrate the risk scale or simply begin to release more defendants at the higher score levels (which have come to betoken a lower true level of risk than they did initially).[59]

SESSMENT, https://www.psapretrial.org/implementation/guides/managing-risk/guide-to-the-pretrial-decision-framework (last visited Apr. 27, 2020).

54 REDCROSS, *supra* note 52, at 8 ("When this document discusses the effects of "the PSA policy changes," it is referring to the PSA, the decision-making framework, and other related policy changes implemented around the same time.").

55 Email from Cherise Fanno Burdeen, Chief Executive Officer of the Pretrial Justice Institute (Nov. 7, 2019, 9:16 AM) (on file with author).

56 DESMARAIS & LOWDER, *supra* note 16, at 4.

57 DESMARAIS & LOWDER, *supra* note 16, at 9.

58 Robinson & Koepke, *supra* note 34.

59 John Logan Koepke & David G. Robinson, *Danger Ahead: Risk Assessment and the Future of Bail Reform*, 93 WASH. L. REV. 1725, 1794 (2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3041622.

Defenders must remind judges that according to risk, need, responsivity principles, intervention has counterproductive effects on lower-risk individuals, so *meaningful* classifications based on up to date re-arrest data and proportionate corresponding recommendations are imperative to effective pretrial release.[60]

Put simply, the development of the decision-making framework is an opportunity for defenders to push for and codify, new "going rates," advocating for less-restrictive pretrial conditions across the board.

IV. Challenge Policy

Beyond the courtroom, defenders can further safeguard the use of pretrial risk assessment instruments by advocating for legislative policies that have a direct nexus to practice on the ground. For example, New York State has long been an outlier in that its criminal court judges are only permitted to consider failure to appear risk in making pretrial release decisions: considerations of public safety risk or dangerousness are precluded by statute.[61] Prior to the recent passage of pretrial reform legislation in New York State, some policymakers, including New York City Mayor Bill de Blasio and New York State Governor Andrew M. Cuomo, pushed to change the law to allow judges to take public safety into account in making pretrial release decisions. In practice, this change would have entailed expanding the use of risk assessment algorithms beyond statistical predictions of a defendant's likelihood of appearing in court. In response, defense organizations across the state joined a broader coalition of criminal justice advocates in a letter to the governor pushing back against the inclusion of dangerousness in the statute. The organizations wrote the following:

> [W]e are deeply concerned about efforts to amend the existing bail statute to require that judges consider a person's risk of fu-

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[60] D.A. Andrews & Craig Dowden, *Risk Principle of Case Classification in Correctional Treatment: A Meta-Analytic Investigation*, 50 Int'l J. Offender Therapy & Comp. Criminology 88–100 (2006); Christopher T. Lowenkamp, Edward J. Latessa, & Paula Smith, *Does Correctional Program Quality Really Matter? The Impact of Adhering to Principles of Intervention*, 5 Criminology & Pub. Pol'y 201 (2006), https://www.uc.edu/content/dam/uc/ccjr/docs/articles/Correctional_Program_Quality.pdf.

[61] Michael Rempel & Krystal Rodriguez, Ctr. for Ct. Innovation, Bail Reform in New York: Legislative Provisions and Implications for New York City (2019), https://www.courtinnovation.org/sites/default/files/media/document/2019/Bail_Reform_NY_full_0.pdf.

> ture dangerousness. We, the undersigned organizations, are united in the belief that: we do not have to add dangerousness to New York's bail statute to reduce our pretrial detention population; the use of risk assessment instruments to predict dangerousness will further exacerbate racial bias in our criminal justice system; and the use of these instruments will likely lead to increases in pretrial detention across the state.[62]

Ultimately, these defense organizations prevailed.[63]

"We fought on everything," recalls Deputy Ciancimino about the legislative reform process in New Jersey.[64] In particular, she underscored advocating for fewer charges being assigned rebuttable presumptions of pretrial detention. Deputy Ciancimino explained that higher risk assessment scores make it more difficult for a defender to rebut a presumption of detention, therefore, it is important to ensure that all but the more serious charges be assigned a presumption of pretrial release. The consequences of this legislative advocacy were significant, "Right now, it is only those defendants facing life in prison where there is a rebuttable presumption of detention."[65]

V. Conclusion

In a recent survey, more than 80% of public defender respondents indicated that "the pretrial risk assessment tool used in their jurisdiction 'contributed to racial and ethnic disparities in the criminal justice system.'"[66] This may reflect a trend toward bright-line renunciations of risk assessment. Calling into question the frequently cited justification for algorithmic risk assessment as an improvement on the status quo,[67] a 2019 report by the Partnership on

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62 Letter from Over 100 Community & Advocacy Groups Across New York State, to Governor Andrew Cuomo (Nov. 2019), https://www.bronxdefenders.org/wp-content/uploads/2017/11/Bail-Reform-Letter-to-Governor-Cuomo.pdf.

63 Emma Whitford, *A Closer Look at Albany Democrats' Compromise on Bail Reform*, Gotham Gazette (Apr. 5, 2019), https://www.gothamgazette.com/state/8420-a-closer-look-at-albany-democrats-compromise-on-bail-reform.

64 Telephone Interview with Mary Ciancimino, Deputy Public Defender of the Hudson County Trial Region and Johnny Cardona, Assistant Deputy Defender of the Hudson Trial Region (Oct. 24, 2019).

65 *Id.*

66 Desmarais & Lowder, *supra* 16, at 7.

67 *See, e.g.*, Adler et al., *supra* note 15, at 210; Desmarais et al. *supra* note 12; Adam Nufeld, *In Defense of Risk-Assessment Tools*, Marshall Project (Oct. 22, 2017, 10:00 PM), https://www.themarshallproject.org/2017/10/22/in-defense-of-risk-assessment-tools.

AI contends that "[o]ther reforms may address the same objectives (e.g., improving public safety, reducing the harm of detention, and reducing the costs and burdens of judicial process) at lower cost, greater ease of implementation, or without trading off civil rights concerns."[68] Ultimately, this remains an open question ripe for debate, innovation on the ground (e.g., presumptions of release, expanded community-based alternatives, real-time use of data analytics, etc.), rigorous empirical analysis, and legislative action.[69] However, in the here and now, defenders are in prime position to safeguard against the potential harms of pretrial risk assessment and push for the greatest decarcerative yield.

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[68] Partnership on AI, Report on Algorithmic Risk Assessment Tools in the U.S. Criminal Justice System 11 (2019), https://www.partnershiponai.org/report-on-machine-learning-in-risk-assessment-tools-in-the-u-s-criminal-justice-system/.

[69] Robinson & Koepke, *supra* note 34; The Leadership Conference, *supra* note 9, at 10.