



**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  
NOVEMBER 30, 2018**

In June 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 proposed Sentence Risk Assessment Instrument. Although the Commission has made some progress over the last five months in revising the Proposed Instrument, the changes made have failed to cure the proposed instrument of its defects. Additionally, because the Commission’s Response to Public Comments did not fully address the concerns raised by AI Now and the Center—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.<sup>1</sup>

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 Proposed Sentence Risk Assessment Instrument—even as revised—falls short on both of these counts. As an initial step in the right direction, the Commission should take no further action until after inspecting the Urban Institute’s external review and completing a review of concerns left unaddressed or under review during the previous comment period (e.g. re-validating with a more recent data set or completion of racial impact analysis). We also urge the Commission to establish a process for future public input on the goals, design and implementation of high-risk systems like the Sentence Risk Assessment Instrument before they are ever deployed. Until then, the Commission should reject the use of the Sentence Risk Assessment Instrument.

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<sup>1</sup> The foregoing comments do not purport to represent the views of New York University School of Law or New York University.

**Defining recidivism by predicting how likely it is that the police will re-arrest a criminal defendant, even where that arrest results in a conviction, perpetuates racial bias in policing.**

Notably, the Commission took steps to address the concerns raised about its recidivism definition by re-casting it as re-arrest within three years resulting in a conviction. This definition no longer includes technical parole violations. Yet the critique over the use of this type of data remains unanswered. Predictions based on historical policing data perpetuate the racial bias that already exists throughout the criminal justice system.<sup>2</sup> 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.<sup>3</sup> This disproportionate representation of risk is also driven by bias police practices, most recently evidenced in the consent decree monitoring reports of the Philadelphia Police Department.<sup>4</sup> Thus, having a prior criminal or arrest record—a significant feature of the proposed Sentence Risk Assessment Instrument—becomes a “proxy” for race. In other cases of risk assessment in criminal justice, this tight correlation between prior criminal or arrest records and race “has proven devastating to African-American communities.”<sup>5</sup> Though the definitional change made by the Commission dramatically reduced racial disparities, it did not eliminate them. It also reinforces the false perception that Black people are more dangerous than their White counterparts, and obscures reality: that recidivism rates reflect differential treatment by criminal justice actors, not a difference between races in the commission of crime. The Commission should reject the legitimacy of risk assessments that are developed and validated on inherently biased data.

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<sup>2</sup> Kristian Lum and 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>.

<sup>3</sup> 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](http://www.drugpolicy.org/sites/default/files/dpa_marijuana_legalization_report_feb14_2018_0.pdf).

<sup>4</sup> [https://www.aclupa.org/download\\_file/view\\_inline/3275/198](https://www.aclupa.org/download_file/view_inline/3275/198)

<sup>5</sup> 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>.

**Risk assessments do not give additional relevant information to judges when sentencing. Rather, they give an illusion of certainty to what are actually uncertain evaluations of individual defendants.**

Judges already consider the factors used in the Sentence Risk Assessment instrument in defendants' criminal records.<sup>6</sup> The Commission's own study of how people judged a defendant's recidivism risk found that even in the 10% of cases in which the risk assessment changed someone's perception of risk, the change was relatively small.<sup>7</sup> This suggests that the risk assessment does not provide judges with any meaningfully new insights into the behavior of defendants that they do not already know.

But this does not mean that risk assessment is harmless. Research has shown that the availability of any information can be enough to prejudice a judge's sentence, even if the information is not meant to be used as an aggravating or mitigating factor.<sup>8</sup> The effect of the risk assessment could be to strengthen a judge's certainty in the absence of actual new information.<sup>9</sup> Since risk assessments are built by looking at entire populations, such instruments can fail to capture how individuals differ: risk assessments run counter to the notion that judges should take into account individual considerations before depriving someone of their liberties.<sup>10</sup> Indeed, risk assessment instruments may effectively encourage profiling, by reinforcing a judge's implicit biases by characterizing the individual as inherently risky. Ideally, actors in the criminal legal system are supposed to undertake an individualized assessment of

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<sup>6</sup> "Policy Overview of the Sentence Risk Assessment Instrument," Pennsylvania Commission on Sentencing, May 24, 2018, [http://www.hominid.psu.edu/specialty\\_programs/pacs/guidelines/proposed-risk-assessment-instrument/additional-information-about-the-proposed-sentence-risk-assessment-instrument/policy-overview-of-the-sentence-risk-assessment-instrument/view](http://www.hominid.psu.edu/specialty_programs/pacs/guidelines/proposed-risk-assessment-instrument/additional-information-about-the-proposed-sentence-risk-assessment-instrument/policy-overview-of-the-sentence-risk-assessment-instrument/view); Julian V. Roberts, "The Role of Criminal Record in the Sentencing Process," *Crime and Justice* 22 (1997): 303–62.

<sup>7</sup> "Interim Report 8: Communicating Risk at Sentencing," Pennsylvania Commission on Sentencing, 2014, <http://pcs.la.psu.edu/publications-and-research/risk-assessment/phase-i-reports/interim-report-8-communicating-risk-atsentencing/view>.

<sup>8</sup> Caryn Devins, Teppo Felin, Stuart Kauffman and Roger Koppl, "The Law and Big Data," *Cornell Journal of Law and Public Policy* (2017), <http://www.lawschool.cornell.edu/research/JLPP/upload/Devins-et-al-final.pdf>.

<sup>9</sup> Indeed, the factors used by the proposed risk assessment (e.g. prior and current conviction) are—in large part—already reflected in the sentencing guidelines through prior record score and offense gravity score. Therefore, judges are encouraged to consider these factors twice, to the disadvantage of those who are being sentenced.

<sup>10</sup> Sonja B. Starr, "Evidence-Based Sentencing and the Scientific Rationalization of Discrimination." *Stan. L. Rev.* 66, no. 4 (2014): 803-72.

those who have been convicted of a crime to fashion an appropriate sentence. Risk assessments are anathema to that ideal.

Ultimately, the use of risk assessments can give judges own biases and uncertainty about individual behavior a false veneer of scientific objectivity, resulting in inappropriately harsher sentences that close the door to redemption and rehabilitation.

**Risk assessments do not meet their goals without producing undesirable outcomes: risk assessments have not been shown to effectively lower incarceration rates or improve public safety, and generally assume that the goal of incarceration is not to rehabilitate.**

Risk assessments do not necessarily meet the policy goals with which they were deployed. Research has demonstrated that risk assessment tools have not reduced incarceration, improved public safety, or produced less disparate outcomes for Black communities.<sup>11</sup> Risk assessments that encourage judges to give “riskier” defendants longer sentences also tend to assume that the goal of incarceration is selective incapacitation, even if it would be better for the individual and for the community to prioritize rehabilitation.<sup>12</sup> We cannot assume that a risk assessment will actually meet its policy goals while avoiding harmful outcomes without clear evidence showing how it will actually be used. Here, the Sentencing Commission has neither stated an affirmative, defined goal for the adoption of a risk assessment, nor has it offered an estimate of how implementation of the tool would affect Pennsylvania’s prison population or racial disparities in sentencing. Without that evidence today, the Sentencing Commission should not approve the use of the Sentence Risk Assessment Instrument.

**Before the commission can adopt tools like risk assessments for criminal sentencing, there must be a process in place for the comprehensive review of high-risk automated decision systems that solicits significant community input during the tools design and validation.**

The Commission should not move forward with the Sentence Risk Assessment Instrument or any similar system without a process for public review. Self-assessments like the Commission on Sentencing’s existing validation studies are helpful for that public review, but they clearly did not address the profound public

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<sup>11</sup> Megan Stevenson, "Assessing Risk Assessment in Action," George Mason Law & Economics Research Paper 17-36 (2017): 4, <https://papers.ssrn.com/abstract=3016088>.

<sup>12</sup> Bernard E. Harcourt, "Against Prediction: Sentencing, Policing, and Punishing in an Actuarial Age," University of Chicago Public Law & Legal Theory Working Paper No. 94, (2005), [https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=1021&context=public\\_law\\_and\\_legal\\_theory](https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=1021&context=public_law_and_legal_theory).

concern over the use of the Sentence Risk Assessment Instrument. AI Now’s proposal for Algorithmic Impact Assessments helps agencies proactively solicit public feedback to address community concerns in self-assessments and give the public better information about a proposed system early in its development.<sup>13</sup> Proactive community input through an established process could give the public a voice in how the Commission uses tools that significantly impact their lives while saving the public and the Commission unproductive controversy.

**The statute that mandates the adoption of a risk assessment instrument does not actually require that such an instrument be used by Pennsylvania courts.**

Although 42 Pa.C.S. § 2154.7 mandates that the Commission “adopt a sentence risk assessment instrument,” no language in the statute directs Courts how to make use of that instrument in practice. Instead, 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 what supports one 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.

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<sup>13</sup> Dillon Reisman, Jason Schultz, Kate Crawford and Meredith Whittaker, “Algorithmic Impact Assessments: A Practical Framework for Public Agency Accountability,” AI Now Institute (2018), <https://ainowinstitute.org/aiareport2018.pdf>.