AMERICAN BAIL COALITION

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Risk Assessments and the Arnold Foundation PSA (Public Safety Assessment)

I. Summary

Recent scholarly research has exposed major flaws in the widely held view that we can use computerize risk assessments in the setting of bail that will simultaneously reduce jail populations and reduce crime. Instead, three key areas from the research have emerged over the past six months: (1) the risk assessments, including the Arnold Foundation PSA are not proven to have achieved their goals; (2) there are serious due process concerns related to proprietary and black-box algorithms; and, (3) the discriminatory impact of such algorithms has been called into question.

Regarding the Arnold Foundation, the Foundation has conceded through various legal filings in several cases that the end goal of the Foundation is not to respect the laws of the States in which it operates but to in fact implement the New Jersey no-money bail system.

State legislatures considering the use of these risk assessment tools should follow the lead of New York and other jurisdictions that are calling for a halt to the expansion of such risk assessments until they can be better studied and understood by legislative bodies.

II. The Arnold Foundation Intends to Implement the No-Money Bail System in all of the U.S.

The Arnold Foundation hired former Bill Clinton lawyer and Solicitor General of the United States to advocate for the continuation of the no-money bail system being implemented in New Jersey. New Jersey's no-money bail system is currently facing a constitutional challenge from noted conservative constitutional lawyer Paul D. Clement.[1] In *Holland v. Rosen*, the plaintiff has argued that he has a constitutional right to monetary bail and that the onerous restrictions of pretrial release (e.g. the mandatory use of an ankle monitor and checking in to pretrial services in-person twice per month) violates his civil liberties under the law.

The Arnold Foundation joined the lawsuit by filing an *amicus* brief in the appeal, urging that the U.S. Court of Appeals for the Third Circuit hold that New Jersey's bail system, which

[1] *See Holland v. Rosen*, No. 17-3104 (3rd Cir., 2017).

banned all monetary conditions of bail, is constitutional.[2] The Foundation claims it has a "strong interest" in making sure that the no-money bail system is affirmed.[3] In fact, the Arnold Foundation clearly explains that the research done by the Foundation laid the groundwork for the elimination of all monetary conditions of bail in favor of the risk assessment and either detention or nonmonetary conditions of bail.[4]

The Arnold Foundation is not some scientific and neutral organization that is trying to give judges more information within the context of state laws. They have hired the finest appellate lawyer of our time, Seth Waxman, to argue that money bail is unconstitutional.[5]

III. The Arnold Foundation, In Attempting to Dodge a Products Liability Case in New Jersey, Concedes that the Tool is Not Scientific

In the case of *Rodgers v. Arnold Foundation, et. al.*., the Arnold Foundation is attempting to side-step a products liability case where the PSA tool scored a prior felon in possession of a firearm as low-risk, which prior felon then shot and killed a man days later.

The Arnold Foundation in that case is attempting to argue that the PSA is protected speech under the First Amendment rather than a scientific product. The Foundation's lawyers in the case described the Arnold Foundation PSA as "predictive opinion, dependent on a subjective and discretionary weighing of complex factors."[6] In fact, not only do the Foundations lawyers fail to claim that the PSA is scientific, they analogize it to no different than "advise and ideas" in a diet book or "reference guide on collecting and cooking edible plants."[7]

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[2] Said the Foundation: "By this lawsuit, plaintiffs want to reverse New Jersey's progress toward a safer and fairer criminal justice system. They would restore a money-bail system that discriminates based on wealth, ineffectively addresses the risk of pretrial failures, and opens the door to constitutional violations. But plaintiffs' legal theories are meritless and their injunction would disserve the public interest, as the District Court rightly concluded. LJAF, a committed supporter of pretrial justice reform, has a strong interest in seeing this conclusion affirmed."

[3] *Id*.

[4] Paul Clement, the lawyer challenging the New Jersey system, noted that the zeal for the PSA was what caused the State to lose sight of constitutional principles: "Somewhere along the road to reform, the state's pursuit of those goals gave way to enthusiasm for classifying and restraining people based on predictive algorithms and caused it to lose sight of first principles."

[5] In fact, Mr. Waxman notes the purpose of the Arnold Foundation is to recommend only nonmonetary conditions or detention, which of course is not legal in Utah: "A decision making framework tailored to each jurisdiction uses the defendant's risk levels to recommend to the judge **the least restrictive nonmonetary conditions that will reasonably mitigate the identified risks, or detention if no such conditions exist**."

[6] *See Rodgers v. Arnold Foundation*, et. al., 1:17-cv-05556-JHR-JS (District of New Jersey), document 27-1 at 21.

[7] *Id*. at 20.

This means the PSA is riddled with substantive judgments, judgments that should be disclosed to the parties and judge in a criminal case, and judgments concerning which the public and the legislature should be fully aware.

IV. Risk Assessments, Including the Arnold Foundation PSA, Are Unproven at Reducing Jail Populations or Crime and Proven to Increase Failures to Appear in Court

In a recent scholarly article that is the most definitive study of risk assessments in practice, released in December, 2017, the author, a professor of law at the George Mason University School of Law, concluded as follows:

> "In sum, there is a sore lack of research on the impacts of risk assessment in practice. There is ***next to no evidence*** that the adoption of risk assessment has led to dramatic improvements in either incarceration rates or crime without adversely affecting the other margin.[8]"

This conclusion was reached as a result of reviewing the data and studies from as many as eight jurisdictions. This is similar to the argument made by Nevada Governor Brian Sandoval, who vetoed legislation that would have created risk assessments in Nevada because they are a "new and unproven method" and that "no conclusive evidence" has been presented that such pretrial risk tools work.

The Kentucky model, which proponents of bail reform point to as a success, was clearly debunked as part of Professor Stevenson's research.[9] Using six years' worth of data, she made a variety of important conclusions. Regarding the use of the risk assessment in Kentucky, the Arnold Foundation Pretrial Safety Assessment, she found it increased failures to appear for Court:

> Figure 7 shows a sharp jump up in the failure-to-appear rate (defined as the fraction of all defendants who fail to appear for at least one court date) from before the legislation was introduced to after the new law was implemented. The size of the increase – about 3 percentage points– was not large in and of itself, but it is large relative to the base level: about a 40 percent increase over the mean. **The introduction of the PSA did not lead to**

[8] Stevenson, Megan T., Assessing Risk Assessment in Action (December 8, 2017)(emphasis added). George Mason Law & Economics Research Paper No. 17-36. Available at SSRN: https://ssrn.com/abstract=3016088 or http://dx.doi.org/10.2139/ssrn.3016088

[9] *Id.* at 6 (Professor Stevenson notes that there was an "error in methodology" by the Arnold Foundation which caused them to inflate the success of the PSA in Kentucky, which then reinforces the need for third-party research to valid such claims).

> **a decline in failures-to-appear. If anything, the FTA rate is slightly higher after the PSA was adopted than before.**[10]

Regarding the rearrest rates for new crimes, which proponents say would be reduced, the opposite was true:

> Inferring that HB 463 led to an increase in rearrests requires inferring that the drop in rearrests right before the introduction of the legislation was indicative of a meaningful change in trend that would have continued in the absence of the law. Alternatively, one could argue that the drop down in rearrests towards the end of 2010 was just an idiosyncratic fluctuation in the rearrest rate, and the rise after the legislation was introduced was simply more idiosyncratic fluctuation. Alternative analysis, shown in the appendix, suggests that the former interpretation is more likely. **Regardless, it is clear that the increased use of risk assessments as a result of the 2011 law did not result in a decline in the pretrial rearrest rate**.[11]

Despite all of the promises that expanding risk assessments would deliver fantastic results, in fact "the large gains that many had assumed would accompany the adoption of the risk assessment tool were not realized in Kentucky."[12] Concerning what other jurisdictions can learn from Kentucky, the Professor explained that, "Kentucky's experience with risk assessment should temper hopes that the adoption of risk assessment will lead to a dramatic decrease in incarceration with no concomitant costs in terms of crime or failures to appear."[13]

The Arnold Foundation continues to tout its successes, even though it has removed reports from its website touting the success of the PSA because of data quality concerns.[14] The Arnold Foundation proclaims a successful rollout in one county in North Carolina, but their research as to whether it works was limited to some slides in a couple of power point presentations.[15]

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[10] *Id*. at 44
[11] *Id*. (emphasis added).
[12] *Id*.
[13] *Id.* at 55-56
[14] *Id*. at 22, fn. 92.
[15] *Id.* at 23 ("Mecklenberg, North Carolina is also supposed to have seen a dramatic drop in their jail population after adopting the Arnold Foundation's risk assessment, but the evidence that is cited to support this consists entirely of slides taken from two Power Point presentations. A report put out by Mecklenberg County Jails makes no mention of risk assessment but does indeed show that the jail population declined after 2010 (the year pretrial risk assessment was adopted). However, the jail population had been steadily decreasing prior to 2010 as well.

V. The Lucas County, Ohio Model is Not a Success

Lucas County, Ohio, another success trumpeted by the Arnold Foundation, is backed up by "one-page press release" that contains little detail.[16]

A leading researcher hired by the Arnold Foundation, and paid $1.7 million in contracting fees in the last year for which figures were unavailable, testified under oath in the case *ODonnell v. Harris County, Texas* as to the lack of success of the risk assessment in Lucas County, Ohio. In fact, Dr. Marie VanNostrand testified under oath that the failure to appear rate in Lucas County, Ohio is 28.8 percent.[17] Of the high-risk individuals released by the PSA in Lucas County, Ohio, 47.1 percent failed by either committing a new crime or failing to appear.[18] Even among persons classified as low-risk, 19% failed by either committing a new crime or failing to show up for court according to Dr. Van Nostrand's sworn testimony.[19]

VI. Due Process and Transparency Concerns Abound—The Arnold Foundation PSA is a Proprietary Black-Box for Which Leading Researchers Have Called for Transparency and/or Abolition

In a recent report as part of a symposium at New York University, on the issue of algorithms in criminal justice, the researchers concluded as follows:

> Core public agencies, such as those responsible for criminal justice, healthcare, welfare, and education (e.g. "high stakes" domains) should no longer use "black box" AI and algorithmic systems. This includes the unreviewed or unvalidated use of pre-trained models, AI systems licensed from third party vendors, and algorithmic processes created in-house. The use of such systems by public agencies raises serious due process concerns, and at a minimum they should be available for public auditing, testing, and review, and subject to accountability standards[20]

This report provides scant reason to believe that risk assessment was responsible for the post-2010 decline, as the slope is not visibly different from the long term trend.").

[16] *Id*. at 21.

[17] *ODonnell v. Harris County, Texas*, Case 4:16-cv-01414 Document 277.

[18] *Id*.

[19] *Id*.

[20] https://assets.contentful.com/8wprhhvnpfc0/1A9c3ZTCZa2KEYM64Wsc2a/8636557c5fb14f2b74b2be64c3ce0c78/_AI_Now_Institute_2017_Report_.pdf

No legislation or rules currently proposed would solve in full or in part the due process concerns raised by these researchers or force the type of transparency that the researchers feel is essential in order to protect due process. The report continues:

> Well-intentioned proponents of bail reform argue that risk assessment can be used to spare poor, low-risk defendants from onerous bail requirements or pretrial incarceration. Such arguments tend to miss the potential of risk assessment to "legitimize and entrench" problematic reliance on statistical correlation, and to "[lend such assessments] the aura of scientific reliability."[21]

States are being sold on the scientific reliability of the algorithms, but the public and parties to a criminal case have no right to inspect the underlying data that lead to the adoption of such algorithms.

VII. The Discriminatory Impact of Risk Assessments Is An Unresolved Issue

There has been much criticism of the risk assessments used in the criminal justice system in terms of whether they are more biased than a present system that does not employ such algorithms. A recent scholarly article makes this point quite clear:

> Determining whether or not a risk tool is racially biased is probably redundant. As Princeton computer scientist Aylin Caliskan says: "Machines are trained on human data. And humans are biased." The important question is whether the use of actuarial risk assessment tools results in more disparate outcomes than the status quo, or other viable alternatives. Outside of the research presented in this study, the empirical research on this is next to nonexistent.[22]

Of course, the empirical research presented included several studies that have concluded that risk assessments are discriminatory. In one study, the researchers found as follows: "There's software used across the country to predict future criminals. And it's biased against blacks."[23]

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[21] *Id.* (citing Sandra G. Mayson, "Bail Reform and Restraint for Dangerousness: Are Defendants a Special Case?",SSRN Scholarly Paper (Rochester, NY: Social Science Research Network, August 15, 2016). https://papers.ssrn.com/abstract=2826600, 2

[22] *Id*.

[23] https://www.propublica.org/article/machine-bias-risk-assessments-in-criminal-sentencing

Legislation to restrict the use of algorithms and study their discriminatory impact, such as recently adopted in New York, is the new trend, not the wholesale adoption of such algorithms.[24] In fact, 100 community groups across New York authored a letter to Governor Cuomo, demanding that we not rely on Risk Assessments in criminal justice because "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."[25]

The Arnold Foundation merely tells us that their PSA "has been proven" to be race and gender neutral, but they are unable to produce any reports by anyone other than contractors hired by the Foundation in order to validate such results.

VIII. Conclusion

Risk assessments do not work, suffer from serious due process concerns, and may not be race-neutral. The neutrality the Arnold Foundation sold to the State Courts is completely false—the goal of the Foundation is to eliminate all financial conditions of bail and private bail agents throughout the nation.

About Jeffrey Clayton, Executive Director of the American Bail Coalition:

Jeff Clayton joined the American Bail Coalition as Policy Director in May 2015. He has worked in various capacities as a public policy and government relations professional for fifteen years, and also as a licensed attorney for the past twelve years. He worked as the General Counsel for the Professional Bail Agents of Colorado, in addition to serving other clients in legal, legislative, and policy matters. Jeff spent six years in government service, representing the Colorado State Courts and Probation Department, the Colorado Department of Labor and Employment, and the United States Secretary of Transportation. He is also a prior Presidential Management Fellow and Finalist for the U.S. Supreme Court fellows program. Mr. Clayton holds a B.B.A. from Baylor University, a M.S. (Public Policy) from the University of Rochester, N.Y., and a J.D. from the Sturm College of Law, University of Denver.

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[24] https://www.propublica.org/article/new-york-city-moves-to-create-accountability-for-algorithms

[25] https://d3n8a8pro7vhmx.cloudfront.net/katal/pages/1242/attachments/original/1511364954/FINAL_Bail_Letter_to_Governor_Cuomo_-_11.22.2017_-_10.30am.pdf?1511364954