June 17, 2019

Will Lombardo
Hudson Institute
1201 Pennsylvania Avenue NW
Washington, D.C.

Dear Mr. Lombardo,

We write to you on behalf of the Criminal Justice Section of the American Bar Association. Founded in 1920, the Criminal Justice Section is comprised of over 16,000 members including prosecutors, private and public defense counsel, appellate and trial judges, law professors, correctional and law enforcement personnel, and other criminal justice professionals. We produce publications, run education programs, develop model practices, and promulgate standards covering each stage of the criminal justice system, including corrections. The views we express herein are presented on behalf of our Section; they have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and, accordingly, should not be construed as representing the position of the Association.

Under the First Step Act, passed by Congress and signed by the President, risk and needs assessments are supposed to play a significant role in determining when, and under what conditions, federal prisoners are to be released and serve the remainder of their prison term in home confinement. The Act requires that an instrument—referred to in the Act and here as the Risk and Needs Assessment Tool, or Tool—be devised to assist correctional officials in making decisions about the risk an offender poses and the means for reducing that risk through meeting the prisoner’s individual needs. The Attorney General is to make the final determination as to the content and use of any instrument that is created.

The Criminal Justice Section of the American Bar Association has a strong interest in ensuring that such instruments are constructed in a manner consistent with legal principles and general notions of fairness, because they can have a significant impact on the length of an individual’s sentence, the conditions of his or her confinement, and the overall nature of the criminal disposition. Specifically, the ABA Criminal Justice Section hopes that the Attorney General, the Independent Review Committee, and the developers of the Risk and Needs Assessment Tool will consider the following issues in determining the content of the Tool.

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• The nature of the risk factors that determine the risk level of a prisoner.

In *Buck v. Davis*, 137 S.Ct. 729 (2017), the Supreme Court stated: “It would be patently unconstitutional for a state to argue that a defendant is liable to be a future danger because of his race,” id. at 775, and called such a practice “a disturbing departure from a basic premise of our criminal justice system: Our law punishes people for what they do, not who they are.” Id. at 778. After *Buck*, race—and perhaps close proxies for race as well—are not legitimate risk factors in the punishment context, a position the ABA strongly endorses. It is possible that other factors that focus on what a person is, as opposed to what he or she has done—for instance, gender and age—also fall under *Buck*’s prohibition. At the same time, ignoring potent non-racial risk factors (e.g., age; psychopathy) might reduce the usefulness of a risk tool. The ABA’s concern in this regard is simply that the government be alert to these types of considerations and, to the greatest extent possible, rely on risk factors that are either based on blameworthy conduct (e.g., criminal offenses) or are dynamic in nature (e.g., changeable through treatment or other rehabilitative efforts, as might be the case with substance abuse, behavioral control difficulties, and employment prospects).

• The extent to which a risk factor is likely to reflect discriminatory conduct by government officials.

Research shows that people of color are arrested for minor crimes, including low-level drug crimes, at a much higher rate than whites, Cassia Spohn, *Race, Crime and Punishment in the Twentieth and Twenty-First Centuries*, 44 Crime & Justice, 49, 66-71 (2015), and that the bases for these arrests are sometimes weak. See generally, Rashida Richardson, Jason Schultz & Kate Crawford, *Dirty Data, Bad Predictions: How Civil Rights Violations Impact Police Data, Predictive Policing Systems, and Justice*, N.Y.U. Online (2019), https://ssrn.com/abstract=3333423. Absent evidence that this is not the case, the ABA’s hope is that, in the development of the Risk and Needs Assessment Tool, any reliance on criminal conduct as a risk factor would focus on *convictions* for serious crimes, if it is practically possible to do so without undermining the usefulness of the Tool. The ABA has taken a similar position in connection with the use of “risk assessment tools” in setting bail. ABA Resolution 112C, paragraph 5 (2017) (resolving that courts should “make bail and release determinations based upon individualized, evidence-based assessments that use objective verifiable release criteria that do not have a discriminatory or disparate impact based on race, ethnicity, religion, socio-economic status, disability, or sexual orientation, or gender identification.”).

• The normative aspect of defining high, medium, low, or minimal risk.

The designation of an offender as high, medium, low, or minimal risk is instrumental in implementing the First Step Act. In determining the thresholds for these categories, the ABA believes it is crucial to give careful consideration to four inquiries: (1) the quantified probability that (2) a particular outcome will occur (3) during a specified period of time (4) in the absence of a particular intervention. For instance, it might be decided that a person should only be identified as high risk if he or she poses a high probability (e.g., over 50%) of committing a serious offense within a three-year period if detention is not continued, regardless of any treatment interventions that are available. In contrast, a low risk individual might be defined as a person with a low probability (e.g., under 10%) of committing any serious offense if a specific intervention is successfully undertaken. The important point is that these inquiries be explicitly identified and answered to the greatest extent possible, through a sensitive balancing of individual liberty and public safety concerns. Cf. *Addington v. Texas*, 441 U.S. 418, 432-33 (1979) (requiring “clear and convincing” evidence of dangerousness before commitment to a mental

• The importance of transparency.

Once the Tool is developed, prisoners, their advocates, and researchers could benefit from knowing both the risk factors on which it relies and the weights assigned to those factors. However, many current risk assessment tools are developed by private companies that assert a proprietary interest in the algorithms associated with the instrument and thus refuse to reveal how they were constructed, a position some courts have accepted. See, e.g., *Wisconsin v. Loomis*, 881 N.W.2d 749 (2016). Allowing decisions about risk and needs assessments to be made in such an opaque fashion would prevent legal and empirical evaluation of the Tool’s ability to achieve the foregoing goals. The ABA Criminal Justice Section strongly believes that the Risk and Needs Assessment Tool should be transparent about both the risk factors used and their relative weights, except with respect to information that, if divulged, will demonstrably compromise the efficacy of the Tool. See generally, Rebecca Wexler, *Life, Liberty and Trade Secrets: Intellectual Property in the Criminal Justice System*, 70 Stan. L. Rev. 1343 (2017).

• Validation.

Finally, it is essential that the Risk and Needs Assessment Tool rest on sound empirical foundations. Cf. *Daubert v. Dow Chemical Co.*, 509 U.S. 579 (1993) (requiring that scientific evidence introduced in court be verifiably reliable). Ideally, this would mean that the developers of the Tool can demonstrate that it has adequate construct validity, accuracy (in terms of answering the queries posed above), and inter-rater reliability, and that it has been validated and cross-validated on reference groups composed of the relevant prison populations. Further, provision should be made for periodic validation updates. As with the content of the Tool itself, the data supporting claims about its validity and reliability should also be made public.

The ABA Criminal Justice Section looks forward to participating in any way it can to help the Attorney General and his designees develop the risk and needs assessment instrument or instruments mandated by the First Step Act and similar federal programs. Please do not hesitate to contact James Felman at JFelman@kmf-law.com and/or Christopher Slobogin at c.slobogin@Law.Vanderbilt.edu if questions about this letter or other aspects of risk and needs assessment arise.

Yours very truly,

Lucian E. Dervan
Chair, ABA Criminal Justice Section

cc: James E. Felman
    Former Chair, ABA Criminal Justice Section

    Professor Christopher Slobogin
    Vanderbilt University Law School