

# Current State of Academia Around Pretrial Reform

What practitioners, academics and researchers are saying

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# 3 Critical Areas for Solutions

- ▶ There 3 solutions that hopefully will be helpful to Commissions efforts
  - ▶ 1) Data. Integrated data systems for jail populations, pretrial release and performance.
  - ▶ 2) Pretrial risk assessment tool evaluation. Ensure any risk tool being used by the courts is not exacerbating the current issues.
  - ▶ 3) Codification of presumptions. Lay down some release presumptions for the court to operate on.

# Recent Scholarly Studies on Risk Assessment Tools

- ▶ 26 studies in total. With the exception of 3, they are all within the last 3 years. All concluding in one way or another that risk tools not only do not work but exacerbate the problem(s).
- ▶ Agan, Amanda and Sonja Starr, "Ban the Box, Criminal Records, and Racial Discrimination: A Field Experiment\*", "The Quarterly Journal of Economics", 08 2017, 133 (1), 191-235.
- ▶ Albright, Alex, "If you give a judge a risk score: evidence from Kentucky bail decisions," Working Paper 2019.
- ▶ Arnold, David, Will Dobbie, and Crystal S Yang, "Racial Bias in Bail Decisions\*", "The Quarterly Journal of Economics", 05 2018, 133 (4), 1885-1932.
- ▶ Berdej, Carlos and Noam Yuchtman, "Crime, Punishment, and Politics: An Analysis of Political Cycles in Criminal Sentencing," "The Review of Economics and Statistics", 2013, 95 (3), 741-756.
- ▶ Berk, Richard, "An impact assessment of machine learning risk forecasts on parole board decisions and recidivism," "Journal of Experimental Criminology", Jun 2017, 13 (2), 193-216.
- ▶ Cowgill, Bo, "Bias and Productivity in Humans and Algorithms: Theory and Evidence from Resume Screening," Unpublished Working Paper, August 2018.
- ▶ Cowgill, Bo, "The Impact of Algorithms on Judicial Discretion: Evidence from Regression Discontinuities," Working Paper 2019.
- ▶ Cowgill, Bo and Catherine Tucker, "Algorithmic Bias: A Counterfactual Perspective," Working Paper: NSF Trustworthy Algorithms December 2017.
- ▶ Cowgill, Bo and Catherine Tucker, "Economics, Fairness, and Algorithmic Bias," In preparation for the Journal of Economic Perspectives March 2019.
- ▶ Cowgill, Bo and Megan Stevenson, "Algorithmic Social Engineering," Working Paper 2019.
- ▶ Doleac, Jennifer L and Benjamin Hansen, "The unintended consequences of ban the box: Statistical discrimination and employment outcomes when criminal histories are hidden," "Journal of Labor Economics", 2018, forthcoming.
- ▶ Doleac, Jennifer L. and Megan T. Stevenson, "Are Criminal Risk Assessment Scores Racist," Brookings.edu, August 2016.

# Continued.

- ▶ Dressel, Julia and Hany Farid, "The accuracy, fairness, and limits of predicting recidivism," *Science Advances*, 2018, 4 (1).
- ▶ Garrett, Brandon L., Alexander Jakubow, and John Monahan, "Judicial Reliance on Risk Assessment in Sentencing Drug and Property Offenders: A Test of the Treatment Resource Hypothesis," *Criminal Justice and Behavior*, 2019, 46 (6), 799-810.
- ▶ Garrett, Brandon and John Monahan, "Judging Risk," *California Law Review*, 2018, forthcoming.
- ▶ Garrett, Brandon and John Monahan, "Judging Risk," *Virginia Public Law and Legal Theory Research Paper Series* 2018-27 May 2018. 38.
- ▶ Kleinberg, Jon, Himabindu Lakkaraju, Jure Leskovec, Jens Ludwig, and Sendhil Mullainathan, "Human Decisions and Machine Predictions\*," *The Quarterly Journal of Economics*, 2018, 133 (1), 237-293.
- ▶ Koepke, John and David Robinson, "DANGER AHEAD: Risk Assessment and the Future of Bail Reform" *Georgetown University Law Center*, 2018.
- ▶ Jens Ludwig, Sendhil Mullainathan, and Cass R Sunstein, "Discrimination in the Age of Algorithms," *Journal of Legal Analysis*, 04 2019, 10, 113-174.
- ▶ Mayson, Sandra, "Bias In, Bias Out," *Yale Law Journal*, June 2019, 128 (8).
- ▶ Monahan, John, Anne L. Metz, and Brandon L. Garrett, "Judicial Appraisals of Risk Assessment in Sentencing," *Virginia Public Law and Legal Theory Research Paper Series* 2018-27 April 2018.
- ▶ Sloan, Carly Will, George S Naufal, and Heather Caspers, "The Effect of Risk Assessment Scores on Judicial Behavior and Defendant Outcomes," *IZA DP No. 11948* November 2018.
- ▶ Starr, Sonja, "Evidence-Based Sentencing and the Scientific Rationalization of Discrimination," *Stanford Law Review*, 2014, 66.
- ▶ Stevenson, Megan, "Assessing Risk Assessment In Action. George Mason University" 2017, 1-68.
- ▶ Stevenson, Megan and Jennifer Doleac, "Algorithmic Risk Assessment in the Hand of Humans," *George Mason University*, 2019.
- ▶ Werth, Peter, "Theorizing the Performative Effects of Penal Risk Technologies: (Re)producing the Subject Who Must Be Dangerous," *Rice University*, 2018.

# Statement re: Technical Flaws of Pretrial Risk Assessments Raise Grave Concerns

- ▶ 27 researchers in the fields of statistics, machine learning and artificial intelligence, law, sociology, and anthropology penned a letter to judiciary considering risk tools.
- ▶ Institutions such as MIT, Princeton, NYU, UC Berkley, Columbia and Harvard Law.
- ▶ “Although pretrial risk assessment tools are often promoted as an essential part of bail reform that can help judges make more informed and objective pretrial decisions, these tools suffer from serious methodological flaws that undermine their accuracy and effectiveness. As a result, pretrial risk assessments do not increase the likelihood of better pretrial outcomes, much less guarantee them.”

# Updated Position on Pretrial Risk Assessment Tools

- ▶ Institutions are now against risk tools.
- ▶ Such as AI Now Institute, Black in AI and now Pretrial Justice Institute.
- ▶ The first week of February they published a new position on risk tools.
- ▶ “We now see that pretrial risk assessment tools, designed to predict an individual’s appearance in court without a new arrest, can no longer be a part of our solution for building equitable pretrial justice systems.”
- ▶ “About three years ago, we heard but did not fully appreciate the opposition to pretrial risk assessment tools from civil rights organizations, impacted people, and researchers. Despite these valid concerns, we were too focused on fighting the damaging status quo to really listen. We made a mistake”
- ▶ <https://www.wired.com/story/algorithms-supposed-fix-bail-system-they-havent/>

# 100+ Civil Rights Groups Shared Statement on Risk Tools

- ▶ Statement lays out 6 Principals that should be followed with regard to risk assessment tools.
- ▶ “In reality, however, these tools can defer the responsibility of determining who to detain pretrial and who to release. Furthermore, implementation of these tools has not curtailed the continued over-incarceration of people of color pretrial – people who should otherwise be legally entitled to due process of law before being torn away from their families, homes, and careers.”
- ▶ <https://civilrights.org/2018/07/30/more-than-100-civil-rights-digital-justice-and-community-based-organizations-raise-concerns-about-pretrial-risk-assessment/>

# Where Bail Reform Had Unintended Consequences.

- ▶ New York voters have turned against bail reform as law enforcement finds increase in crime due to reform."
  - NYPD Commissioner: NYPD crime data through Jan. 19 compared with the same period in 2019 showed robberies up 31.5%, burglaries up 15%, grand larceny up 5.6% and auto thefts, which in the past had been in steep decline, up 67%. The total for all serious felonies was up 11% over 2019.
  - New York City Mayor Bill de Blasio has linked the increase in major crime throughout the city to changes in bail regulations for the city's prisoners.
  - A solid majority of state voters - 59 percent - now say that the elimination of cash bail for most misdemeanor and "non-violent" felony crimes is bad for New York, the Siena College poll found.
  - ▶ Only 33 percent of respondents said the law enacted Jan. 1 is good for New York.
- ▶ University of Utah Law School finds Bail Reform in Illinois increased crime.
  - "Properly measured and estimated, after more generous release procedures were put in place, the number of released defendants charged with committing new crimes increased by 45%. And, more concerning, the number of pretrial releasees charged with committing new violent crimes increased by an estimated 33%.



# Where Bail Reform Had Unintended Consequences.

- ▶ Alaska enacted bail reform in 2018, only for it to be rolled back months later by Gov. Dunleavy.
  - SB91 created a tool to assess a criminal suspect's risk of whether or not they will show up to court or will commit a crime while released.
  - In July 2019, HB 49, effectively repealed the Senate legislation.

# 3 Areas For Critical Reform

- ▶ 1) Data, data and data.
  - Florida data bill passed in 2018. SB 1392.
  - Idaho currently considering an integrated data system. HB 432.
  - New York currently considering a data collection system. AB 8441.
- ▶ 2) Pretrial risk assessment tool evaluation
  - If the courts are going to utilize a risk assessment tool, in light of the current research, they need to be able to provide data that the tool is not:
    - Exacerbating racial disparity;
    - Increasing jail populations and;
    - Is accurate in its risk predictions.
- ▶ 3) Codification of presumptions only
  - Codify presumption that individuals should be released on the “least restrictive” means possible while ensuring public safety and the smooth operation of justice.
    - Do not define for the judge what is or is not least or most restrictive. Allow the judge to determine that on an individual basis using at least all currently available tools.
  - Codify presumption that a very limited set of first time, low-level, non-violent, no prior FTA's, non-sexual misdemeanor defendants should be presumptively OR'd. Judge must be able to easily overcome presumption.

# Bail Conditions at Aladdin

- ▶ Once we post the bond with the jail, the person is released.
- ▶ We then require them to come in for an in person meeting to go over what the process looks like on their court case.
  - ▶ We require them to appear at all court dates.
  - ▶ We require they contact us after each court date and inform us of the next court date.
  - ▶ If they fail to appear in court, they need to contact us to get the bond reinstated and put back on the court calendar.
  - ▶ They need to inform us of changes in their contact info, residence or employment.
  - ▶ The indemnitor and defendant are equally liable for the full amount of the bond.
  - ▶ Questions?