

WRESTLING WITH RISK: THE QUESTIONS BEYOND MONEY BAIL*

BRANDON BUSKEY**

INTRODUCTION

It is time for a new discussion about bail. There is an undeniable movement to abolish or limit money bail, the requirement that a person accused of a crime pay a sum of money in exchange for their release from jail.¹ The movement reflects a growing consensus that jailing people prior to trial solely because they cannot afford to pay bail is a moral outrage.² But bail is not just about money. Its abiding concerns are with the conditions we place on a person's release prior to trial and the circumstances in which we can deny a person's release.³ To this end, there is no consensus on *how* to reform systems that routinely detain people who cannot afford money bail. This is the discussion we must begin.

California's recent experience shows that replacing money bail raises complicated questions about what comes next. In 2018, the California legislature adopted Senate Bill 10 (SB-10),⁴ a historic reform of California bail law that rivals the ambition and sweep of New Jersey's much-applauded 2017 bail legislation. Whereas New Jersey relegated money bail to the last possible option,⁵ California abandoned money bail altogether.⁶ The bill thus promised to shut down the state's powerful bail-bond industry, making California one of

* © 2020 Brandon Buskey.

** Deputy Director for Smart Justice Litigation, ACLU Criminal Law Reform Project. I would like to thank Havan Clark, my Articles Editor at the *North Carolina Law Review*, for her wonderful guidance on this piece.

1. *E.g.*, Sandra G. Mayson, *Dangerous Defendants*, 127 *YALE L.J.* 490, 490 (2018) ("Bail reform is gaining momentum nationwide.").

2. *See, e.g.*, Malika Saada Saar & Mark Holden, *America's Broken Bail System Substitutes Cash for Justice, Leaves Poor Behind Bars*, *DAILY BEAST* (May 10, 2018, 5:21 AM), <https://www.thedailybeast.com/americas-broken-bail-system-substitutes-cash-for-justice-leaves-poor-behind-bars> [<https://perma.cc/W56S-QFND>].

3. *See* Wendy Shang, *On the Long History of Bail*, *PRETRIAL JUST. INST.: PRETRIAL BLOG* (Oct. 3, 2017), <https://www.pretrial.org/long-history-bail/> [<https://perma.cc/4RF3-KNE8>].

4. S.B. 10, 2017–2018 Leg., Reg. Sess. (Cal. 2018).

5. N.J. STAT. ANN. § 2A:162-15 (Westlaw through L.2019, c. 211 & J.R. No. 18) ("Monetary bail may be set for an eligible defendant only when it is determined that no other conditions of release will reasonably assure the eligible defendant's appearance in court when required.").

6. Thomas Fuller, *California Is the First State To Scrap Cash Bail*, *N.Y. TIMES* (Aug. 28, 2018), <https://www.nytimes.com/2018/08/28/us/california-cash-bail.html> [<https://perma.cc/87TP-3EAJ>] (dark archive)].

just eight states and the District of Columbia without such an industry.⁷ Similar to New Jersey, California endorsed actuarial risk assessments—statistical tools that forecast outcomes based on historical data—as the preferred method of distinguishing arrestees that should be released immediately from those who may be detained after a bail hearing.⁸

Despite their similarities, reformers expressed dramatically different reactions to bail legislation in these two states. While a broad coalition of groups—ranging from conservative then-Governor Chris Christie to the left-leaning Drug Policy Alliance and American Civil Liberties Union (“ACLU”)—lauded New Jersey’s reforms,⁹ liberal groups—including the ACLU and Human Rights Watch—opposed California’s SB-10.¹⁰

Key to these defections is that California’s bill largely empowers its counties to administer the necessary risk assessments without any centralized oversight by the state.¹¹ The bill also allows counties wide latitude to define the offenses for which they may detain an individual.¹² Critics warned that SB-10’s grant of unchecked discretion to local jurisdictions threatened to increase the number of people detained prior to trial, despite the bill’s elimination of money bail.¹³

7. *What To Do in States That Don’t Have Private Bail*, ABOUTBAIL, <https://www.aboutbail.com/pages/states-with-no-private-bail> [<https://perma.cc/8ZC2-AGLK>]. The bail-bond industry did not take this lightly. It orchestrated a referendum for 2020 to repeal SB-10, halting implementation of the bill in the meantime and allowing bail-bond agents to continue operations. Jasmine Ulloa, *Bail Bond Industry Moves To Block Sweeping California Law, Submitting Signatures for a 2020 Ballot Referendum*, L.A. TIMES (Nov. 20, 2018), <https://www.latimes.com/politics/la-pol-ca-bail-referendum-signatures-20181120-story.html> [<https://perma.cc/K9YH-9WYE> (dark archive)].

8. See generally S.B. 10 (Cal. 2018) (requiring that arrestees be subject to a pretrial risk assessment that courts would then use to make release determinations).

9. *Pretrial Justice Reform*, ACLU N.J., <https://www.aclu-nj.org/theissues/criminaljustice/pretrial-justice-reform> [<https://perma.cc/M5DF-9FRE>]; *Winning Bail Reform in New Jersey*, DRUG POL’Y ALLIANCE, <http://www.drugpolicy.org/new-jersey/winning-bail-reform> [<https://perma.cc/U58G-SHRG>].

10. Letter from Jasmine Tyler, Advocacy Dir., U.S. Program, Human Rights Watch & John Raphling, Senior Researcher on Criminal Justice, U.S. Program, Human Rights Watch, to Adrin Nazarian, Assembly Member, Cal. State Assembly (Aug. 14, 2018) [hereinafter Human Rights Watch Letter], https://www.hrw.org/sites/default/files/supporting_resources/hrw_sb_10_opposition_letter.pdf [<https://perma.cc/RGU8-QPR9>]; Press Release, ACLU of S. Cal., ACLU of California Changes Position To Oppose Bail Reform Legislation (Aug. 20, 2018), <https://www.aclusocal.org/en/press-releases/aclu-california-changes-position-oppose-bail-reform-legislation> [<https://perma.cc/7E97-P6SM>].

11. See Human Rights Watch Letter, *supra* note 10.

12. See *id.*

13. See, e.g., Abbie Vansickle, *So Much for the Great California Bail Celebration: The First State To Abolish Cash Bail. Why Are Proponents So Unhappy?*, MARSHALL PROJECT (Aug. 30, 2018, 7:20 AM), <https://www.themarshallproject.org/2018/08/30/so-much-for-the-great-california-bail-celebration> [<http://perma.cc/3LVW-G3TE>].

By and large, the national debate over money bail has overlooked the concerns raised by the SB-10 opposition—that ending money bail does not necessarily mean that more people will be released prior to their trials, and that it might mean the opposite. The debate has instead focused on situations where defendants are detained either unintentionally, such as when a judge sets a low bail amount without assessing whether the defendant can actually afford it, or indiscriminately, such as when court systems rely on schedules to set bail automatically based on the charged offense.

Reformers rightly observe that, under these circumstances, basing pretrial release on money locks up poorer arrestees who could be released successfully, while allowing wealthier arrestees to purchase their release, irrespective of their risks to the public.¹⁴ A popular rhetorical pivot is to assert that court systems should make sure that only the “right people” go to jail. Left unaddressed, however, is exactly how to identify these so-called “right people.”

This Essay argues that the bail movement must confront this question to achieve meaningful reform. Whether targeting the *right* people to jail will result in *fewer* people going to jail ultimately depends on how one defines the “right people.” More specifically, it requires identifying the point at which an individual’s risk to society sufficiently outweighs her right to freedom before trial. This Essay therefore proposes a course correction away from debating money bail and toward examining risk—particularly, the types and degree of risk that warrant exposing an individual to the harms of incarceration.

As described below, the courts have not settled this issue. While a number of state appellate and federal district courts have weighed in,¹⁵ the United States Supreme Court has not clarified the constitutional limits on when a judge may purposefully deny release prior to trial. In this vacuum, the courts of appeals have only confused the issue.

Policy advocates have also bypassed this question. Their emphasis has been primarily on how to measure risk—that is, the promises and dangers of using actuarial risk assessments to guide release decisions. Yet, however useful one finds risk-assessment instruments, they are silent on the normative issues entangled with pretrial detention, and they threaten to confuse those issues just as much as the courts have.

This Essay does not attempt to resolve these issues. It instead unpacks some of the most critical considerations for how courts and advocates must wrestle with risk as we move away from money bail.

14. See, e.g., Saar & Holden, *supra* note 2.

15. E.g., Caliste v. Cantrell, 329 F. Supp. 3d 296, 309–11 (E.D. La. 2018), *aff’d*, 937 F.3d 525 (5th Cir. 2019); *In re Humphrey*, 228 Cal. Rptr. 3d 513, 535–38 (Cal. Ct. App. 2018), *discretionary review granted*, 417 P.3d 769 (2018).

I. COURTS HAVE FAILED TO DEFINE THE LIMITS OF PREVENTIVE DETENTION

The California bail controversy discussed above raises the neglected but fundamental issue of preventive detention. The 1970s and 80s witnessed a robust debate about the government's power to detain someone for future dangerousness.¹⁶ This debate culminated in the Supreme Court's 1987 decision in *United States v. Salerno*,¹⁷ which rejected a facial challenge to the preventive detention scheme of the Bail Reform Act of 1984.¹⁸ The Court held that the Constitution did not categorically prohibit preventive detention for dangerousness, and that the Act sufficiently ensured that pretrial detention for future dangerousness would remain the "carefully limited exception" to pretrial liberty.¹⁹

By most accounts, *Salerno* halted the public debate about the scope of preventive detention.²⁰ But the federal experience with pretrial detention since *Salerno* suggests renewal of this debate is sorely needed. There is no wealth-based detention in the federal system: a court may detain a defendant only if the court issues a detention order subject to several substantive and procedural requirements.²¹ Yet, in 2010, 76% of people accused of federal offenses and 84% of those accused of drug offenses were detained prior to trial.²² This hardly seems like the "carefully limited exception" contemplated by *Salerno*.²³

But that is a matter of interpretation. And it is one intrinsically tied to how we evaluate risk in the pretrial setting. As *Salerno* explains, the Supreme Court has identified flight and future dangerousness as the risks courts may consider to deny pretrial release.²⁴ Courts' use of money represents their attempts to calibrate bail amounts to contain these risks.

Along with the government's interests in mitigating the risks of flight and future violence, there is increasing awareness that pretrial detention poses significant risks for those arrested. These risks include the loss of employment, housing, or child custody that often follows just two to three days of detention and the causal effect of pretrial detention on increased guilty pleas and sentence

16. Preventive detention for flight has historically been assumed. See *United States v. Salerno*, 481 U.S. 739, 749 (1987).

17. 481 U.S. 739 (1987).

18. *Id.* at 755; see also Bail Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1976 (codified as amended at 18 U.S.C. §§ 3141–3150 (2012)).

19. *Salerno*, 481 U.S. at 755.

20. Mayson, *supra* note 1, at 505.

21. See 18 U.S.C. § 3142(c) (2012).

22. Amaryllis Austin, *The Presumption for Detention Statute's Relationship to Release Rates*, FED. PROB., Sept. 2017, at 52, 53.

23. *Salerno*, 481 U.S. at 754–55.

24. *Id.*

severity.²⁵ Research has also revealed that pretrial detention may undermine the government's interests in court appearance and public safety, in that pretrial detention generally increases a person's likelihood of both failing to appear at subsequent court dates and being rearrested.²⁶

Unfortunately, the Supreme Court and federal circuit courts have failed to provide a coherent framework for balancing these respective risks. The Fifth Circuit's *ODonnell v. Harris County*²⁷ opinion illustrates the problem. Though striking down the Harris County (Houston), Texas, bail system for misdemeanors for its reliance on a bail schedule, the court avoided deciding how the federal right to pretrial release limits a judge's authority to issue unaffordable bail.²⁸

The *ODonnell* court instead relied on the guarantee of release upon "sufficient sureties" in the Texas Constitution.²⁹ Under this provision, courts may impose money bail so long as the amount is not oppressive.³⁰ This analysis requires a particular balancing of the right to pretrial release against the need to guarantee an arrestee's appearance. Specifically, courts may issue unaffordable bail if detention is not the sole purpose of bail and if they conduct an individualized assessment of an arrestee's flight risk.³¹

ODonnell follows in the tradition of other federal circuits that have allowed unaffordable bail under the Eighth Amendment's prohibition against excessive bail.³² To satisfy the Eighth Amendment, the bail amount must be "reasonably calculated" to address an individual's flight risk.³³ Circuit courts have applied this rubric to hold that a judge may set bail beyond what the arrestee can afford if, after evaluating the individual's circumstances, that amount is reasonably required to guarantee the person's return to court.³⁴

Ultimately, *ODonnell* and the excessive bail cases rest on a specious concept of risk. They assume that an unaffordable bail can be reasonable as long as a judge makes an individualized assessment of risk. However, an individualized

25. *E.g.*, Paul Heaton, Sandra Mayson & Megan Stevenson, *The Downstream Consequences of Misdemeanor Pretrial Detention*, 69 STAN. L. REV. 711, 715, 781 (2017).

26. *E.g.*, CHRISTOPHER T. LOWENKAMP, MARIE VANNOSTRAND & ALEXANDER HOLSINGER, LAURA & JOHN ARNOLD FOUND., THE HIDDEN COSTS OF PRETRIAL DETENTION 4 (2013), craftmediabucket.s3.amazonaws.com/uploads/PDFs/LJAF_Report_hidden-costs_FNL.pdf [https://perma.cc/498S-LM6P]; Will Dobbie, Jacob Goldin & Crystal S. Yang, *The Effects of Pretrial Detention on Conviction, Future Crime, and Employment: Evidence from Randomly Assigned Judges*, 108 AM. ECON. REV. 201, 214 (2018).

27. 892 F.3d 147 (5th Cir. 2018).

28. *Id.* at 163–64.

29. *Id.* at 158 (citing TEX. CONST. art. 1, § 11).

30. *Id.*

31. *Id.* at 153, 158.

32. *See, e.g.*, *United States v. Beamon*, 631 F.2d 85, 86 (6th Cir. 1980).

33. *Id.*

34. *See, e.g.*, *White v. Wilson*, 399 F.2d 596, 598 (9th Cir. 1968).

bail amount cannot be unaffordable and reasonable. The two concepts cannot coexist. To explain, any system of risk assessment depends on feedback to ensure reliability.³⁵ In the pretrial context, this requires informing judges of the actual successes and failures of the bail they impose. One may then evaluate if a judge's bail decisions reliably distinguish the "risky" from the "not risky."

From this it is readily apparent that unaffordable bail lacks any objective basis. Indeed, unaffordable bail is inherently counterfactual. It requires a court to extrapolate the effect of a bail amount *if* the defendant could afford it. But arrestees who cannot afford bail go to jail; thus, a judge never knows if the arrestee could have been successfully released with an affordable bail or a nonfinancial condition. Judges consequently cannot develop credible expertise in setting unaffordable bail amounts, as it is impossible to ascertain whether unaffordable bail was truly required in any given case.³⁶ Unaffordable bail thus only works in the sense that the detained reliably attend their court dates. It otherwise denies any way of knowing who has been properly detained.

This clumsy legal fiction cannot provide a coherent standard for when a court intentionally detains an individual prior to trial. Without resolving the issue, *Salerno* suggests that if the constitutional right to pretrial release is fundamental—and independent of the Eighth Amendment right against excessive bail—heightened scrutiny applies to any detention order.³⁷ A judge may therefore only deny pretrial release if it is necessary, in that alternative release conditions cannot adequately manage the identified risk.³⁸ Notwithstanding this precedent, the reasoning of *ODonnell* and the unaffordable bail cases allows judges to deny release whenever they believe it would be reasonable. The implication is that a judge may detain a person with an unaffordable bail even if there is another adequate condition of release.

This is an odd way to treat a fundamental right. Failing to reserve detention as a last resort allows judges to be highly risk averse when deciding whether to release an arrestee; judges never have to take the risk of releasing a person if they can plausibly justify an unaffordable bail. Consequently, this jurisprudence permits courts to undervalue the risks of detention to the individual.

35. See generally John Logan Koepke & David Robinson, *Danger Ahead: Risk Assessment and the Future of Bail Reform*, 93 WASH. L. REV. 1725, 1795–96 (2018) (noting significant deficiencies in the data collected on pretrial defendants and suggesting improved tracking to "help ensure that risk assessment tools lead to more equitable outcomes").

36. Timothy P. Cadigan, James L. Johnson & Christopher T. Lowenkamp, *The Re-Validation of the Federal Pretrial Services Risk Assessment (PTRA)*, FED. PROB., Sept. 2012, at 3, 8.

37. *Schultz v. Alabama*, 330 F. Supp. 3d 1344, 1365 n.23 (N.D. Ala. 2018) (recognizing under *Salerno* that "pretrial liberty is a fundamental right to which heightened scrutiny applies"), *appeal docketed*, No. 18-13898 (11th Cir. Sept. 13, 2018).

38. See *Caliste v. Cantrell*, 329 F. Supp. 3d 296, 314–15 (E.D. La. 2018), *aff'd*, 937 F.3d 525 (5th Cir. 2019).

The Eleventh Circuit's decision in *Walker v. City of Calhoun*³⁹ is a jarring example of the callousness to pretrial liberty that results when courts allow themselves to balance interests in this way. The *Walker* court recognized that imposing prolonged detention on a person because she cannot afford bail is unconstitutional.⁴⁰ Nonetheless, it granted a forty-eight-hour safe harbor for jurisdictions that indiscriminately detain arrestees using a bail schedule.⁴¹ Thus, the City of Calhoun may continue detaining people based solely on their access to money if it holds a release hearing within forty-eight hours after arrest. The court justified the safe harbor by asserting that being in jail forty-eight hours did not constitute an "absolute deprivation" of pretrial liberty.⁴² The court claimed instead that people attempting to avoid two days of jail were merely seeking a privilege that states may deny to those who cannot pay, like "if the Postal Service wanted to continue to deny express service" without payment.⁴³

The court's logic is patently absurd. You lose your liberty the moment you set foot in a jail, not two days later. While a weekend in jail may seem inconsequential to a federal judge, for people like Sandra Bland—who died in the immediate days after being detained on money bail in Texas⁴⁴—it can amount to a death sentence.

There is a political truism that judges often jail arrestees for fear of making news headlines if they release someone who later commits a sensational crime. Judges are unfairly blamed in those cases even though such crimes are exceptionally rare. But perhaps judges should also make headlines when tragedies like this happen. Or when a child is separated for days from a parent who is locked away. Or when that parent pleads guilty to a crime she did not commit just to return home. Judges are rarely held accountable for these harms, even though they are far more common. Without a legal standard to enforce such accountability, our overuse of pretrial detention is likely to survive our abandonment of money bail.

II. THE PUBLIC DISCUSSION OF RISK OVEREMPHASIZES RISK-ASSESSMENT INSTRUMENTS

The debate on risk tolerance in the policy arena has been similarly misdirected. Like California and New Jersey, other jurisdictions are increasingly turning to actuarial risk assessments to replace charge-based bail

39. 901 F.3d 1245 (11th Cir. 2018).

40. *Id.* at 1261, 1267 n.13.

41. *Id.* at 1266.

42. *Id.* at 1261.

43. *Id.* at 1262.

44. Sharon Grigsby, *Another Outrage in Sandra Bland Injustice: She Couldn't Find \$500 Bail*, DALL. MORNING NEWS (July 27, 2015, 6:38 PM), <https://www.dallasnews.com/opinion/opinion/2015/07/27/another-outrage-in-sandra-bland-injustice-she-couldnt-find-500-bail> [http://perma.cc/ZN3M-ENEK].

schedules.⁴⁵ These tools make algorithmic judgments about the likelihood that individuals who share certain characteristics—like criminal history or prior failures to appear—will either fail to appear for a subsequent court date or be arrested for a new offense.⁴⁶ These tools then assign people to groups based on their relative risk, such as “high,” “medium,” and “low.”⁴⁷

The allure of risk-assessment tools is that the most popular, like the Public Safety Assessment (“PSA”) by Arnold Ventures, generally place most people in low- or medium-risk groups and tend to predict that even high-risk groups are overwhelmingly likely to stay out of trouble. For instance, the PSA includes a “flag” for those deemed high risk for a violent-offense arrest.⁴⁸ But only about 9% of individuals within this designation experienced such an arrest; the remaining 91% succeeded without any intervention.⁴⁹

Notwithstanding this promise, these tools, like the bail judicial decisions, obscure the critical issue of risk tolerance. For one, they cannot measure the risks that truly matter in the pretrial context. As referenced above, the Supreme Court has identified flight and future dangerousness as the risks that may warrant pretrial detention.⁵⁰ By this metric, risk assessments fall short. For one, no instrument measures flight; instead, all predict the more common occurrence of failing to appear, which only rarely indicates true flight.⁵¹ Further, no instrument measures the actual commission of a dangerous act; instead, all predict the more general phenomenon of being arrested for a new crime, though some, like the PSA, forecast arrests for violent offenses.⁵²

The actuarial challenge is that flight and violent offenses are exceedingly rare,⁵³ and predicting rare events is inherently difficult. Imagine the difference between predicting thunderstorms versus lightning strikes. Tool designers therefore focus on the risks they can most credibly measure, like thunderstorms,

45. Brandon Buskey & Andrea Woods, *Making Sense of Pretrial Risk Assessment*, CHAMPION, June 2018, at 18, 18.

46. *Id.* at 19.

47. *Id.*

48. LAURA & JOHN ARNOLD FOUND., RESULTS FROM THE FIRST SIX MONTHS OF THE PUBLIC SAFETY ASSESSMENT – COURT IN KENTUCKY 3 (2014), <http://www.arnoldfoundation.org/wp-content/uploads/2014/02/PSA-Court-Kentucky-6-Month-Report.pdf> [<https://perma.cc/8QS4-CYSB>] (indicating that the New Violent Criminal Activity category is associated with an 8.6% likelihood of arrest for a violent charge).

49. *Id.*; Matt Alsdorf, Laura & John Arnold Found., *Public Safety Assessment—Court 2*, 6, <https://www.ncsc.org/~media/Microsites/Files/PJCC/NCSC%20DC%20Presentation.ashx> [<https://perma.cc/3AF2-8C64>]. In the context of pretrial release, “success” may be defined as when an individual “appear[s] for court and/or is not rearrested during the pretrial period.” Buskey & Woods, *supra* note 45, at 19.

50. *See supra* Part I.

51. *See* Sandra G. Mayson, *Bias In, Bias Out*, 128 YALE L.J. 2218, 2252 n.114 (2019).

52. *Id.* at 2251–52.

53. Buskey & Woods, *supra* note 45, at 19.

rather than on the risks courts must assess in bail hearings, which are more akin to lightning strikes.

Even accepting that risk assessments may provide valuable insight for pretrial detention—a proposition civil rights groups and community organizers are increasingly rejecting⁵⁴—there remains the question of how much risk society must accept when it releases someone who has been arrested prior to trial. Here, we encounter an information gap and a normative gap. As to information, it is likely surprising to learn that 91% of individuals flagged for a violent offense under a tool like the PSA are never rearrested for a violent offense.⁵⁵

That leaves the normative gap. Considering the significance of the violence flag, one must ask whether a 91% chance of success is high enough to warrant release if failure means the person may commit a violent offense or at least be re-arrested for one. What about 95%? 98%? These are hard normative questions beyond the province of actuarial science. They are questions for us, not the tools.

Acknowledging this limitation, tool advocates insist the instruments are merely one tool out of many needed to reduce pretrial detention and that they may help guide judges to more rational pretrial decisions.⁵⁶ Perhaps this is true, but research has not yet borne out this proposition. Early research indicates that judges are prone to detain when a tool classifies someone as high risk, but that judges are also likely to detain *despite* a tool classifying someone as low risk.⁵⁷ These results are consistent with a wealth of behavioral economic research demonstrating that people are systematically bad at rationally evaluating risk and frequently resort to emotional biases to make risk-based decisions.⁵⁸

For those deemed high risk, this research suggests that a judge is likely to substitute the hard question of whether the person presents an unmanageable risk of dangerousness for an easier question: whether the tool classifies the person as high risk. If true, far more than 9% of those flagged for a new violent offense will be detained. For those deemed low risk, the judge may tend to revert to her instincts rather than risk being in a headline for the next notorious

54. *More Than 100 Civil Rights, Digital Justice, and Community-Based Organizations Raise Concerns About Pretrial Risk Assessment*, LEADERSHIP CONF. ON CIV. & HUM. RTS. (July 30, 2018), <https://civilrights.org/more-than-100-civil-rights-digital-justice-and-community-based-organizations-raise-concerns-about-pretrial-risk-assessment/> [http://perma.cc/NC5S-QV87].

55. See LAURA & JOHN ARNOLD FOUND., *supra* note 48, at 3.

56. *E.g., Risk Assessments, When Paired with Appropriate Policies, Can Contribute Significantly to Pretrial Reform*, ARNOLD VENTURES (July 1, 2019), <https://www.arnoldventures.org/newsroom/risk-assessments-when-paired-with-appropriate-policies-can-contribute-significantly-to-pretrial-reform/> [https://perma.cc/J2PG-WSMG].

57. Megan Stevenson, *Assessing Risk Assessment in Action*, 103 MINN. L. REV. 303, 352–57 (2018).

58. See generally DANIEL KAHNEMAN, *THINKING, FAST AND SLOW* (2nd ed., 2013) (discussing how emotions impact decisionmaking in all aspects of life, including evaluating risk).

crime. That means far more in the low-risk group will also be detained than what the tool would recommend. More recent studies of Kentucky's bail system, one of the first to adopt risk assessments generally and the PSA specifically, corroborate these concerns.⁵⁹

At a minimum, these patterns provide compelling evidence that tool designers must abandon the nomenclature of risk. Labeling someone as "high risk" may accurately place her in the group with the highest rate of pretrial failure. However, as the PSA example demonstrates, the high-risk group may not be high risk at all for the purposes of determining an individual's pretrial fate. We also need more research on how well judges understand and apply the results of risk assessments. Most importantly, we must assess the type and degree of risk we require for pretrial decisions against the type and degree of risk actuarial tools are able to measure. The size of the gap between the two should decide what role we assign to risk assessments, if any.

CONCLUSION

Our failure to address the role of risk in bail decisions threatens the same predicament reformers strive to avoid in abandoning money bail: a system that over-detains pretrial arrestees because it lacks a rigorous threshold for risk and a mechanism for holding judges accountable to that threshold. Overcoming this threat requires the Supreme Court to settle the legal standard for preventive detention beyond money bail and society to reckon with the norms of risk tolerance beyond the labels of risk assessment instruments. How we engage these imperatives, not whether we end cash bail or build the ideal risk assessment, will decide the fate of pretrial reform.

59. See MEGAN T. STEVENSON & JENNIFER L. DOLEAC, AM. CONST. SOC'Y, THE ROADBLOCK TO REFORM 5 (2018), <https://www.acslaw.org/wp-content/uploads/2018/11/RoadblockToReformReport.pdf> [<https://perma.cc/2V3U-T3UP>] (noting that "if Kentucky judges had followed the recommendations associated with the risk assessment in all cases, the pretrial release rate among low- and moderate-risk defendants would have jumped up by 37 percentage points after risk assessments were made mandatory," but instead it only increased by four percentage points).