

---

## The Movement Against Pretrial Risk Assessment Tools is Gaining Momentum Due to Concerns of Ineffectiveness, Inefficient Use of Dollars, Racial and Other Protected-Class Bias, Transparency Issues, and Validity Concerns

December 10, 2020

Pretrial risk assessment tools are sold as an “evidence-based” solution to get everything we want concerning the pretrial release of criminal defendants: make the communities safer, reduce jail populations, increase appearance rates, solve racism, and fix many other issues in the system. The problem is that in practice that has simply not occurred, and there is great risk and growing evidence that pretrial risk assessments have simply made things worse.

While resources in the criminal justice system are extremely limited, it is time to ask a serious question as to whether in fact such resources are being wasted on pretrial risk assessments and the staff who implement them. Civil rights groups, academics, legislators, policy-makers and others have shifted from demanding that we fix the issues with pretrial risk assessment tools to instead simply stop using them altogether because the flaws are too great.

The following is a list of recent criticisms of such pretrial risk assessment tools:

- California voters in November, 2020 soundly rejected Proposition 25<sup>1</sup>, which would have used pretrial risk assessments to sort people into categories for purposes of implementing a no-money bail system. A bi-partisan coalition of groups from across the political spectrum opposed the law.<sup>2</sup>
- The Pretrial Justice Institute, the nations’ oldest pretrial reform institute, in February, 2020 reversed decades of support of pretrial risk assessment tools and is now advocating for a nation-wide end the use of such tools.<sup>3</sup>
- The website [www.pretrialrisk.com](http://www.pretrialrisk.com) was launched in 2020 by the Media Mobilizing Project to detail the issues and problems with pretrial risk assessments and call for the repeal of their use.
- The ACLU of Colorado, in October, 2020, issued a report entitled *Dangerous, Misleading and Biased: A Letter on Pretrial Risk Assessment Tools in Colorado*.<sup>4</sup> In the report, the ACLU details a litany of problems with the Colorado pretrial risk assessment tool and calls for its abolition.
- In August, 2019, **twenty-seven prominent academics from prominent universities issued a statement that jurisdictions must stop using pretrial risk assessment tools because they do**

---

<sup>1</sup> <https://ambailcoalition.org/california-voters-uphold-the-right-to-bail-and-reject-the-no-money-bail-system-and-pretrial-risk-assessments/>

<sup>2</sup> <https://ambailcoalition.org/download/169/ca-proposition-25/5832/no-on-prop-25-coalition-list-11-3-20-final.pdf>

<sup>3</sup> <https://ambailcoalition.org/download/29/risk-assessment-opposition-statements/5833/the-case-against-pretrial-risk-assessment-instruments-pji-2020.pdf>

<sup>4</sup> <https://ambailcoalition.org/download/29/risk-assessment-opposition-statements/5834/dangerous-misleading-and-biased-a-letter-on-pretrial-risk-assessment-tools-in-colorado.pdf>

**not accurately predict, they are racially biased, and they cannot be fixed.**<sup>5</sup> The same researchers then sent letter to three jurisdictions demanding that they cease using the tools.<sup>6</sup>

- In 2018, 100 national civil rights groups, including the NAACP and ACLU, issued a statement cautioning jurisdictions to not use the tools due to concerns of racial bias and validity, and then demanding transparency if the tools are to be used.<sup>7</sup>
- In 2020, Ben Green of Harvard University published an article where he concluded that “risk assessments are an ill-advised tool for challenging the centrality and legitimacy of incarceration within the criminal justice system.”<sup>8</sup>
- Academic research indicates that proprietors of these tools pursuant the common law are able to shield the underlying mathematics and data of these tools not only from the public but from criminal defendants who seek to expose the ineffectiveness of these tools in court when it means jail or freedom.<sup>9</sup>
- A 2020 article noted that research has found that pretrial risk assessments have not reduced pretrial incarceration as promised.<sup>10</sup>
- In 2019, Alex Albright of Harvard University found that based on data in Kentucky, that risk assessments reinforced and increased racial bias rather than reduced it.<sup>11</sup> “I use this paper to show that, counter to intuition, the **introduction of risk score recommendations can increase racial disparities for individuals with the same risk level.**”
- Over 100 civil rights groups in New York State opposed the expansion or use of pretrial risk assessment tools.<sup>12</sup>
- The ACLU of Kansas issued a powerful rebuke of risk assessment tools to a judiciary led task force looking at bail reform.<sup>13</sup>

---

<sup>5</sup> <https://ambailcoalition.org/download/24/risk-assessments/4956/technical-flaws-of-pretrial-risk-assessments.pdf>

<sup>6</sup> <https://ambailcoalition.org/download/29/risk-assessment-opposition-statements/4976/california-researchers-rat-warning.pdf>

<sup>7</sup> <https://ambailcoalition.org/download/29/risk-assessment-opposition-statements/863/110-civil-rights-groups-pretrial-risk-assessment-full.pdf>

<sup>8</sup> <https://ambailcoalition.org/download/24/risk-assessments/5835/the-false-promise-of-risk-assessments-epistemic-reform-and-the-limits-of-fairness.pdf>

<sup>9</sup> <https://ambailcoalition.org/download/24/risk-assessments/5836/life-liberty-and-trade-secrets-intellectual-property-in-the-criminal-justice-system.pdf>

<sup>10</sup> <https://theappeal.org/new-data-suggests-risk-assessment-tools-have-little-impact-on-pretrial-incarceration/>

<sup>11</sup> <https://ambailcoalition.org/download/24/risk-assessments/5837/if-you-give-a-judge-a-risk-score-evidence-from-kentucky-bail-decisions.pdf>

<sup>12</sup> <https://ambailcoalition.org/download/29/risk-assessment-opposition-statements/864/new-york-100-community-leaders-bail-reform-letter.pdf>

<sup>13</sup> [https://ambailcoalition.org/download/29/risk-assessment-opposition-statements/4646/aclu\\_presentation-kansas.pdf](https://ambailcoalition.org/download/29/risk-assessment-opposition-statements/4646/aclu_presentation-kansas.pdf)

- In February, 2020, Human Rights Watch issued a letter to the California Judicial Council, demanding an end to pretrial risk assessments in California.<sup>14</sup>
- Eighty digital groups, including Google, Facebook, IBM, Samsung, etc. issued a statement saying that they believe the assessments potentially bake-in existing bias into the system and prevent real change.<sup>15</sup>
- One scholar's research shows that risk assessment algorithms have contributed to generational mass incarceration, rather than the suggestion that these algorithms actually reduce it.<sup>16</sup>
- The legislature of the State of Iowa passed legislation that ended a pilot project of the Arnold Foundation PSA in Iowa, which was endorsed by the Governor, due to concerns which we have seen coast-to-coast that the tool is too soft on gun cases, is not transparent and may be potentially biased.
- The ACLU of Colorado at a recent legislative hearing in the House Judiciary Committee considering the statewide expansion of risk assessments in H.B. 19-1226, testified that the Colorado CPAT tool violated the Americans With Disabilities Act because it scored those with current or previous mental health or substance abuse disorders as higher risk, increasing the chances they would stay in jail or face greater supervision by county agencies. Many of the existing tools suffer from the same issues.
- In a landmark peer-reviewed study, Professor Megan Stevenson of George Mason University School of Law, after reviewing significant data from various jurisdictions, concluded that in practice the tools had a negligible if any effect on jail populations and increased slightly the risk of failing to appear in court as required and the risk of committing new crimes while on bail.<sup>17</sup>
- New Jersey claims the success of the Arnold Foundation Public Safety Assessment algorithm, but even if the jail population drop could be attributed to bail reform, there is no indication that the use of the algorithm is the reason there is an impact versus forcing prosecutors to have to prove detention has driven more releases.
- No one has been able to demonstrate that the investment of government resources into the risk assessment process has resulted in any savings, much less savings significant enough to offset the cost of doing the risk assessment in the first place.
- The Chief Justice of Ohio, as chair of a task force, recommended that the enabling legislation of the Ohio Risk Assessment Tool (ORAS), upon which the Indiana IRAS tool is based, be repealed and instead allow individual counties and judges to select their own. **The Ohio Senate then**

---

<sup>14</sup> <https://ambailcoalition.org/download/29/risk-assessment-opposition-statements/5838/human-rights-watch-statement-to-the-california-judicial-council-pretrial-reform-and-operations-workgroup.pdf>

<sup>15</sup> <https://ambailcoalition.org/download/24/risk-assessments/4766/report-on-algorithmic-risk-assessment-tools.pdf>

<sup>16</sup> <https://ambailcoalition.org/download/24/risk-assessments/835/performance-effects-risk-tech-robert-werth-rice-university.pdf>

<sup>17</sup> <https://ambailcoalition.org/download/24/risk-assessments/828/assessing-risk-assessment-in-action.pdf>

---

**introduced SB 353 in late 2020, which would over-rule the ORAS enabling act and start over with new tools.** The current ORAS tool, now used in 11 states, has never been re-validated, and the original validation study considered only a total 4 persons in the data set of high-risk categories 8 and 9, which the original validation study pointed out was a problem. This problem has never been corrected.

- The Idaho Legislature passed legislation, Idaho House Bill 118,<sup>18</sup> that Governor Little signed into law, to require the pretrial risk assessments to be fully transparent and to eliminate the ability for the algorithms to be proprietary and enjoy the ability to quash discovery requests in a criminal case. John Arnold, of the Arnold Foundation, in fact supported that legislation, and yet states and jurisdictions like Michigan, New Jersey, Toledo, Ohio, etc. all have contracts that still maintain and allow the proprietary protections. No other legislature in the nation has yet to act on this.
- 50 Civil Rights groups, including the ACLU and San Francisco public defender, opposed the passage of California’s Senate Bill 10<sup>19</sup>, largely on grounds of opposition to the risk assessment and expansion of preventative detention.
- A recent article on Wired.com noted that the Kentucky experiment with the use of the Arnold Foundation algorithm based on empirical research has failed.<sup>20</sup>

In short, there is no reason at this point to believe that pretrial risk assessments will reduce jail populations, save money, make the system fairer (largely due to bias issues), reduce crimes while on bail, or reduce failures to appear in court as required. In practice, the risk assessment era has failed over the last decade or deliver on its promises, and we believe it is time for it to come to an end.

---

**Contact Information:**

Jeffrey Clayton, M.S., J.D.  
Executive Director  
(877) 735-2240  
[jclayton@americanbail.org](mailto:jclayton@americanbail.org)

---

<sup>18</sup> <https://legislature.idaho.gov/wp-content/uploads/sessioninfo/2019/legislation/H0118.pdf>

<sup>19</sup> <https://ambailcoalition.org/download/29/risk-assessment-opposition-statements/863/110-civil-rights-groups-pretrial-risk-assessment-full.pdf>

<sup>20</sup> <https://www.wired.com/story/algorithms-shouldve-made-courts-more-fair-what-went-wrong/>