

NEW YORK UNIVERSITY LAW REVIEW

VOLUME 95

OCTOBER 2020

NUMBER 4

SYMPOSIUM

THE PETER PARKER PROBLEM

W. DAVID BALL*

Sandra Mayson, in her article Dangerous Defendants, points out the ways in which pretrial detention on the basis of public safety risk violates the “parity principle”—a measure of decisionmaking fairness that evaluates whether individuals of like risk are treated alike. As Mayson convincingly argues, if public safety risk is what justifies detention of those who have been arrested, it should also justify preventative detention of similarly risky people who remain in the community at large. In other words, merely having a person in custody does not logically change the analysis of the risk they present or what should be done with them.

In this Article, I argue that psychological factors, not assessments of risk, can explain why the parity principle is violated. A person in custody and a person in the community may present the same level of public safety risk, but the human brain typically uses heuristics, not calculations, to make decisions. Our brains want to minimize losses and regret. Whenever something bad happens, our brains automatically generate counterfactuals—the “if only I had done X” hypotheticals that allow us to imagine (and believe in) a world where tragedy would have been avoided. Counterfactuals that eliminate harm are easy to generate when someone is in custody, but hard to generate when someone is at large, and our brains conflate ease of generation with real-world probability. Counterfactuals, then, may help explain why the pretrial, public safety default seems to be to keep someone locked up, “just in case”—and why this desire is resistant to information and argument.

* Copyright © 2020 by W. David Ball, Professor, Santa Clara University School of Law. My profound thanks to the many people who read early drafts of the article, including participants in the Santa Clara Faculty Workshop, the Southwest Criminal Legal Scholars Conference, and CrimFest. I benefited from the excellent research assistance of Tiffany Uhri Chu and Dustin Weber, as well as extremely comprehensive (and patient!) editorial advice from the staff of the *New York University Law Review*. I would also like to thank two mentors of mine who were instrumental in helping me develop my critical thinking acumen: Joan Petersilia and my father, Byrd Ball, both of whom passed away in the fall of 2019. I miss them both dearly and hope that this Article and future scholarship does them justice.

This Article adds an important dimension to the ongoing debates about whether judicial discretion or actuarial tools should govern pretrial release decisions. Judicial discretion may be biased towards incapacitation by operating on the “gut level” of psychology—even if the harms of detention outweigh the benefits. Across the United States, jails contain thousands of prisoners who could be released safely, who could resume work and the rest of their lives, but who remain incarcerated because of the fear that one of them might commit a sensational crime. The insights of this Article may also apply more generally to a host of similar problems, including parole release, executive clemency, diversion programs, and the removal of children from potentially abusive parents, and suggest that policymakers and reformers be cognizant of the way in which current criminal justice thinking is short-sighted, overly reactive, and biased towards incapacitation. By applying theories of the counterfactual proposed by Neal Roese and other behavioral psychologists, the Article provides an explanation for why, even when regulations change, judicial decisions to release arrestees may remain low. It suggests that experimental research specifically targeting judicial counterfactual thinking should be conducted.

INTRODUCTION	880
I. INVOKING RISK WITHOUT DEFINING IT	889
II. COUNTERFACTUALS ARE AUTOMATIC AND INVISIBLE ..	895
A. <i>Counterfactual Activation: Dealing with Pain by Generating Counterfactuals</i>	898
B. <i>Counterfactual Content: What Painful Lessons We Think We’ve Learned</i>	901
C. <i>An Alternative Scenario: Peter’s Catch and Release</i>	904
III. COUNTERFACTUALS AND CRIMINAL JUSTICE	908
IV. WHAT CAN BE DONE?	912
A. <i>Systems, Not Cases</i>	914
B. <i>Reducing Counterfactual Pressures on Judges</i>	915
C. <i>New Narratives</i>	917
CONCLUSION	917

INTRODUCTION

Arrestees can be detained prior to trial on the basis of either a concern about their failure to appear at future court dates or their potential dangerousness.¹ Professor Sandra Mayson, noting that the “core concern” of pretrial detention is future dangerousness,² demonstrates in her article *Dangerous Defendants* that our current practices fail the “parity principle”—a measure of decisionmaking fairness that evaluates whether individuals of like risk are treated alike.³ As she

¹ Though the two are often, unfortunately, merged. See, e.g., Lauryn P. Gouldin, *Disentangling Flight Risk from Dangerousness*, 2016 *BYU L. REV.* 837, 842 (noting “judges’ muddling of flight risk and dangerousness in the pretrial process”).

² Sandra G. Mayson, *Dangerous Defendants*, 127 *YALE L.J.* 490, 493 (2018).

³ *Id.* at 499.

argues, there is nothing about the act of arrest itself—legally, evidentially, or otherwise—that requires us to treat those who are in jail differently from those of equal risk who are not in jail.⁴ Mayson acknowledges that our existing tools and standards for assessing risk are imprecise;⁵ her argument, instead, is that even if the system perfectly captured risk, it makes no sense to use risk only to oppose release and not also as a reason to apprehend: “If dangerousness alone can indeed justify detention at some level of risk, then the parity principle permits pretrial preventive detention at that threshold.”⁶ After all, not releasing someone from detention and putting them into detention amount to the same thing: that person is behind bars. And releasing someone and not apprehending them also amount to the same thing. So why do decisionmakers treat these two types of decisions so differently?

The answer this Article explores is that human beings don’t always stop to weigh costs, benefits, and risks rationally. The human brain is optimized for efficiency and employs decisionmaking methods that consume the fewest resources.⁷ These shortcuts, called heuristics, diverge from rational calculations in several ways. Losses are felt more acutely than commensurate gains.⁸ Our brains focus on certain types of harms and certain types of causal stories.⁹ All of this takes place without our being conscious of it.¹⁰ We do not stop and reason every time we think we do; often, we use heuristics and trust their results.¹¹

⁴ See *id.* (“The parity principle holds that the state has no greater authority to preventively restrain a defendant than it does a non-defendant who poses an equal risk.”).

⁵ For instance, Mayson notes that “actuarial tools are far from perfect,” *id.* at 497, and that existing legal standards are “extremely vague,” *id.* at 507, and often “too vague to provide practical guidance,” *id.* at 561.

⁶ *Id.* at 501.

⁷ See Anuj K. Shah & Daniel M. Oppenheimer, *Heuristics Made Easy: An Effort-Reduction Framework*, 134 *PSYCHOL. BULL.* 207, 209 (2008).

⁸ Daniel Kahneman, Jack L. Knetsch & Richard H. Thaler, *The Endowment Effect: Evidence of Losses Valued More Than Gains*, in 1 *HANDBOOK OF EXPERIMENTAL ECONOMICS RESULTS* 939, 946–47 (Charles R. Plott & Vernon L. Smith eds., 2008) [hereinafter *The Endowment Effect*] (“[I]ndividuals value losses far more than otherwise fully commensurate gains.”).

⁹ See generally Neal J. Roese, *Counterfactual Thinking*, 121 *PSYCHOL. BULL.* 133 (1997) (discussed at length in Part II, *infra*).

¹⁰ See Jon Hanson & David Yosifon, *The Situational Character: A Critical Realist Perspective on the Human Animal*, 93 *GEO. L.J.* 1, 8 (2004) (arguing that we overstate the amount of individual control we have over our thoughts and underestimate the degree to which our actions follow our reasons); see also Roese, *supra* note 9, at 135 (describing “automatic counterfactual thoughts” as “those that apparently pop into mind without conscious intent”).

¹¹ See, e.g., ELIEZER YUDKOWSKY, MACH. INTELLIGENCE RESEARCH INST., *COGNITIVE BIASES POTENTIALLY AFFECTING JUDGMENT OF GLOBAL RISKS* 17 (2008), <https://>

Consider this example of a decision that makes intuitive sense but which does not, upon reflection, withstand scrutiny.

A young man—call him Peter Parker—is in an upper-floor hallway of an office building one evening. Someone shouts “Stop! Thief!” Peter sees two people running towards him: a blond-haired man chased by a slow-moving police officer.¹² The blond-haired man runs past Peter and gets into a waiting elevator. Peter merely watches as the elevator doors close on the laughing face of the blond-haired man just as the officer arrives. Catching his breath, the officer asks Peter why he did nothing. Peter replies that it’s not his job.

Some time later, Peter’s beloved Uncle Ben is fatally shot during a robbery. Peter catches the killer and realizes it’s the very blond-haired thief he had the opportunity to stop, if only he had kept the elevator doors open or tripped him. Sobbing, Peter says, “If only I had stopped him when I *could* have! But I *didn’t*—and now—Uncle Ben—is dead. . . .”¹³

When Peter thinks about what he could have (and should have) done to save his uncle, he is engaged in counterfactual thinking. Counterfactuals are our minds’ thought experiments, ways of envisioning how our current situation might have been different “if only” we had done something different.¹⁴ Two of Peter’s responses are worth examining. The first is causal, as Peter makes sense of the tragedy, and the second is future-oriented, as Peter decides what to do to avoid the same heartbreak in the future.

First, Peter is sure he caused his uncle’s death—a conclusion with which many readers may instinctively agree. Upon closer examination, however, the case against Peter gets weaker. Peter may be inclined to focus on his agency—the role he played—when he did not stop the thief. But why is Peter the central actor in this story? Isn’t the main agent the thief himself? The thief decided to rob Uncle Ben, the thief decided to kill Ben when the robbery went wrong, and the thief decided in the first instance to become a thief. Second, while the thief did, in fact, kill Peter’s uncle, how was Peter to know that the man running past him that fateful night was even violent, much less a killer? There was no evidence of violence, and people who steal (and

intelligence.org/files/CognitiveBiases.pdf (noting that our use of heuristics makes us overconfident).

¹² Stan Lee & Steve Ditko, *Introducing Spider-Man*, AMAZING FANTASY, no. 15, 1962, at 8, <https://viewcomiconline.com/amazing-fantasy-1962-issue-15>.

¹³ *Id.* at 11.

¹⁴ See Kai Epstude & Neal J. Roese, *The Functional Theory of Counterfactual Thinking*, 12 PERSONALITY & SOC. PSYCHOL. REV. 168, 170 (2008) (describing how counterfactual thoughts can fuel corrective future behavior to avoid the current disfavored outcome from recurring).

leave witnessing police alive) aren't necessarily violent. Peter is being influenced by hindsight bias, the tendency to find an outcome more probable in retrospect once it has happened. Third, Peter's sense of responsibility is probably amplified by his physical proximity to the thief—he may have felt less remorseful if he had seen the chase take place across a city street, even if he were nevertheless still close enough to intervene.¹⁵

Peter's analysis focuses on a one-to-one relationship between cause and effect (if A, then B). Peter is not inclined to think in terms of multifactorial causes—say, how the thief's poverty combined with high unemployment for low-skilled laborers combined with easy access to firearms made Uncle Ben's murder more likely. Instead, Peter thinks about factors under his personal control,¹⁶ even though factors not in his control would also have prevented the murder. Peter does not say, "If only the elevator had been out of order," or "If only Uncle Ben had gotten food poisoning last night and not gone out of the house today," or "If only he had left five minutes later or five minutes earlier," or "If only the thief's gun had jammed." These other factors do not come as readily to mind. Peter knows he didn't have control over the elevator, so imagining it were out of order would do nothing to bring Uncle Ben back. But why is it that he thinks so hard about stopping the thief when merely thinking about it will also fail to bring Uncle Ben back?

Peter's impulse towards counterfactual thinking is motivated by a desire to avoid feeling this kind of grief in the future. The real pain Peter feels makes him want to do something.¹⁷ Of course, Peter could just decide never to let his surviving relatives leave his side. He could teach nonviolence or the importance of not resisting in the case of attempted robberies. He could promote a universal basic income to make property crimes less likely, or he could advocate on behalf of gun control. These solutions, however, require him to have identified

¹⁵ See DANIEL KAHNEMAN & AMOS TVERSKY, THE SIMULATION HEURISTIC 4–6 (1981) [hereinafter THE SIMULATION HEURISTIC] (arguing that there are "constraints on the freedom of fantasy" and that humans are better at imagining things that are more "possible"). For example, Kahneman and Tversky discuss that people are more likely to be upset when they just barely miss a flight by five minutes than they would be if they were to miss a flight by half an hour. See *infra* notes 107–08 and accompanying text for a discussion of a study demonstrating this phenomenon. See also Roese, *supra* note 9, at 136.

¹⁶ See Roese, *supra* note 9, at 139 (noting that the content of counterfactuals tends to focus on factors within individuals' personal control). This tendency, that human beings like to believe that our free choices are what cause real-world events (which Hanson and Yosifon call dispositionism), is ubiquitous. See Hanson & Yosifon, *supra* note 10, at 8.

¹⁷ See Roese, *supra* note 9, at 135 (noting that "counterfactual thinking may be triggered most often by negative emotional experience"); see also discussion at Part II, *infra*.

other causes of Uncle Ben's death. But Peter is likely to think of simple causes first and, once he has found them, he is likely to stick with them even in the presence of contradictory evidence.¹⁸ In this case, the simple causal story promotes simple solutions. Peter Parker decides to wear a spider costume and fight crime as Spider-Man.

Peter's decision to become a superhero surely seems ridiculous, but the way he thinks through Uncle Ben's death is not unusual, even among those of us who have not been bitten by radioactive spiders. Like Peter, we are more likely to generate counterfactuals when responding to something bad.¹⁹ The pain focuses the mind the way Peter's grief did. Like Peter, our brains tend to latch on to certain causal stories; we don't consider all possibilities, weigh them systematically, and select rationally.²⁰ Instead, we tend to "fixate on a focal outcome, which implicitly pushes [us] into many-to-one or even one-to-one assumptions about causation."²¹ The very fact of this simple explanation tends to make us more certain of its accuracy.²² Most often, the content of counterfactual stories puts our own agency at the center of what was needed to avoid tragedy.²³ We conflate the ease with which we can generate a particular counterfactual with its real-world probability.²⁴ And the "nearer" we feel we were to a desired outcome—for example, feeling so close to the thief that we could have touched him—the more intense our feelings are.²⁵

Criminal law is rife with situations that lend themselves to counterfactual thinking, where the temptation is to opt for simple, overly restrictive solutions "just in case" something bad might happen, even when the probability of these events is extremely remote. As long as it can be imagined, it may be considered. So, for example, California prison officials denied medical parole to a quadriplegic man

¹⁸ See Gregory Mitchell, *Case Studies, Counterfactuals, and Causal Explanations*, 152 U. PENN. L. REV. 1517, 1523 (2004) ("Social scientists would argue that causal stories provide, at best, innocently misleading portraits of the causes of behavior and, at worst, unavoidably partial stories biased by the writer's preexisting beliefs and values.").

¹⁹ See *supra* note 17 and accompanying text.

²⁰ See Neal J. Roese & Kathleen D. Vohs, *Hindsight Bias*, 7 PERSP. ON PSYCHOL. SCI. 411, 416 (2012) (discussing how humans stop generating alternative explanations after finding one plausible explanation).

²¹ *Id.* at 414.

²² See *id.* ("Indeed, the better the story, the greater the hindsight bias." (citation omitted)).

²³ See *id.* at 417 (noting that causal stories tend to gravitate toward individual choices).

²⁴ See THE SIMULATION HEURISTIC, *supra* note 15, at 4–6 (providing an example of outcome closeness and discussing its implications).

²⁵ See Adam J. Hirsch & Gregory Mitchell, *Law and Proximity*, 2008 U. ILL. L. REV. 557, 560 ("Proximate stimuli naturally evoke more active and intense responses than distal stimuli, and the harms associated with near misses are just as real, and often just as intense, as the harms associated with 'hits.'").

on the grounds that he posed a threat to public safety “just in case” he might “possibly use his vocal cords, which [were] not paralyzed, to order crimes, maybe attacks on state employees.”²⁶ Police officers stopped and frisked hundreds of thousands of mostly Black and Latinx people in New York “just in case” some of them had weapons, even though the overwhelming majority didn’t.²⁷ The Supreme Court held that it was reasonable to strip search someone wrongly arrested on a bench warrant “just in case” they were smuggling drugs—based on the fear that the defendant could have anticipated both the clerical error that resulted in the warrant and the timing of the arrest and secreted drugs in his rectum in advance.²⁸ Alan Dershowitz, a well-known law professor, argued that we should allow torture “just in case” we come across a situation where we know that there is a bomb, we know that it is going to go off soon, we know that the person we’ve detained knows all about it and won’t tell us unless we torture him—but, despite knowing almost everything about the scheme, we just don’t know where the bomb is.²⁹ And if these harms never arrive? We got lucky—this time—but we need to pursue the same course of action just in case it happens the next time.

²⁶ Tony Perry, *California Authorities Deny State’s First Medical Parole Case*, L.A. TIMES, (May 30, 2011), <https://www.latimes.com/local/la-xpm-2011-may-30-la-me-prisoners-20110530-story.html>.

²⁷ See *Floyd v. City of New York*, 959 F. Supp. 2d 540, 558–59 (S.D.N.Y. 2013). The opinion noted that between January 2004 and June 2012, over 4.4 million stop-and-frisk searches were conducted, of which 52% were followed by a search for weapons. *Id.* at 558. However, weapons were only found in 1.5% of those weapon searches. *Id.* Furthermore, of the total 4.4 million stops, 52% of the persons stopped were Black and 31% were Latinx, despite the fact that, in 2010, roughly 23% of the New York City population was Black and 29% was Latinx. *Id.* at 559.

²⁸ See *Florence v. Bd. of Chosen Freeholders*, 566 U.S. 318, 323–24, 327–28 (2012) (reciting the facts of the case and arguing that “detering the possession of contraband depends in part on the ability to conduct searches without predictable exceptions” and that “[i]nmates would adapt to any pattern or loopholes they discovered in the search protocol”).

²⁹ See Alan M. Dershowitz, *Opinion, A Choice of Evils*, BOS. GLOBE (Sept. 18, 2014), <https://www.bostonglobe.com/opinion/2014/09/17/torture-tool-fight-against-terrorist-groups-like-isis/1Tfqfk1Amck7Rh9kEra8IN/story.html>. Dershowitz’s argument is an unwitting example of the conjunction fallacy—the tendency to see a series of conjoined probabilities as more likely than a series of disjunctive possibilities. That is, humans tend to see scenarios with more facts as more probable than ones with less, even though the more facts there are, the less likely something is. See, e.g., Amos Tversky & Daniel Kahneman, *Extensional Versus Intuitive Reasoning: The Conjunction Fallacy in Probability Judgment*, 90 PSYCHOL. REV. 293, 297 (1983) (finding that human test subjects tend to violate the laws of probability in, for example, finding it more likely that someone is “a bank teller and . . . active in the feminist movement” than that she is “a bank teller,” even though the latter condition contains the former and must necessarily be more probable).

Counterfactual thinking is applicable to many decision points in the legal system such as release on parole,³⁰ failure to remove a child from abusive parents,³¹ or furloughing a prisoner to a work-release program.³² This Article, however, focuses on pretrial release decisions because they are particularly rich soil for the seeds of counterfactual thinking. Judges often consider what would happen if they release someone pretrial who then goes on to commit a heinous crime such as murder. This “what if something bad happens?” scenario, the negative alternative to the existing world, activates counterfactual thinking, even though it is a product of the imagination. As stated above, when we envision what might cause crime we are likely to envision a simple, one-to-one cause and conflate the ease with which we generate the cause with its likelihood. Our simplest explanation is that something abnormal caused the result.³³ Because inactions are seen as normal and actions as abnormal, when a judge decides to release someone and something bad happens, our counterfactuals focus on mentally undoing the release.³⁴ All counterfactuals contain implicit causal stories;³⁵ this one would be that the judge was responsible for what happened because of the detainee’s release.³⁶ Because we can easily envision not letting someone out, we think that at the time the decision was made, the riskiness involved in release should have been apparent, the way Peter should have “known” a man running from the

³⁰ See, e.g., RACHEL ELISE BARKOW, PRISONERS OF POLITICS: BREAKING THE CYCLE OF MASS INCARCERATION 75–76, 83 (2019) (“[The endowment effect] helps explain why the public is so much angrier when someone who was released early [on parole] goes on to commit a crime than it is over the consistently high recidivism rates that exist for people who serve their full sentences.”).

³¹ See, e.g., Daniel Heimpel, *In Aftermath of Latest Child Death, L.A. Contends with Potential Foster Care Panic*, CHRON. SOC. CHANGE (Aug. 13, 2019), <https://chronicleofsocialchange.org/featured/after-latest-child-death-l-a-contends-with-foster-care-panic/36912> (describing the phenomenon of “foster care panic,” when the failure of one social worker to remove a child from a dangerous home leads to an increase in other social workers causing children to be removed from homes).

³² See, e.g., BARKOW, *supra* note 30, at 66–67 (“These [work-release and halfway house] programs pose the classic Willie Horton problem: if one individual in the program commits a violent crime, the clamor for the program’s abolition overwhelms the facts about its overall success rates.”).

³³ Cf. Roese, *supra* note 9, at 135 (“[N]ormality (i.e., whether circumstances surrounding the outcome are ‘normal’ or unusual) is the main determinant of content [of a counterfactual thought].”).

³⁴ See *id.* at 138 (describing how “counterfactuals may well gravitate more toward actions than inactions” (citation omitted)).

³⁵ See *id.* at 141 (“Counterfactuals . . . imply causal conclusions.”).

³⁶ See *id.* at 142 (discussing the ways in which counterfactuals influence the attribution of blame).

police was capable of murder.³⁷ This means that judges are likely to give more weight to the probability of pretrial crime than is supported by the evidence.

We thus arrive at an explanation of why pretrial detention practices violate Mayson's "parity principle": our brains treat letting someone "out" who is already "in" very differently from failing to put an equally risky person "in" who is already "out."³⁸ Judges are reluctant to make discretionary decisions to release a given individual pretrial because they worry what might happen if that individual commits a crime. Judges do not focus on the foregone social benefits of releasing individuals to resume their normal lives. My argument here is not that the calculations are somehow off; my argument is that calculations of any kind are not driving these decisions. As Professors Jonathan Baron and Ilana Ritov summarize in their research on counterfactuals, "Most of our results can be accounted for by a heuristic rule: avoid acts that lead to harm (compared to the outcome of omissions) even when they are compensated by benefit (again, compared to the outcome of omissions)."³⁹ Based on these heuristics, it is better to do nothing than to release someone who goes on to cause harm, even if the social benefit is greater, in the aggregate, from more permissive pretrial release practices. This is compounded by the fact that "overestimation and overweighting may both operate to increase the impact of rare events."⁴⁰

If all that were at stake were the violation of the parity principle, perhaps we could live with it. The problem is that, in focusing on the possible harms of release, judges create definite harms from detention. These harms include those caused by family separation, loss of family income, inability to continue schooling, interruption of drug treatment,⁴¹ as well as the potential of victimization in jail.⁴² Indeed,

³⁷ See *id.* ("[E]xplanation breeds certainty. Several experiments have shown that causal attributions influence the hindsight bias, such that explanatory clarity increases hindsight certainty.").

³⁸ See Mayson, *supra* note 2, at 557.

³⁹ Jonathan Baron & Ilana Ritov, *Reference Points and Omission Bias*, 59 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 475, 497 (1994).

⁴⁰ Daniel Kahneman & Amos Tversky, *Prospect Theory: An Analysis of Decision Under Risk*, 47 ECONOMETRICA 263, 281 (1979) [hereinafter *Prospect Theory*].

⁴¹ See *Barker v. Wingo*, 407 U.S. 514, 532–33 (1972) ("[Pretrial detention] often means loss of a job; it disrupts family life; and it enforces idleness. Most jails offer little or no recreational or rehabilitative programs. The time spent in jail is simply dead time.").

⁴² See, e.g., Josh Voorhees, *A City of Convicts*, SLATE (June 30, 2014, 9:07 AM), <https://slate.com/news-and-politics/2014/06/prison-crime-rate-the-u-s-violent-crime-rate-is-falling-partly-because-the-justice-department-ignores-the-countless-crimes-that-take-place-in-prisons.html> (describing the violence that occurs in prisons, such as physical and sexual assault, rape, and homicide and commenting that the majority of such crimes are unreported or unrecorded).

we can only be “sure” that someone behind bars will not commit crimes because U.S. crime statistics do not cover crimes committed by prisoners in custody.⁴³

Though these harms are substantial, they are less salient in the minds of the judges who are making these decisions because it is harder to keep them front of mind. The simplicity and naiveté of the Peter Parker Problem is, in fact, what is useful about studying it. It is just a comic, but simpler, causal stories have a greater hold on our minds.⁴⁴ It is the reason that we still, more than 30 years later, discuss a prisoner who was furloughed to a work detail in Massachusetts in the 1980s. His name was Willie Horton, and, during the presidential campaign of 1988, the fact that he assaulted and raped someone was used in a successful ad campaign against Democratic nominee Michael Dukakis, who was governor at the time of the crime.⁴⁵ The singular failure of Horton’s furlough overshadowed the fact that more than ninety-nine percent of participants were furloughed without incident.⁴⁶

So why do these stories have such a hold on us? Why do we still talk about Willie Horton? And, once we answer that, what can we do to counteract the problems caused by heuristic thinking?

The literature on regret and counterfactuals adds insight into why crime victim stories are so salient while the harms to those in jail awaiting trial are not. Why do only some kinds of public safety—speculative losses, not sure ones—count? Why do we not ever say, “If only we had treated Adverse Childhood Experiences (ACEs)⁴⁷ before someone self-soothed by abusing alcohol and other drugs!”—even though such an outcome is almost inevitable? Why do we not regret our failure to invest in quality preschool, given that it substantially reduces criminal activity for the rest of someone’s life?⁴⁸ And why

⁴³ See *id.* (“[C]ountless crimes go unreported [in U.S. prisons] and the relatively few that are recorded end up largely ignored.”).

⁴⁴ See *supra* notes 20–22 and accompanying text for a discussion of how the human mind tends to latch on to a singular and simple causation narrative rather than conduct a sophisticated analysis of a multitude of possible responsible factors.

⁴⁵ BARKOW, *supra* note 30, at 6.

⁴⁶ *Id.* For recent examples of similar rollbacks of successful programs in Arkansas and Illinois, see *id.* at 6, 67.

⁴⁷ See, e.g., Shanta R. Dube, Vincent J. Felitti, Maxia Dong, Daniel P. Chapman, Wayne H. Giles & Robert F. Anda, *Childhood Abuse, Neglect, and Household Dysfunction and the Risk of Illicit Drug Use: The Adverse Childhood Experiences Study*, 111 PEDIATRICS 564, 564 (2003) (finding that each instance of an adverse childhood experience increased the likelihood of illicit drug use).

⁴⁸ See, e.g., LAWRENCE J. SCHWEINHART, JEANNE MONTIE, ZONGPING XIANG, W. STEVEN BARNETT, CLIVE R. BELFIELD & MILAGROS NORES, *THE HIGH/SCOPE PERRY PRESCHOOL STUDY THROUGH AGE 40: SUMMARY, CONCLUSIONS, AND FREQUENTLY ASKED QUESTIONS* 5 (2005), <http://nieer.org/wp-content/uploads/2014/09/>

does one question about pretrial release—“What if I release someone and something bad happens?”—play such an outsized role that it is often the most important (or even the only) consideration?

I will begin the analysis in Part I by setting out the problem: that the legal regime governing detention on the basis of dangerousness lends itself to an unwarranted fixation on the possibility of crime. In Part II, I will summarize relevant research from behavioral psychology that sheds light on why human decisionmaking is not likely to be made on the basis of reason or evidence-based public safety optimization. I will focus on Neal Roese’s work on counterfactuals, supplementing a discussion of his work with other insights from the field. Part III applies the research to pretrial release, specifically evaluating how these heuristics make a full consideration of the consequences of detention and release extremely difficult. Part IV concludes by figuring out how we might incorporate these insights into pretrial population management. My main suggestion is that we build a pretrial system around a release default. This default, however, must be a true, hard rule that mandates a defendant’s release, not a soft norm. In this regime, doing nothing leads to release; decisions must be made (and actions taken) to detain someone. Asking judges to second-guess themselves in advance, the way the current system does, distorts pretrial decisionmaking.

I

INVOKING RISK WITHOUT DEFINING IT

Current pretrial regimes invoke public safety risk without defining it, making it easier for automatic decisions made out of fear to masquerade as rational, balanced ones. In *United States v. Salerno*,⁴⁹ a prisoner who was detained pretrial under the Bail Reform Act of 1984 argued that he was detained in contravention of the Due Process Clause of the Fifth Amendment and the Excessive Bail Clause of the Eighth Amendment.⁵⁰ Salerno was detained under Section 3142(e) of the Act, which permits detention upon a finding “that no condition or combination of conditions will reasonably assure . . . the

specialsummary_rev2011_02_2.pdf (finding that preschool programs for children in poverty led to participants committing fewer crimes as young adults and later in life).

⁴⁹ 481 U.S. 739 (1987).

⁵⁰ *Id.* at 746. The Due Process Clause of the Fifth Amendment holds that “No person shall . . . be deprived of life, liberty, or property, without due process of law . . .” U.S. CONST. amend. V. The Excessive Bail Clause of the Eighth Amendment provides “Excessive bail shall not be required . . .” *Id.* amend. VIII.

safety of any other person and the community”⁵¹ The Supreme Court held that detention on the basis of future dangerousness was constitutional.⁵² Salerno maintained that “pretrial detention on the ground that the arrestee is likely to commit future crimes” was “unconstitutional on its face.”⁵³ The Supreme Court disagreed. While the majority reaffirmed the idea that “[i]n our society, liberty is the norm, and detention prior to trial or without trial is the carefully limited exception,” it nevertheless held that Salerno’s case was one such “carefully limited exception.”⁵⁴ There are no published statistics outlining how many people are detained pretrial on the basis of dangerousness: twenty-two states, the District of Columbia, and the federal system allow such detentions,⁵⁵ but data about the various entities in the criminal legal system is fragmented.⁵⁶ We know that the majority of the jail population is made up of people detained pretrial,⁵⁷ and that most of those detained are there because they cannot afford to pay financial terms of release.⁵⁸ These financial terms may be set unaffordably high, however, on the basis of public safety risk: judges in all but four states may consider the threat that a person awaiting trial may pose to public safety when setting the amount of money bail.⁵⁹

⁵¹ *Salerno*, 481 U.S. at 742 (quoting the Bail Reform Act of 1984, 18 U.S.C. § 3142(e) (amended 2008)).

⁵² *Id.* at 741.

⁵³ *Id.* at 744.

⁵⁴ *Id.* at 755.

⁵⁵ CRIMINAL JUSTICE POLICY PROGRAM, HARVARD LAW SCH., MOVING BEYOND MONEY: A PRIMER ON BAIL REFORM 25 (2016), <http://cjpp.law.harvard.edu/assets/FINAL-Primer-on-Bail-Reform.pdf> (citation omitted). For a historical analysis of the effect of *Salerno* on state preventive detention statutes, see generally Michael W. Youtt, *The Effect of Salerno v. United States on the Use of State Preventive Detention Legislation: A New Definition of Due Process*, 22 GA. L. REV. 805 (1988).

⁵⁶ See WENDY SAWYER & PETER WAGNER, PRISON POLICY INITIATIVE, MASS INCARCERATION: THE WHOLE PIE 2020 (Mar. 24, 2020), <https://www.prisonpolicy.org/reports/pie2020.html> (discussing the difficulty of aggregating data due to the disparate collection practices of American penal systems).

⁵⁷ See *id.* (finding seventy-four percent of people are held in jail without conviction, but not breaking down these numbers into detention on the basis of dangerousness).

⁵⁸ Katherine Hood & Daniel Schneider, *Bail and Pretrial Detention: Contours and Causes of Temporal and County Variation*, 5 RSF 126, 126 (2019), <https://www.rsfojournal.org/content/rsfjss/5/1/126.full.pdf> (“[T]he overwhelming majority of pretrial detainees remain behind bars because they are unable to pay for the bail needed to secure their release”).

⁵⁹ ANDREW M. CUOMO, 2017 STATE OF THE STATE, at 180 (2017), <https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/2017StateoftheStateBook.pdf> (“[O]nly four states . . . do [] not allow judges to consider whether an individual poses a danger to the public if released.”).

But what does “risk to public safety” or “danger” mean? How risky is too risky? How much risk justifies what kind of restraints?⁶⁰ What is public safety—that is, which harms count? Does public safety include harms to people detained and their families, or just to potential victims of crime if those people are released? If someone is in jail and loses their job, does that mean a judge must reconsider the amount of bail, given that they may be more likely to commit property crimes and hence pose a greater danger to the public?

There are no definitive answers to these questions. A judge may have a classification from an actuarial tool (e.g., that the detainee is “high risk”), but that assessment is not data itself, even if it is based on data: it is a judgment.⁶¹ Even if the court has numbers that indicate *some* chance of re-arrest, these predictions are made within “very large ranges of likelihood,” meaning that “virtually everyone’s range of likelihood [of arrest] overlaps.”⁶² Even given the low standards of the legal profession when it comes to defining probability or certainty (e.g., the civil standard of preponderance of the evidence is often referred to in the Court of Federal Claims as “fifty percent plus a feather”⁶³), we don’t know what amount of pretrial risk justifies detention nor what evidence can substantiate that risk. Risks justifying pretrial detention are judged by a lesser standard than therapists’ liability in the civil context.⁶⁴ If a patient leaves a therapy session and kills or injures someone, a plaintiff must show that the therapist determined there was a “serious danger of violence to another” and failed to exercise “reasonable care to protect the

⁶⁰ Cf. Mayson, *supra* note 2, at 496 (commenting that there has been little public discussion determining the appropriate level of risk required to justify detention).

⁶¹ See SARAH PICARD, MATT WATKINS, MICHAEL REMPEL & ASHMINI KERODAL, BEYOND THE ALGORITHM: PRETRIAL REFORM, RISK ASSESSMENT, AND RACIAL FAIRNESS 8, https://www.courtinnovation.org/sites/default/files/media/document/2019/Beyond_The_Algorithm.pdf (“[A]ctual decisions drawing on risk assessments often rely on a simpler calculus: a risk threshold is established above which defendants are typically not considered appropriate candidates for straight release. . . . [And] defendants above this threshold are more likely to be recommended for pretrial supervision, bail, or a pretrial detention hearing . . .”).

⁶² CHELSEA BARABAS, RUHA BENJAMIN, JOHN BOWERS, MEREDITH BROUSSARD, JOY BUOLAMWINI & SASHA CONSTANZA-CHOCK, TECHNICAL FLAWS OF PRETRIAL RISK ASSESSMENTS RAISE GRAVE CONCERNS 2 (July 17, 2019), https://dam-prod.media.mit.edu/x/2019/07/16/TechnicalFlawsOfPretrial_ML%20site.pdf.

⁶³ See, e.g., *Pafford v. Sec’y of Human Health & Servs.*, No. 01-0165V, 2004 WL 1717359 (Fed. Cl. July 16, 2004).

⁶⁴ See, e.g., *Tarasoff v. Regents of the Univ. of Cal.*, 551 P.2d 334, 347 (Cal. 1976) (requiring that therapists disclose confidential patient communications if “essential to avert danger to others”).

intended victim.”⁶⁵ That is, the scenario has to be about a particular person and be particularly imminent. In criminal matters, however, it appears that general threats to the public are sufficient to detain someone on the basis of public safety risk.

Some scholars believe that we can explain rates of pretrial detention within a framework of rational, utility-maximizing decisionmakers working in similarly rational, utility-maximizing systems. To these scholars, the problems are due simply to disagreements or misapprehensions about costs, benefits, and risks. So, for example, Professor Crystal Yang argues that the accounting for costs and benefits of pretrial detention is incomplete, failing to account for, *inter alia*, the harms to people who are detained and their families.⁶⁶ She proposes changing this accounting so that judges will be able to make more accurate decisions.⁶⁷ Alternatively, Professor Kent Weaver argues that policymakers care not about maximizing social welfare but about maximizing their prospects for re-election.⁶⁸ Thus, even if a judge knows that society as a whole would benefit from more permissive pretrial release policies, it would be rational for her to detain based on what a subsequent crime might do to her political fortunes, especially since the public pays more attention to failures than successes. Both of these theories are compatible with Judge Learned Hand’s calculation ($B < PL$) in *Carroll Towing*—even if the probability of pretrial crime (P) is small, the losses from crime (L) may be sufficiently large such that the probability of crime times the magnitude of the losses from crime is greater than the cost (or burden) of detention (B).⁶⁹

These proposals are certainly desirable from a rational vantage-point—but what if the assumptions about rationality and utility-maximization are wrong? What if our decisions about risk aren’t cal-

⁶⁵ *Id.* at 340. But compare the therapeutic duty to warn about dangerous clients to, say, the duties of police officers to respond to an ongoing crime. In *Warren v. District of Columbia*, 444 A.2d 1 (D.C. 1981), for example, two women called the police two times while a third was being raped. The police failed to respond to the calls and all three women were robbed, beaten, and raped. In dismissing the women’s tort claim, the District of Columbia Court of Appeals held that there is, generally, no liability for failing to protect citizens from crime. *Id.* at 3.

⁶⁶ See Crystal S. Yang, *Toward an Optimal Bail System*, 92 N.Y.U. L. REV. 1399, 1404 (2017) (arguing that bail practices focus on benefits of pretrial detention while ignoring costs imposed upon defendants and society).

⁶⁷ *Id.* at 1492.

⁶⁸ Cf. R. Kent Weaver, *The Politics of Blame Avoidance*, 6 J. PUB. POL’Y 371, 373 (1986) (“[P]olicymakers will probably attempt not to maximize credit claiming net benefits but to minimize blame generating losses. . . . [because] constituencies are more sensitive to losses than to gains.”).

⁶⁹ *United States v. Carroll Towing Co.*, 159 F.2d 169, 173 (2d Cir. 1947) (describing the Hand formula).

culated at all—what if, instead, they are “psychological, not cognitive?”⁷⁰ If that is true, then better information is irrelevant. The problem isn’t that we calculate with erroneous values—the problem is that, many times, we are not calculating at all. More and better information won’t fix the problem if we do not use that information the way we think we do—and we, generally, believe that we are making rational decisions even when we are not.⁷¹

If decisions about whether to release pretrial detainees are made with reference to public safety risk, why do our minds—and our officials—focus primarily on speculative, low-probability, high-cost negative events? Why do we overlook the systemic—and certain—impacts of pretrial detention for the people who could be released without incident? If judges were, indeed, making their pretrial release decisions on strictly rational bases, we would expect to see much more discussion of the particular type of harm to be avoided and the likelihood of that harm. Instead, we have statements that make no reference to specific risks of specific crimes against specific people: just “risks to public safety.”

Expressions of judicial concerns about pretrial crime are myriad. The National Judicial College’s report on pretrial justice in criminal cases notes a “primary concern of judges: the risk that an individual will, if released, commit a violent offense. These judges are more concerned about the risk of violent behavior than about risks of possible nonappearance or the risk of additional minor, nonviolent criminal offenses.”⁷² Criminal justice researchers from MIT and Harvard

⁷⁰ Kevin Jon Heller, *The Cognitive Psychology of Circumstantial Evidence*, 105 MICH. L. REV. 241, 245 (2006).

⁷¹ Hanson and Yosifon argued that we assume information helps us make decisions, Hanson & Yosifon, *supra* note 10, at 18, delude ourselves about our degree of control over our own thoughts, *id.* at 33, and generate post hoc rationalizations to make sense of what we’ve done, *id.* at 45.

⁷² WILLIAM F. DRESSEL & BARRY MAHONEY, THE NAT’L JUDICIAL COLL., PRETRIAL JUSTICE IN CRIMINAL CASES: JUDGES’ PERSPECTIVES ON KEY ISSUES AND OPPORTUNITIES FOR IMPROVEMENT 5 (2013); see also Lynh Bui, *Reforms Intended to End Excessive Cash Bail in Md. Are Keeping More in Jail Longer, Report Says*, WASH. POST (July 2, 2018), https://www.washingtonpost.com/local/public-safety/reforms-intended-to-end-excessive-cash-bail-in-md-are-keeping-more-in-jail-longer-report-says/2018/07/02/bb97b306-731d-11e8-b4b7-308400242c2e_story.html (“In a time where judges are politically accountable, there’s a fear you’re going to release someone who will go on to commit a crime so there’s a lot of public pressure to detain people.” (quoting Colin Starger, law professor at the University of Baltimore)); *Long Jail Stays Flourish, Despite Bail Changes*, ASSOCIATED PRESS (July 1, 2019), <https://www.jacksonfreepress.com/news/2019/jul/01/long-jail-stays-flourish-despite-bail-changes> (“Judges are afraid that if a defendant released without paying money bail does something bad, the judge who released that person will be voted out of office.” (quoting Cliff Johnson, director of the MacArthur Center)); Editorial, *St. Louis Shows Promise for Bail Reform*, ST. LOUIS AM. (Dec. 13, 2018), http://www.stlamerican.com/news/editorials/st-louis-shows-promise-for-bail-reform/article_d4ddea1e-

reported that “[O]ne question, above all others, motivates judges’ decisions to release or jail someone before trial: Will this person commit a violent crime?”⁷³ They added, “This fear has led judges to systematically overestimate pretrial violence. Violent crime is quite rare. Even in cities with high crime rates *and* high rates of pretrial release, it’s uncommon for someone to commit violence while awaiting trial.”⁷⁴ The New Mexico Supreme Court also addressed this concern explicitly in an opinion from 2014:

We are not oblivious to the pressures on our judges who face election difficulties, media attacks, and other adverse consequences . . . particularly when there is no way to absolutely guarantee that any defendant released on any pretrial conditions will not commit another offense [N]o judge can predict the future with certainty or guarantee that a person will appear in court or refrain from committing future crimes. In every case, a defendant *may* commit an offense while out on bond, just as any person who has never committed a crime *may* commit one.⁷⁵

Judges confronting decisions about pretrial release have a lot more in common with Peter Parker than may be apparent on first blush. They fear negative outcomes, they think only in terms of one-to-one causes (jail is what stops crime), and, while they do not become superheroes, their decisions about how to solve their problems are similarly extreme. Indeed, even within the pretrial release decision itself, judges tend to assign multiple conditions of release—despite the fact that these conditions increase risks of failure and hurt public safety⁷⁶—“just to be on the safe side.”

The *Salerno* regime asks judges to weigh speculative, unquantifiable harms to the public, and, because they are human, judges tend to overly weight scenarios that are merely possible. It is, indeed, possible

fe60-11e8-8eb1-5f9c361b3504.html (citing the common, but unfounded, judicial fear that the accused will commit crimes while at liberty); Steven Zeidman, *CityViews: New York City’s ‘Serious’ Crime Problem*, CITYLIMITS (Mar. 26, 2018), <https://citylimits.org/2018/03/26/cityviews-new-york-citys-serious-crime-problem> (“Add to the mix a judge’s fear of being pilloried in the press and the impact on prospects for reappointment if someone they release commits a new serious crime, and it is no surprise that high bail or remand is the likely result whenever someone is charged with a truly serious crime.”).

⁷³ Chelsea Barabas, Karthik Dinakar & Colin Doyle, Opinion, *The Problems with Risk Assessment Tools*, N.Y. TIMES (July 17, 2019), <https://www.nytimes.com/2019/07/17/opinion/pretrial-ai.html>.

⁷⁴ *Id.*

⁷⁵ State v. Brown, 338 P.3d 1276, 1293 (N.M. 2014) (finding that the district court should have released the defendant pending trial).

⁷⁶ See James R.P. Ogloff & Michael R. Davis, *Advances in Offender Assessment and Rehabilitation: Contributions of the Risk-Needs-Responsivity Approach*, 10 PSYCHOL. CRIME & L. 229, 232 (2004) (“[L]ower risk offenders have been shown to derive better outcomes from a less intensive level of service and intervention.” (citation omitted)).

that someone released might kill Uncle Ben, but humans—including judges—aren't skilled at evaluating the difference between possibilities and probabilities.⁷⁷ For example, Professors Shima Baradaran (Baughman) and Frank McIntyre found that judges rely on dangerousness when they make the decision to detain someone, despite the fact that they aren't particularly good at predicting who will be dangerous.⁷⁸ When it comes to fine-grained statistical analysis, our brains are not up to the task. One model suggested that we are, at most, capable of understanding only five levels of probability: “surely true,” “more probable than not,” “as probable as not,” “less probable than not,” and “surely false.”⁷⁹

As a result, we have risk assessment statements like this one from the Sheriff of Rockland County, New York after a person released from pretrial detention stabbed five people at a Hanukkah party: “[T]here's [sic] hate crimes where there's no bail.”⁸⁰ Of course, bail is not a necessary component of either prejudice or hate crimes. Dylann Roof, to cite just one example, was not out on bail when he killed nine African-American churchgoers for expressly racist purposes.⁸¹ Nor, it should be said, do most people released pretrial end up committing hate crimes. Why, then, are risk assessment statements like the Sheriff's likely to be generated—and found persuasive? Behavioral psychology provides some insights.

II

COUNTERFACTUALS ARE AUTOMATIC AND INVISIBLE

In this section, I review counterfactual research from behavioral psychology to help explain why decisionmakers focus on certain fac-

⁷⁷ See, e.g., Howard Kunreuther, Nathan Novemsky & Daniel Kahneman, *Making Low Probabilities Useful*, 22 J. RISK & UNCERTAINTY 103, 104 (2001) (“There is evidence that many people are not able to meaningfully use probability information” (citation omitted)); Mary Kynn, *The ‘Heuristics and Biases’ Bias in Expert Elicitation*, 171 J. ROYAL STAT. SOC'Y 239, 242 (2008) (“There are many experiments which illustrate that people cannot be relied on to give accurate probability assessments in many contexts.”).

⁷⁸ Shima Baradaran & Frank L. McIntyre, *Predicting Violence*, 90 TEX. L. REV. 497, 558 (2012) (concluding that “if the goal is to prevent crime, judges are often releasing and detaining the wrong groups” because “about half of those detained have a lower chance of being rearrested pretrial than many of the people released”).

⁷⁹ DAVID SALSBERG, *THE LADY TASTING TEA: HOW STATISTICS REVOLUTIONIZED SCIENCE IN THE TWENTIETH CENTURY* 307 (W.H. Freeman & Co. 2001).

⁸⁰ Joseph Spector, *Rockland Sheriff Raises Concerns over New York's New Bail Law After Stabbings*, TIMES-HERALD REC. (Dec. 30, 2019, 9:30 AM), <https://www.recordonline.com/news/20191230/rockland-sheriff-raises-concerns-over-new-yorks-new-bail-law-after-stabbings> (arguing for reconsideration of New York law ending cash bail in certain cases).

⁸¹ See Ray Sanchez & Ed Payne, *Charleston Church Shooting: Who Is Dylann Roof?*, CNN (Dec. 16, 2016, 3:13 PM), <https://www.cnn.com/2015/06/19/us/charleston-church-shooting-suspect/index.html>.

tors when they heuristically assess the risks associated with pretrial release. Indeed, counterfactual research helps explain why the natural question is about the risks of pretrial *release* rather than the certain harms of pretrial *detention*—despite the fact that pretrial release is (or should be) the default according to *Salerno*.⁸² Part of what makes counterfactuals so important to study—and so difficult to discern in one’s own thinking—is that they are generated automatically in response to negative events.⁸³ We do not decide to generate counterfactuals. Our minds generate them, and with those counterfactuals come ancillary ideas about causation, likelihood, and future courses of action.

Several legal scholars have addressed the role of counterfactuals in the law. Professor Robert Strassfeld applied the counterfactual to an analysis of tort.⁸⁴ Professors Adam Hirsch and Gregory Mitchell also examined the counterfactual as applied to tort and criminal attempt liability.⁸⁵ Moving beyond counterfactuals in particular, several scholars have applied the legal implications of the heuristic model of the brain to a variety of subjects: contingency fees,⁸⁶ limitations of the case study model,⁸⁷ the use of evidence at trial,⁸⁸ plea bargains,⁸⁹ tax enforcement,⁹⁰ and criminal behavior.⁹¹ Insights about counterfactuals have never been applied to pretrial release decisions per se. But several theories from behavioral psychology might help explain the

⁸² See *supra* note 54 and accompanying text.

⁸³ Roesse, *supra* note 9, at 135 (“Feeling bad [after a negative event] makes one think ‘if only,’ with such thoughts directed in large part to the avoidance of whatever is making one feel bad, thus resulting in imaginings of a better (or upward) counterfactual world.”). Though it is possible to generate counterfactuals on demand about idle musings, the counterfactuals Roesse focuses on, like those of this Article, are the ones generated automatically after negative events. See *id.* at 133.

⁸⁴ See generally Robert N. Strassfeld, *If . . . : Counterfactuals in the Law*, 60 GEO. WASH. L. REV. 339 (1992).

⁸⁵ See Hirsch & Mitchell, *supra* note 25, at 571–78 (comparing how the psychology of proximity influences both areas).

⁸⁶ See generally Eyal Zamir & Ilana Ritov, *Revisiting the Debate over Attorneys’ Contingent Fees: A Behavioral Analysis*, 39 J. LEGAL STUD. 245 (2010) (using prospect theory to explain why plaintiffs and defendants prefer certainty in attorney fee arrangements).

⁸⁷ See Mitchell, *supra* note 18, at 1524 (analyzing how causal stories depend on counterfactual causal reasoning, which is prone to inferential bias and fallacy).

⁸⁸ See Maggie Wittlin, *Hindsight Evidence*, 116 COLUM. L. REV. 1323, 1340 (2016) (asserting that jurors “judge using heuristics and biases that subject them to cognitive traps”).

⁸⁹ See Chris Guthrie, *Prospect Theory, Risk Preference, and the Law*, 97 NW. U. L. REV. 1115, 1136–38 (2002) (explaining how plea bargaining rates can be reconciled with prospect theory).

⁹⁰ See John S. Carroll, *Compliance with the Law: A Decision-Making Approach to Taxpaying*, 11 L. & HUM. BEHAV. 319, 326 (1987) (describing how taxpayers may frame their behavior as “compliance” or “avoidance”).

ways in which judicial assessments of risk might be prone to focus on the speculative harms of release rather than the certain harms of detention.

To begin, let's return our attention to Peter Parker. The counterfactual his mind generates is, again, that if he had stopped the thief as he ran down the hall, Uncle Ben would not have been shot and killed. Counterfactuals are, generally, more likely to be generated in response to negative outcomes.⁹² Peter is much less likely to generate a counterfactual in response to a positive event ("I'm glad I have superpowers and a gift for photography; if I didn't, I couldn't make money selling photographs to the Daily Bugle!"), even though this, too, is a mental simulation about a different course of events.⁹³ This is because the human mind is generally more attuned to losses than commensurate gains.⁹⁴

One hypothesis about why our minds generate counterfactuals is that they are often useful—we can use them to learn from our mistakes and avoid future problems.⁹⁵ If your stomach hurts an hour after you eat at a new restaurant, you will probably decide that it made you sick and avoid it in the future. This is a relatively simple scenario—the cause was proximate in time to the harm and there is just one likely explanation. The problem is that counterfactuals occur to us any time something bad happens, not just when we have a stomach ache.

Counterfactuals are stories about causes,⁹⁶ but we tend to focus only on certain causes. We attribute causes to something we already find plausible;⁹⁷ we "underestimate the likelihood of events that are produced by slow and incremental changes."⁹⁸ Just like Peter, our counterfactuals tend to focus on what we can control⁹⁹—and can give

⁹¹ See Robert Apel, *Sanctions, Perceptions, and Crime: Implications for Criminal Deterrence*, 29 J. QUANTITATIVE CRIMINOLOGY 67, 70 (2013) (noting the existence of theories that "allow for decision making that is intuitive as opposed to strictly normative").

⁹² Roese, *supra* note 9, at 135.

⁹³ See *id.*

⁹⁴ See Daniel Kahneman, Jack L. Knetsch & Richard H. Thaler, *Anomalies: The Endowment Effect, Loss Aversion, and Status Quo Bias*, 5 J. ECON. PERSP. 193, 199 (1991) (discussing the notion of loss aversion).

⁹⁵ See Epstude & Roese, *supra* note 14, at 179 (noting that, even though people can learn from others' mistakes, "insights that are self-directed are by definition more specific in their focus on personal improvement").

⁹⁶ See *id.* at 177 ("[C]ausal insight is a property or characteristic of counterfactual thinking. That is, to the extent that a counterfactual takes the form of a conditional proposition (i.e., an 'if-then' statement), its very essence embodies a causal proposition.").

⁹⁷ Neal J. Roese & Mike Morrison, *The Psychology of Counterfactual Thinking*, 34 HIST. SOC. RES. 16, 20 (2009).

⁹⁸ THE SIMULATION HEURISTIC, *supra* note 15, at 13.

⁹⁹ See Roese & Vohs, *supra* note 20, at 417 (stating that people rely upon acts of individuals, rather than business or mechanical forces, to explain the cause of an event); see

us a false sense of security in our own abilities,¹⁰⁰ as well as a superficial consideration of causes and solutions.¹⁰¹ These tendencies may be somewhat useful when we are talking about particular events and particular people, but they are ill-suited to more complex circumstances involving abstract, large-scale, multi-dimensional problems, such as risk and probability of future crime across pretrial populations.¹⁰²

For simplicity's sake, I will structure my discussion of counterfactuals using the framework from Roese's 1997 summary of counterfactual research.¹⁰³ Roese summarizes the research by organizing counterfactual thinking into two stages: activation and content.¹⁰⁴ Activation considers the circumstances under which counterfactual thinking is most likely, and content considers what causes and solutions are likely to occur to us.¹⁰⁵

A. *Counterfactual Activation: Dealing with Pain by Generating Counterfactuals*

We are most likely to engage in counterfactual thinking when something bad happens; we generate counterfactuals in response to bad events quickly and automatically.¹⁰⁶ Our minds want to learn something from the pain so we can avoid it in the future. The greater the pain, the greater the activation. Peter Parker does not need time to reflect after his uncle is killed. His conclusion that he caused Uncle Ben's death is both swift and certain. Peter's sense of regret is heightened by his proximity to the thief. The thief ran right by him, and the elevator doors closed just as the pursuing officer arrived. Like Peter,

also Epstude & Roese, *supra* note 14, at 178 (providing an example of a “dysfunctional counterfactual[]” where a car accident victim focuses on how she could have averted the crash even though the accident was wholly caused by the other driver who was intoxicated). For an extremely comprehensive discussion of how thinking we are in control of our own thoughts is, ironically, an automatic response outside our control, see Hanson & Yosifon, *supra* note 10.

¹⁰⁰ See Yudkowsky, *supra* note 11, at 17–19 (discussing how overconfidence often affects our behavior).

¹⁰¹ See THE SIMULATION HEURISTIC, *supra* note 15, at 10 (explaining why people prefer to revert to norms); see also Roese & Morrison, *supra* note 97, at 20 (noting that counterfactual thoughts may “underlie overconfidence in predicting the past” and impact predictions of future events).

¹⁰² See Roese, *supra* note 9, at 144 (focusing on the relationship between counterfactual thinking and individual emotional experience, coping, and adjustment).

¹⁰³ *Id.* at 133.

¹⁰⁴ *Id.* at 139.

¹⁰⁵ See *id.* at 137, 139.

¹⁰⁶ See *id.* at 139.

human beings generally feel greater regret the closer they are to the alternative universe where the bad outcome never happened.¹⁰⁷

Professors Daniel Kahneman and Amos Tversky offered an illustration of proximity's role in counterfactuals in this hypothetical.¹⁰⁸ Mr. Crane and Mr. Tees are each scheduled to catch a flight leaving at 8:00. Both arrive late at 8:30 (Kahneman and Tversky wrote their report in the early 1980s, an era obviously pre-dating lengthy check-in and security procedures). Mr. Crane learns that his flight departed on-time at 8:00. Mr. Tees, on the other hand, hears that his plane had been delayed and left at 8:25. Who is more upset? Ninety-six percent of the students presented with this hypothetical responded that Mr. Tees would be more upset, even though both Mr. Crane and Mr. Tees were late and neither could have reasonably expected to catch the plane.¹⁰⁹ The authors concluded that “[t]he only reason” for Mr. Tees to feel greater disappointment is that “it was more ‘possible’ for him to reach his flight”—that is, our brains can more readily simulate a scenario in which Mr. Tees catches the flight.¹¹⁰

There is an Alice-in-Wonderland quality to such examples, with their odd mixture of fantasy and reality. If Mr. Crane is capable of imagining unicorns—and we expect he is—why does he find it relatively difficult to imagine himself avoiding a 30 minute delay, as we suggest he does? Evidently, there are constraints on the freedom of fantasy, and the psychological analysis of mental simulation consists primarily of an investigation of these constraints.¹¹¹

Peter Parker was proximate in actual time and space to the thief that ultimately killed his Uncle Ben. But Kahneman and Tversky's study suggests that proximity is also a mental characteristic, where proximity means the ease with which we can imagine something.

Proximity concerns are heightened at what Roese calls a “category boundary.”¹¹² The closer one is to a category boundary (such as being apprehended or at large, or being uninjured in any way versus injured in any way), the more keenly one will feel either joy (from a narrowly avoided tragedy) or regret (from almost achieving a desired outcome). A well-known example is that Olympic silver medalists are, on the whole, less satisfied than bronze medalists, despite finishing

¹⁰⁷ See THE SIMULATION HEURISTIC, *supra* note 15, at 4 (“[I]t appears reasonable to speak of the distance between reality and some once-possible but unrealized world.”).

¹⁰⁸ *Id.* at 4–6.

¹⁰⁹ *Id.* at 5.

¹¹⁰ *Id.*

¹¹¹ *Id.* at 6.

¹¹² Roese, *supra* note 9, at 140 (explaining how people's counterfactual thoughts at category boundaries “center[] on the closest crossing into a new category”).

one place ahead of them.¹¹³ For the bronze medalist, the category boundary is between receiving a medal and not. The contrast heightens the exhilaration (“I almost didn’t get a medal, but I made it onto the podium!”). For the silver medalist, the relevant category boundary is first versus second, which tends to heighten the disappointment (“I almost won the whole thing, but I didn’t.”). Death is an obvious category boundary, but we would also expect there to be a greater perceived harm between Uncle Ben receiving no injuries versus some injuries than between suffering one broken bone and several. This will return in the pretrial context: the difference between no crime and any crime is potentially more salient than the difference between some minor crime and some more serious crime.

One additional feature of the silver medalist example is worth examining. Sometimes a near miss is seen as a good event (“I almost didn’t medal but I got the bronze!”) and sometimes it registers as something bad (“I almost got the gold but I only got silver.”). An exception to the rule that bad news activates counterfactual thinking is when a bad outcome is so narrowly avoided that we assimilate it, feeling how near we came to the loss rather than celebrating the fact that we did not, in fact, endure it.¹¹⁴ So we may assimilate a near miss (“That bike almost hit me!”) and feel fear at what might have happened, instead of being grateful that we were spared.¹¹⁵ Judges, then, who hear about a crime committed in another jurisdiction by a person on pretrial release may see that as a contrasting positive (“Thank goodness that didn’t happen in my courtroom!”), but they could also assimilate it (“That could’ve been me!”). If there is assimilation, counterfactual processes will be activated even though the judges themselves did not experience any negative outcome. Proximity does not only affect activation—whether counterfactuals are generated at all—it can also make the counterfactual process more intense near category boundaries.¹¹⁶ As with the airport example, we may feel greater regret the closer we were to a positive scenario, or we may feel greater exhilaration via contrast if we narrowly avoid a negative scenario.

¹¹³ *Id.* (noting that most fans would likely believe second place would provide more joy than third place).

¹¹⁴ Hirsch & Mitchell, *supra* note 25, at 564 (“The salient fact riveting attention is the calamity that almost *did* happen, making the close call too close for comfort.”).

¹¹⁵ *Id.* at 574 (discussing such close calls in connection with torts).

¹¹⁶ *See id.* (asserting that “experiencing a close call is exhilarating when the subject contrasts what occurred with what almost occurred”); *see also id.* at 560 (arguing that near misses can cause psychological harms of the same magnitude as tangible accidents).

B. Counterfactual Content: What Painful Lessons We Think We've Learned

Activation describes what makes us start to wonder “if only;” content is what our mind decides we should have done. It is the “solution” to our mind’s experiment. Peter Parker is activated to imagine a counterfactual upon Uncle Ben’s death; his conclusion (that if he had stopped the thief, Uncle Ben would be alive) is the content of that counterfactual. The content of Peter’s counterfactual is typical in that it focuses on proximity: how close he was to correcting the problem. It is atypical in that it focuses on his failure to act. The content of counterfactuals typically focuses on undoing actions, not undoing omissions.

Peter was physically close to the thief that evening in the hallway. The thief ran right past Peter, and the policeman “almost” caught the thief before the elevator doors closed. Due to Peter’s proximity in space and the policeman’s proximity in time, Peter can easily imagine a counterfactual where the thief is stopped. Proximity can also mean, more abstractly, proximity to the norm—counterfactual content often replaces unusual actions taken with more typical or usual actions.¹¹⁷

We can look to Kahneman and Tversky’s research for another useful example.¹¹⁸ They provided their subjects a prompt for a fatal accident, where Mr. Jones drives home from work via a novel route and his car is struck by a truck at an intersection, killing him. The researchers prompted their subjects with the phrase “If only . . .” and asked them to complete the sentence. Many subjects responded that Mr. Jones should have taken his normal route home.¹¹⁹ Kahneman and Tversky, however, were surprised that “not a single subject mentioned that if Mr. Jones had come to the intersection 2 or 3 seconds earlier he would have gone through safely,”¹²⁰ even though there is a high probability that Mr. Jones could have sped up (or slowed down) for two to three seconds at any point during his drive. They concluded that the content our minds generate is not an accurate reflection of real world probabilities.¹²¹ In other words, it is easier to imagine Mr. Jones taking his usual way home from work (because it is “nearer” to the normal course of events) than to imagine him slowing down or

¹¹⁷ See THE SIMULATION HEURISTIC, *supra* note 15, at 9 (“[S]ubjects were more likely to undo the accident by restoring a normal value of a variable than by introducing an exception.”).

¹¹⁸ *Id.* at 6–9.

¹¹⁹ *Id.* at 8.

¹²⁰ *Id.*

¹²¹ *Id.* at 9 (“Whatever it is that people do, then, is not perfectly correlated with prior probability.”).

speeding up two or three seconds. This is not because, in reality, a two or three second deviation is less likely, but rather because our minds are unlikely to focus on (or even generate) that possibility.¹²² As Roese concludes, “counterfactual content recapitulates normality.”¹²³

Other research suggests that people tend to find a story and then look for confirmation of that story, rather than analyzing all the facts and then finding the story that fits them best.¹²⁴ Counterfactuals are not the result of fact-finding; they precede it. This phenomenon is particularly pronounced when emotions are heightened.¹²⁵ We tend to stop thinking critically when we arrive at a solution to our counterfactual problems and only look for evidence that confirms that our initial choices were correct.¹²⁶

We might expect tension between counterfactuals and the hindsight bias.¹²⁷ When our minds use counterfactuals, they suggest that what actually happened was *not* inevitable. The hindsight bias, in contrast, leads us to think that what ended up happening *was* inevitable.¹²⁸ But once we begin our mental simulations, our minds bewitch themselves: “Counterfactuals, causes, and (some) probabilities are treated as facts about the world, not as constructions of the mind.”¹²⁹ Once we imagine a counterfactual possibility, our mind treats it as something that both actually and inevitably happened, while “what [actually] happened is not treated as necessary or inevitable.”¹³⁰ Our mind treats the counterfactual as something that we could have (and should have) seen coming, the way Peter feels he should have known that the man running down the hall would kill his Uncle Ben.¹³¹ Peter’s thoughts about saving Uncle Ben reinforce the centrality of his own choices and perceptions, consistent with the human tendency

¹²² *Id.* at 8–9.

¹²³ Roese, *supra* note 9, at 137 (describing how “counterfactual content return[s] the deviation back to its normal state of affairs”).

¹²⁴ See Heller, *supra* note 70, at 278 (discussing how jurors are so drawn to direct evidence that they will overlook circumstantial evidence even if such evidence is probative).

¹²⁵ YUDKOWSKY, *supra* note 11, at 9 (declaring that confirmation bias is worse under emotionally fraught, or “hot,” conditions).

¹²⁶ See Heller, *supra* note 70, at 288 (noting that this behavior occurs when jurors stick to eyewitness identifications or confessions despite discrediting information).

¹²⁷ Daniel Kahneman & Carol A. Vary, *Propensities and Counterfactuals: The Loser that Almost Won*, 59 J. PERSONALITY & SOC. PSYCHOL. 1101, 1103 (1990).

¹²⁸ *Id.* (explaining how “retrospective assessments of the probability of events are affected by knowledge of whether or not these events have taken place”).

¹²⁹ *Id.* at 1102.

¹³⁰ *Id.*

¹³¹ Roese & Vohs, *supra* note 20, at 413 (characterizing foreseeability as one level of hindsight bias).

towards heightening our sense of control and meaning.¹³² Peter would rather torture himself over how he could have changed things than accept that he was just a peripheral character in the tragedy of Uncle Ben.¹³³ Never mind the fact that we can imagine other counterfactuals that, like the two to three second delay for Mr. Jones, would have saved Uncle Ben's life (e.g., "If only there had been a shelter-in-place order!" or "If only Uncle Ben had been five minutes early or late!"). If they don't involve Peter making choices or taking action, he (and we) are unlikely to think of them.

While the content of Peter's counterfactual is typical in that it focuses on Peter, it is atypical in that it focuses on what Peter failed to do, rather than what he did. As Baron and Ritov observed, "[p]eople often judge acts to be worse than omissions with the same consequences."¹³⁴ Our feelings of regret are heightened if things turn out poorly because of something we did; those same feelings of regret are dampened if things turn out poorly because of something we didn't do.¹³⁵

Strassfeld wrote about "decision causation," the way in which feelings of regret are heightened if bad outcomes can be traced to individual decisions.¹³⁶ Hirsch and Mitchell described the "*deliberative* near miss," the regret that comes from *almost* choosing the right thing.¹³⁷ A bad outcome after switching from one decision to another is particularly painful: we tend to avoid switching even in advantageous situations because of our fear that our regret will be heightened.¹³⁸ This is what Professor Lawrence Sanna called "precounterfactuals."¹³⁹ We run mental simulations of how various courses of action might turn out and make decisions that minimize our future regret—even when that regret is improbable. Parents may

¹³² See *id.* (discussing how foreseeability "includes beliefs about one's own prowess at understanding the world").

¹³³ See Epstude & Roese, *supra* note 14, at 178.

¹³⁴ Baron & Ritov, *supra* note 39, at 475.

¹³⁵ *Id.* at 482 (stating the conclusion from an experiment that asked subjects to compare the feelings of people who achieved the same exact predicament either through an omission or an act).

¹³⁶ Strassfeld, *supra* note 84, at 358 (examining how decision causation's effects on plaintiffs in medical informed consent cases have prompted courts to apply an objective standard).

¹³⁷ Hirsch & Mitchell, *supra* note 25, at 565.

¹³⁸ See Richard Thaler, *Toward a Positive Theory of Consumer Choice*, 1 J. ECON. BEHAV. & ORG. 39, 51–52 (1980) (highlighting how even the knowledge of choice can be burdensome).

¹³⁹ Lawrence J. Sanna, *Defensive Pessimism, Optimism, and Simulating Alternatives: Some Ups and Downs of Prefactual and Counterfactual Thinking*, 71 J. PERSONALITY & SOC. PSYCHOL. 1020, 1020 n.1 (1996) (clarifying that others have used the term "prefactual" to refer to the same concept).

refuse to have their kids vaccinated even when the risks of the side effects of vaccines are less than the risk of infection from the disease itself.¹⁴⁰ This is not a rational, utility-maximizing decision, but one that addresses the psychological costs of choosing to do something—including the potential to regret the decision. Kahneman, Jack Knetsch, and Richard Thaler noted that our minds tend to treat risks differently based on their source.¹⁴¹ If the kid gets infected, it was going to happen anyway; if the vaccine kills him, the parents “added” that risk. Our brains perceive some causes more readily than others and apportion blame accordingly.¹⁴²

The emotional toll of weighing these potential negative precounterfactuals may be one reason why decisionmaking itself is so draining. Not only do we feel worse if a bad outcome results from a decision we made (rather than an external force or situation), we also feel drained if we have to make too many decisions about anything at all. Thaler concludes that greater choice might actually decrease an individual’s welfare.¹⁴³ Kahneman calls this cost of decisionmaking “ego depletion,”¹⁴⁴ but it is also known as “decision fatigue.”¹⁴⁵ A study of eight judges in Israel found that the rates at which judges granted parole tended to diminish the longer it had been since they’d had a break.¹⁴⁶ It is important to note the presumption of parole denial in this example: if the judges did nothing, parole would not be granted. Thus, the longer that judges worked, the less likely they were to act—via their decisions to release.

C. *An Alternative Scenario: Peter’s Catch and Release*

In this section, I will examine a hypothetical variation on Peter’s case: that Peter caught the thief and let him go. How would he have

¹⁴⁰ See Baron & Ritov, *supra* note 39, at 476.

¹⁴¹ See Kahneman et al., *supra* note 94, at 202 (distinguishing between a “voluntary assumption of additional risk” and “a mere failure to reduce or eliminate existing risk”).

¹⁴² Roese & Morrison, *supra* note 97, at 18 (citing the tendency to blame crime victims and consider how their actions could have been different).

¹⁴³ See Thaler, *supra* note 138, at 55.

¹⁴⁴ See Charles W. Murdock & Barry Sullivan, *What Kahneman Means for Lawyers: Some Reflections on Thinking, Fast and Slow*, 44 *LOY. U. CHI. L.J.* 1377, 1394 (2013); see also Roy F. Baumeister, Ellen Bratslavsky, Mark Muraven & Dianne M. Tee, *Ego Depletion: Is the Active Self a Limited Resource?*, 74 *J. PERSONALITY & SOC. PSYCHOL.* 1252 (1998) (defining the notion of ego depletion and the idea that voluntary actions incur a cost and influence later acts of volition).

¹⁴⁵ See John Tierney, *Do You Suffer from Decision Fatigue?*, *N.Y. TIMES MAG.* (Aug. 17, 2011), <https://www.nytimes.com/2011/08/21/magazine/do-you-suffer-from-decision-fatigue.html>.

¹⁴⁶ Murdock & Sullivan, *supra* note 144, at 1394–95 (reporting that the proportion of parole releases granted dropped nearly to zero right before the judges’ next food break).

felt then? This is, in fact, the scenario with the greatest factual similarity to pretrial release, and thus sheds light on the violation of the parity principle—the fact that having someone in custody and releasing them feels different than not capturing them in the first place. We already know from Baron and Ritov that a decision to release would make Peter feel worse than a failure to capture, since action (to release) is worse than inaction (not capturing him). But a few other theories from behavioral psychology also shed light on why Peter might feel worse: the endowment effect, the role of narratives and explicability, and the “certainty effect”—our preference not just for risk reduction but risk elimination.

The endowment effect describes people’s tendency to increase the value they place on how they feel about an object or a situation simply by virtue of having it.¹⁴⁷ This doesn’t mean that people are grateful for what they have: “[T]he main effect of endowment is not to enhance the appeal of the good one owns, only the pain of giving it up.”¹⁴⁸ In experiments testing the endowment effect, subjects given fungible items without sentimental value (say, a coffee mug) required a higher price to sell the item than they would have paid to buy that same item.¹⁴⁹ “Prospect theory” suggests that we are much more attuned to changes in conditions than in ultimate conditions—for example, we are more attuned to financial gains and losses relative to our starting point than to absolute levels of wealth or poverty.¹⁵⁰ Taken together, the combination of the endowment effect and prospect theory gives us a quick explanation for Peter’s attitude toward the thief and why the parity principle is violated during pretrial release decisions. Because we tend to value what we have and we don’t like change,¹⁵¹ catching the thief and subsequently losing him would have a greater negative impact on Peter (via the endowment

¹⁴⁷ See *The Endowment Effect*, *supra* note 8, at 939.

¹⁴⁸ Kahneman et al., *supra* note 94, at 197.

¹⁴⁹ *The Endowment Effect*, *supra* note 8, at 940.

¹⁵⁰ See *Prospect Theory*, *supra* note 40, at 277; see also Zamir & Ritov, *supra* note 86, at 253, 268 (using prospect theory to explain how plaintiffs prefer contingency fees because they look at costs and benefits in terms of their current state, valuing the immediate losses from paying a lawyer more than the long-term future losses from contingency fee arrangements).

¹⁵¹ The preference for the current state of affairs (“status quo bias”) and the tendency to attribute greater value to an object already owned solely by virtue of having it (“endowment effect”) are both related to an asymmetry of value—the “disutility of giving up an object is greater than [sic] the utility associated with acquiring it.” See Kahneman et al., *supra* note 94, at 194; see also Baron & Ritov, *supra* note 39, at 477 (describing numerous studies that found individuals gravitate toward inaction or the status quo). As a result of this asymmetry, “the disadvantages of a change loom larger than its advantages.” Kahneman et al., *supra* note 94, at 200.

effect and prospect theory) than failing to catch the thief at all. It follows therefore that decisionmakers and the public are also inclined to value what they have and to notice more readily when someone goes from being in custody to out of custody. These losses have greater salience.

A second relevant theory is narrative coherence. In general, humans (as social creatures) are much more attuned to narratives than mathematical probabilities.¹⁵² The more vivid and coherent a narrative is, the more salient and persuasive it becomes.¹⁵³ Heller discusses this in the context of the Wells Effect.¹⁵⁴ Given identical scenarios, subjects in mock jury trials were more likely to find a defendant civilly liable when direct evidence rather than circumstantial evidence was presented, even when the reliability of the evidence was numerically equivalent.¹⁵⁵

That is, subjects find direct testimony from a witness (“I’m sure I saw a blue bus run over a dog,” when the witness testifies truthfully eighty percent of the time) much more credible than the same weight of circumstantial evidence (“Tire marks were consistent with eighty percent of the blue bus fleet.”). We process narratives more easily, with characters who act, than we process situations and numbers. Expertise is no shield: In the experiment that gave the Wells Effect its name, judges were four times more likely to find liability when identically reliable evidence came from direct (rather than circumstantial) evidence!¹⁵⁶

Narratives that involve human choice and control are especially compelling, which is why the content of counterfactuals often focuses on the choices people made or should have made.¹⁵⁷ Narrative power is further heightened when choices lead to bad outcomes¹⁵⁸ or “near misses” of bad outcomes.¹⁵⁹ “People have a need to see the world as predictable and find it threatening to believe that many outcomes are at the mercy of unknown, random chance.”¹⁶⁰ While the narrative

¹⁵² Mitchell, *supra* note 18, at 1546; *see also* Lisa Kern Griffin, *Criminal Adjudication, Error Correction, and Hindsight Blind Spots*, 73 WASH. & LEE L. REV. 165, 170 (2016) (describing how fact-finders in a trial create narratives based on new pieces of evidence).

¹⁵³ *See infra* note 207 and accompanying text.

¹⁵⁴ Heller, *supra* note 70, at 245 (referring to the puzzling fact “that jurors are likely to acquit in a circumstantial case *even when they know the objective probability of the defendant’s guilt is sufficient to convict*”).

¹⁵⁵ *See* Heller, *supra* note 70, at 257.

¹⁵⁶ *See* Gary L. Wells, *Naked Statistical Evidence of Liability: Is Subjective Probability Enough?*, 62 J. PERSONALITY & SOC. PSYCHOL. 739, 744 (1992).

¹⁵⁷ *See infra* notes 180–89 and accompanying text.

¹⁵⁸ Epstude & Roese, *supra* note 14, at 172.

¹⁵⁹ *See infra* notes 168–72 and accompanying text.

¹⁶⁰ Roese & Vohs, *supra* note 20, at 415.

impulse may help in the short term as we process tragedies, in the long term it risks skewing our views about the likelihood of those tragedies, generating policies that deal with abnormal cases rather than normal ones. “In the end, any causal statements made on the basis of a single-observation case study will depend more on the researcher’s supposition and counterfactual reasoning than on empirical observation and experimental or statistical testing.”¹⁶¹ If we want to study the pretrial system (or any system), we can, of course, learn from failure. But “[i]n traumatic circumstances that are uncontrollable at the individual level (e.g., war) or are unlikely to repeat (e.g., infant deaths . . .), the normal counterfactual generation process produces no inferences useful for future action, only unpleasant affect.”¹⁶² If we are going to study systems, we should pay attention to average cases—say, a random representative sample—not just individual, sensational failures. By focusing our problem-solving on abnormal cases, we may learn lessons inapposite to normal ones.

As for certainty, Kahneman and Tversky,¹⁶³ as well as Thaler,¹⁶⁴ have noted that people tend to prefer certainty to probability, particularly when it comes to downside risk.¹⁶⁵ We pay more for risk elimination than risk reduction.¹⁶⁶ In a scenario that is distressingly appropriate in 2020, Kahneman and Tversky asked study participants to choose among several responses to an “outbreak of an unusual Asian disease.”¹⁶⁷ The outcomes were mathematically identical, but the way they were framed was different. People chose to lock in gains (“200 people will be saved” was preferred almost 3 to 1 over “1/3 probability that 600 people will be saved and 2/3 probability that no people will be saved”) but were so averse to losses that they were willing to risk killing everyone in order to lose no one (“1/3

¹⁶¹ Mitchell, *supra* note 18, at 1561.

¹⁶² Roese, *supra* note 9, at 144.

¹⁶³ See *Prospect Theory*, *supra* note 40, at 265 (finding that individuals tend to overweight outcomes considered certain relative to those that are probable).

¹⁶⁴ See Thaler, *supra* note 138, at 42 (citing *Prospect Theory*, *supra* note 40, to develop a positive theory of consumer choice).

¹⁶⁵ See Greg Pogarsky, Sean Patrick Roche & Justin T. Pickett, *Offender Decision-Making in Criminology: Contributions from Behavioral Economics*, 1 ANN. REV. CRIMINOLOGY 379, 387 (2018) (describing several studies that found ambiguity reduced willingness to engage in criminal activity when risk of detection was low, but increased willingness to engage in the same activity when risk of detection was high).

¹⁶⁶ Cf. *Prospect Theory*, *supra* note 40, at 283 (finding that individuals in a hypothetical game of Russian Roulette were willing to pay more money to reduce the risk of death from 1/6 to 0 than from 4/6 to 3/6). See also Amos Tversky & Daniel Kahneman, *The Framing of Decisions and the Psychology of Choice*, 211 SCI. 453, 456 (1981) (describing the “certainty effect”: a reduction in the probability of an outcome has a greater impact if the outcome was initially certain rather than probable).

¹⁶⁷ Tversky & Kahneman, *supra* note 166, at 453.

probability that nobody will die, and 2/3 probability that 600 people will die” was preferred almost 3.5 to 1 over “400 people will die”).¹⁶⁸ It is unclear, though, how these frames might operate when it comes to how we characterize pretrial release decisions. Which harms are we seeking to minimize? Someone who is incapacitated bears no risk of committing crimes, and, if that is the frame, we may prefer that certain outcome. But it is also true that putting someone away definitively deprives them of liberty. More research is needed to see whether (and how) people are able to reframe liberty and potential danger in terms of gains and losses.

III

COUNTERFACTUALS AND CRIMINAL JUSTICE

The counterfactual framework can help us assess why pretrial releases might occur less frequently than risk alone (and/or cost-benefit analysis) might suggest—and why the parity principle is not followed. I will focus here on how the timing and procedure of release decisions might activate counterfactual thinking and how the theories described earlier may explain the content of those thoughts.

Three pathways might activate counterfactual thinking in the pretrial context. Imagine that Judge A releases a person from pretrial detention who goes on to commit murder. The tragedy will activate counterfactual thinking in Judge A.¹⁶⁹ Now imagine Judge B, who sees her situation as somehow proximate to Judge A’s situation,¹⁷⁰ perhaps because Judge B is in the same jurisdiction, because Judge B handles similar kinds of cases, or simply because Judge B is also a judge. Rather than respond to the news with relief (“Whew, I’m glad that wasn’t my case!”), Judge B may, instead, activate her counterfactual thinking by feeling that the news “almost” happened to her (“That could have easily been my case!”).¹⁷¹ Now imagine Judge C, who has not heard the news about Judge A. Judge C uses precounterfactuals, evaluating pretrial release decisions by simulating how he will feel about them in the future. Because Judge C can easily imagine crimes committed by someone he releases, he will *feel*—not *think*—that such an outcome is more likely than it is, and will be more likely to retain than release.¹⁷²

¹⁶⁸ *Id.*

¹⁶⁹ *See supra* note 106 and accompanying text.

¹⁷⁰ *Cf. supra* note 116 and accompanying text.

¹⁷¹ *Cf. id.*

¹⁷² *See* Roesse, *supra* note 9, at 144 (discussing the potential for “vicious circles . . . in which negative affect unleashes counterfactual thinking, which then increases negative affect, further activates counterfactual thinking, and so on”).

More research is needed on the issues raised above. It would be particularly helpful to examine what factors determine whether a bad outcome is “near” enough so that Judge B assimilates it and engages in counterfactual thinking. Does this extend to cases beyond Judge B’s own jurisdiction—say, cases in another state—and, if so, under what circumstances? Is Willie Horton really still salient, even thirty years later, and even in jurisdictions far from Massachusetts?¹⁷³ Researchers might also explore, say, the relationship between the salience of particular fictional stories (and the way in which crime stories are prominent in our media ecosystem¹⁷⁴) and activation. The more stories one hears about pretrial crimes, the easier it is to imagine them; the easier they are to imagine, the more probable our brain thinks they are.

The Peter Parker story itself, then, may contribute to the Peter Parker Problem. If we have read about Uncle Ben’s death and felt Peter’s grief, our brain may treat it as data about the world, not simply an amazing fantasy.¹⁷⁵ For example, in one California case, a defendant was not released to house arrest, even though his house had a surveillance system to which prosecutors would be given full access at all times. The judge was worried that the defendant would splice innocent footage of himself into the surveillance feed while he was actually violating the terms of his home confinement. The judge thought this was possible because he had seen Tom Cruise do it in *Mission Impossible*.¹⁷⁶

It is also surely relevant that pretrial judges only see failures, not successes, in their courtrooms. If someone succeeds on pretrial release, a judge won’t see them again. Our brains tend to equate likelihood in the world with ease of recall in our minds (via the availability heuristic).¹⁷⁷ So, if judges can more easily recall instances of pretrial failures—whether via appearance in their courtrooms or via particularly memorable or salient stories—then they may tend to think failure is more likely than it actually is. Finally, framing the issue itself determines what counts as a success and what counts as a failure

¹⁷³ The answer is probably yes. See BARKOW, *supra* note 30, at 66–67.

¹⁷⁴ See, e.g., Sara Sun Beale, *The News Media’s Influence on Criminal Justice Policy: How Market-Driven News Promotes Punitiveness*, 48 WM. & MARY L. REV. 397 (2006).

¹⁷⁵ Cf. Yudkowsky, *supra* note 11, at 13 (describing the anchoring effects consuming media may have on the human psyche).

¹⁷⁶ *Kellen Winslow’s Bail Denied over Judge’s Fear He’s like Tom Cruise*, TMZ SPORTS (June 28, 2018 2:36 PM), <https://www.tMZ.com/2018/06/28/kellen-winslow-rape-bail-mission-impossible-tom-cruise> (quoting the judge asking about “all these movies . . . like Mission Impossible . . . where they create this endless loop” and the person monitoring the surveillance camera “sees everything is fine and meanwhile, Tom Cruise and all his folks are going around the scene and doing all this stuff” (alterations in original)) (court transcript on file with San Diego Superior Court).

¹⁷⁷ See THE SIMULATION HEURISTIC, *supra* note 15, at 2.

(and, in so doing, focuses our minds on particular data and outcomes¹⁷⁸). If we seek to maximize liberty, that focuses our minds on release. If we focus on threats to public safety, as in the *Salerno*¹⁷⁹ framework, we will focus on how to minimize those threats.

Once the mind is focused on avoiding negative outcomes, it generates the content that tells us how to avoid it. Recall that deviations from the norm are the first place our mind goes to explain a bad result¹⁸⁰ and that counterfactual content focuses on events within personal control.¹⁸¹ In a typical framework, where a judge herself has to decide to release someone (via bail or a finding of no dangerousness), many factors suggest that, once counterfactual thinking is activated, the judge will stick to the detention norm by deciding not to release. First, an act to release someone is more salient than failing to make that decision.¹⁸² Second, a judge will focus not on things outside her control (the defendant's actions, the situation in the community) but on her own actions (to release or not).¹⁸³ Third, because it is easier to simulate a "stay in, no crime" scenario than a "get out, be non-eventful" one—due both to the attention-grabbing salience of crime and to the many, diffuse causes of success (or non-criminal failure) on release¹⁸⁴—the judge will likely substitute ease of simulation with probability.¹⁸⁵ Fourth, most humans, including judges, prefer elimination of risk to reduction of risk.¹⁸⁶ Fifth, decisions are themselves draining (and a potential source of dread), particularly under time pressures,¹⁸⁷ stress,¹⁸⁸ and fear.¹⁸⁹ Based on these factors, it is easy to see that the content of the typical counterfactual after someone on

¹⁷⁸ Tversky & Kahneman, *supra* note 166, at 458.

¹⁷⁹ See *supra* note 51 and accompanying text.

¹⁸⁰ Roese, *supra* note 9, at 137.

¹⁸¹ *Id.* at 139.

¹⁸² See Baron & Ritov, *supra* note 39, at 477; see also *supra* notes 134–42 and accompanying text.

¹⁸³ See Roese, *supra* note 9 at 139.

¹⁸⁴ See Kahneman & Varey, *supra* note 127, at 1107; see also THE SIMULATION HEURISTIC, *supra* note 15, at 13.

¹⁸⁵ See Heller, *supra* note 70, at 260; THE SIMULATION HEURISTIC, *supra* note 15, at 2.

¹⁸⁶ See *Prospect Theory*, *supra* note 40, at 265; Tversky & Kahneman, *supra* note 166, at 453.

¹⁸⁷ Paula Kautt, *Heuristic Influences over Offense Seriousness Calculations: A Multilevel Investigation of Racial Disparity Under Sentencing Guidelines*, 11 PUNISHMENT & SOC'Y 191, 193 (2009) (finding that time pressure increases the likelihood an individual will use automatic/heuristic processes).

¹⁸⁸ See Heimpel, *supra* note 31 (describing how social worker stress makes child removal more likely in Los Angeles).

¹⁸⁹ See Pogarsky et al., *supra* note 165, at 395 (describing that the fear of being caught for criminal activity and the perceived likelihood of being caught for criminal activity are processed separately in the brain).

pretrial release commits a crime—or a precounterfactual if a judge like Judge C considers the possibility of crime—will be that the person should have been kept in jail. This is not the same as saying that it’s “true” that someone should have been kept in, or that it “is” the cause (or the “necessary” cause), only that our brains automatically push us hard in that direction.

In Peter’s case, he takes what he has learned and makes one final decision: to fight crime as Spider-Man. The content of his counterfactual could have been different, involving other ways of fighting crime that were at least as effective but more diffuse and long-term. Peter could have become a youth mentor,¹⁹⁰ or an early childhood educator,¹⁹¹ or the founder of a community non-profit,¹⁹² all of which reduce crime and criminality. One’s first impulse need not be the final word. But automatic thoughts come quickly. We have to stop and think—to think slowly, in Kahneman’s terms¹⁹³—in order to see alternative explanations and paths forward.

We may be tempted to dismiss Peter as a naïve teen from whom we can learn little. We don’t have superpowers, and, surely, we would make more rational, reasoned choices if we did. But consider what judges and lawyers know that Peter didn’t. Peter had a single case that changed his life; judges are part of a system and have many cases. Spider-Man never had to deal with a false negative, thinking there was no problem when there actually was—say, encountering a man escaping Jeffrey Dahmer but returning him to his death because it’s just a lover’s spat¹⁹⁴—or a false positive, thinking there was a problem when there actually wasn’t—say, a Black man who is killed for having a cell phone in his grandmother’s backyard,¹⁹⁵ or a Black man who is

¹⁹⁰ See Christopher J. Sullivan & Darrick Jolliffe, *Peer Influence, Mentoring, and the Prevention of Crime*, in THE OXFORD HANDBOOK OF CRIME PREVENTION 207, 221 (David P. Farrington & Brandon C. Welsh eds., 2012) (finding mentoring to be a “promising crime-prevention approach[.]”).

¹⁹¹ See SCHWEINHART ET AL., *supra* note 48, at 3.

¹⁹² See Patrick Sharkey, Gerard Torrats-Espinosa & Delaram Takyar, *Community and the Crime Decline: The Causal Effect of Local Nonprofits on Violent Crime*, 82 AM. SOC. REV. 1214, 1218 (2017) (positing that the presence of community nonprofits causes a reduction in crime levels).

¹⁹³ See generally DANIEL KAHNEMAN, THINKING, FAST AND SLOW (Farrar, Straus & Giroux eds., 2011).

¹⁹⁴ The Associated Press, *Officer Defends Giving Boy Back to Dahmer*, N.Y. TIMES (Aug. 26, 1991), <https://www.nytimes.com/1991/08/26/us/officer-defends-giving-boy-back-to-dahmer.html>.

¹⁹⁵ Richard Winton, Sarah Parvini & Monte Morin, *Stephon Clark Shooting: How Police Opened Fire on an Unarmed Black Man Holding a Cellphone*, L.A. TIMES (Mar. 23, 2018, 8:10 AM), <https://www.latimes.com/local/lanow/la-me-stephon-clark-shooting-sacramento-explainer-20180323-story.html>.

killed while being arrested for selling loose cigarettes,¹⁹⁶ or a Black man who is killed after telling an officer he had a permitted concealed weapon,¹⁹⁷ or a Black man who is killed walking down the middle of the street with a small knife in his hand,¹⁹⁸ or a Black man who is killed on suspicion of passing a counterfeit twenty dollar bill.¹⁹⁹ At least Peter's regret is well-founded: Even though there was a bare allegation of theft at the time Peter could have intervened, it was, in fact, true that if Peter had stopped the thief he would have prevented Uncle Ben's murder. Judges (and, more generally, the criminal legal system) can't be so sure. Police and judges have ample evidence that they are often mistaken and that it would, in fact, be wise to do nothing at least some of the time. Nevertheless, the scales are tipped in favor of stopping the next killing of Uncle Ben, so decisionmakers are inclined to detain *everyone* accused of being a thief—just in case they might do something worse—even if that results in certain harms to those detained and to society at large.²⁰⁰

IV

WHAT CAN BE DONE?

In this Part, I will offer some tentative suggestions about how we might change pretrial policies, practices, and conversations in light of the research presented in Part III. The tentativeness with which I make these suggestions honors the primary takeaway from that research: Heuristics make us overconfident, and our brains tend to fool us into thinking that our analysis is more comprehensive and reasoned than it is.²⁰¹ I would be missing the central point of my own Article if I suggested that I were somehow immune to these patterns

¹⁹⁶ Al Baker, J. David Goodman & Benjamin Miller, *Beyond the Chokehold: The Path to Eric Garner's Death*, N.Y. TIMES (June 13, 2015), <https://www.nytimes.com/2015/06/14/nyregion/eric-garner-police-chokehold-staten-island.html>.

¹⁹⁷ David Chanen, *Philando Castile Had Permit to Carry Gun*, STAR TRIB. (July 9, 2016, 4:17 PM), <http://www.startribune.com/philando-castile-had-permit-to-carry-gun/386054481>.

¹⁹⁸ David Alm, *'16 Shots' Revisits the Murder of Laquan McDonald, and its Aftermath*, FORBES (June 11, 2019, 2:14 PM), <https://www.forbes.com/sites/davidalm/2019/06/11/16-shots-revisits-the-murder-of-laquan-mcdonald-and-its-aftermath>.

¹⁹⁹ Holly Bailey, *New Police Video Reveals George Floyd's Desperate Pleas Before His Death*, WASH. POST (July 15, 2020, 2:52 PM), https://www.washingtonpost.com/national/new-video-reveals-george-floyds-desperate-pleas-before-his-death/2020/07/15/c81e9d3c-c6b4-11ea-b037-f9711f89ee46_story.html.

²⁰⁰ See Stephanie A. Wiley & Finn-Aage Esbensen, *The Effect of Police Contact: Does Official Intervention Result in Deviance Amplification?*, 62 CRIME & DELINQ. 283, 283 (2016). Stops not only result in immediate harms—they increase future criminal activity. Juveniles who are stopped are much more likely to become offenders—to grow into officers' suspicions. "Our findings reveal that being stopped or arrested not only increases future delinquency but also amplifies deviant attitudes." *Id.*

²⁰¹ See Yudkowsky, *supra* note 11, at 17.

of thought and behavior just because I know about them. In fact, as Eliezer Yudkowsky points out, if we learn about heuristics but only focus on the way in which they apply to others and not ourselves, we are worse off:

Awareness of human fallibility is dangerous knowledge if you only remind yourself of the fallibility of those who disagree with you. If I am selective about *which* arguments I inspect for errors, or even *how hard* I inspect for errors, then every new rule of rationality I learn, every new logical flaw I know how to detect, makes me that much stupider.²⁰²

So, if there is one lesson to be learned from this research, it is humility. The temptation may be to point to the ways in which others are using heuristics on autopilot, but we have to recognize that the same is true about ourselves.²⁰³ Just because we feel certain doesn't mean that we are right.

The following suggestions are intended to move towards Salerno's²⁰⁴ stated goal: that pretrial liberty is the norm. Norms can be established and reinforced through policies and procedures, but they can also be established and reinforced by the way we talk about them. Sensational pretrial crime does happen, and we should talk about it and, to some extent, implement policies designed to address it. But pretrial crime is also rare—so our conversations and our policies should, in general, be focused on cases that are common. We should think about average cases, not exceptional ones, on the wide middle of the bell curve, not the tails.

What follows are recommendations about how to manage pretrial populations. My primary recommendation is that we think about pretrial in population-level, systemic terms, not individual cases.²⁰⁵ This will help us contextualize failure. Memorial Sloan-Kettering is a successful cancer center, but sometimes people die there. Those deaths, however, are not indictments of the institution. Excellent basketball players miss open shots. Good musicians sometimes miss notes. Failure is part of every human endeavor. Once we adopt a systemic framework, however, we can more easily adopt policies to deal with the average case; think about ways of making the non-sensational but very real harms of pretrial detention as salient as the potential, imagi-

²⁰² *Id.* at 10.

²⁰³ See *supra* note 71 and accompanying text.

²⁰⁴ See *supra* note 53 and accompanying text.

²⁰⁵ For a broader discussion of how systemic analysis is needed in order to properly understand case-level probability, see, for example, W. David Ball, *The Plausible and the Possible: A Bayesian Approach to the Analysis of Reasonable Suspicion*, 55 AM. CRIM. L. REV. 511 (2018).

nary harms of some future crime; and consider overarching narratives to sit alongside atypical stories like Peter Parker's. I will divide my suggestions into three categories: thinking about systems, reducing precounterfactual pressures on judges, and making new narratives to contrast with those of sensational crime.

A. *Systems, Not Cases*

The first suggestion is to think about pretrial in terms of systems and populations, not cases. This is not because individuals are not important—they are. But if we consider each case as unique, “what ifs” are more likely to creep in. Specifically, imagining the details of a future event can make it seem more likely.²⁰⁶ We are tempted to think only of the single universe of this case—not how likely it is relative to other possibilities. A systemic approach might entail some way of reinforcing the ordinal nature of risk—that is, for “exceptional” dangerousness to have any meaning, the majority of cases cannot be exceptionally dangerous. One way to do this would be to allocate a fixed number of detention beds according to relative dangerousness. Judges could not just say someone was dangerous in the abstract; they would, instead, have to compare the relative dangers posed by one person versus another. If judges ran out of beds but believed an arrestee could not be released safely, they would have to release the least dangerous person currently in custody. We must remember not to fixate on individual case failures as necessary indictments of the whole system (though, of course, sometimes things happen that do indict the system). We need to look at representative cross-sections of cases. Looking at systems, not cases, is at odds with our inherent tendency towards thinking that human choices dictate outcomes. It may be disconcerting to think that there is noise and randomness, or that we may have made the right decision but it just turned out wrong, but that is, indeed, the case.

Chester Bliss pioneered a branch of statistical analysis, known as probit analysis, that speaks directly to this point.²⁰⁷ Variability within populations is to be expected. So, for example, while it is possible to accurately predict what might happen to a population—in Bliss's case, that a certain percentage of insects will die when exposed to a certain level of insecticide²⁰⁸—it is impossible to predict which individual members of that population will be the ones to die. Some insects are

²⁰⁶ See, e.g., Yudkowsky, *supra* note 11, at 6; Tversky & Kahneman, *supra* note 29, at 297.

²⁰⁷ Chester I. Bliss, *The Method of Probits*, 79 *SCI.* 38 (1934); see also SALSBERG, *supra* note 79, at 75–76.

²⁰⁸ *Id.*

able to handle strong doses of insecticide, some die easily. All we can know is what the general tendency is across the population. The same is, of course, true for populations of offenders released pretrial. We can know the average risk of a population without knowing which individuals will commit crimes and which will not. There are limits to what we can predict about individuals no matter how much data we have.

A system-wide approach might help contextualize gains and losses. Losses from individual crimes are vivid and coherent. Losses from detention are spread across populations of prisoners, their families, and taxpayers. Adding up the number of days lost, or the amount of wages lost, or the money spent detaining people pretrial might make the harms of detention more salient. Individually vivid stories of the harms of detention can also improve their availability in our minds, restoring some balance to our automatic estimation of what is likely to go wrong if someone is retained or released.²⁰⁹ Kalief Browder, who was detained pretrial for three years as a teenager (spending two of those years in solitary confinement), is a vivid example of the effects of pretrial detention and a story that gained national attention.²¹⁰ The charges against him were dropped, but he took his own life after he was released.²¹¹ While the circumstances of Browder's death are unique, the mental strains he suffered are not. Note also that Browder could have been released had he pleaded guilty. He stayed in jail because he insisted on his innocence. The what if, in this instance, was not, "What if we release him and he does something bad," but "What if we have an innocent person and detain him for years?" Sadly, we found out the answer to the latter question, which was as tragic as it was avoidable.

B. Reducing Counterfactual Pressures on Judges

One way to limit the influence of "what if" pretrial crime scenarios on judges might be to state, explicitly, that most people who are arrested should be released. At the same time, policies and procedures should change so that it takes judicial action to detain someone. Release should be automatic unless there is a decision made to retain.

²⁰⁹ See Yudkowsky, *supra* note 11, at 13.

²¹⁰ Benjamin Weiser, *Kalief Browder's Suicide Brought Changes to Rikers. Now It Has Led to a \$3 Million Settlement*, N.Y. TIMES (Jan. 24, 2019), <https://www.nytimes.com/2019/01/24/nyregion/kalief-browder-settlement-lawsuit.html> (describing Browder as "the young Bronx man whose detention on Rikers Island became a symbol of the breakdown in criminal justice in New York").

²¹¹ Jennifer Gonnerman, *Kalief Browder Learned How to Commit Suicide on Rikers*, NEW YORKER (June 2, 2016), <https://www.newyorker.com/news/news-desk/kalief-browder-learned-how-to-commit-suicide-on-rikers>.

The research presented in Part II demonstrates that the content of our counterfactuals is about returning to the norm; if release is normal, then we will be more likely to (properly) think of crimes committed by those on pretrial release as a subspecies of crime in general. We will be more likely to treat equal public safety risks equally, whether or not it comes from someone in custody awaiting trial. Recall that regret is minimized if it results from inaction (a failure to detain) rather than action (a decision to release).²¹² A firm presumption may also reduce the effects of the endowment effect and prospect theory. Currently, when someone is arrested, the system “has” him (the endowment effect). When someone is released from custody, we notice the change (prospect theory). If release is the default, however, judges, police, and the public may no longer think of detention in jail as the status quo, and may not be as fixated on maintaining it. Finally, a system where the judge is only called on to rule in the extraordinary case of detention, not the mine-run case of release, is also one that would involve less ego depletion. Judges could save their decision-making energy and attention for the truly exceptional cases.

Even without some of the aforementioned changes in policy, judges with a pretrial docket could get feedback on whether their assessments of danger are accurate. Judges should get information on successful, safe releases, not just ones that result in some threat to public safety. Judges might also be trained in ways that can make them aware of their hindsight biases. Heuristics cannot be eliminated, but their effects may be somewhat mitigated.²¹³ As shown in Part II, humans tend to work backwards from events; hindsight biases make us feel like we should have seen the warning signs in retrospect. Judges could be presented with actual, anonymized pretrial reports similar to those they use in practice. If, say, the rate of pretrial crime were five percent, then we could give judges twenty cases and tell them to find the one failure. Judges may learn that their “gut feeling” is much more often wrong than it is right. Looking at cases in tranches emphasizes the systemic nature of pretrial release. If each case is evaluated in isolation, each case might be the one in twenty where release would be the wrong decision. But if one looks at twenty cases, one must, instead, find the nineteen cases where release should be granted.²¹⁴

²¹² See Baron & Ritov, *supra* note 39, at 488.

²¹³ Heller, *supra* note 70, at 304; see also Roese & Vohs, *supra* note 20, at 418 (stating that expertise does not prevent counterfactual generation or concomitant errors).

²¹⁴ See, e.g., Murdock & Sullivan, *supra* note 144, at 1396 (describing a study where subjects who serially estimated the odds of each NBA team winning the championship resulted in a total probability of more than one hundred percent, pointing out the pitfalls

C. *New Narratives*

We should, wherever possible, encourage the population at large and decisionmakers in particular to brainstorm about more diffuse or non-obvious causes of crime, and to learn from those who are already engaging in this line of inquiry.²¹⁵ What, besides being at liberty, causes crime? What could we do on the societal scale, besides detaining people, that might be more efficient and effective? What are the harms that accrue to people who are incarcerated? The more we are exposed to narratives, the more salient they become, and the more natural it becomes to consider alternatives to the automatic causal story that the only way to prevent crime is via incapacitation.

Finally, we still have the desire to make sense of tragic events. We cannot ignore our desire for meaning-making. We want to feel like we learned something, that we are doing something. But perhaps the answer is to embrace risk. It's not about avoiding the bad—tragedies happen—it's about promoting the good. Taking a chance on people, working towards giving them a good life, and using collective wounds to promote psychological healing are real, attainable goals. Completely preventing crime is not.

CONCLUSION

Unlike Peter Parker, judges are not superheroes. They are ordinary human beings. As such, they have the same limitations all of us do when it comes to our abilities to predict risk and to learn from our mistakes. While heuristics are generally useful, they are not always useful, and we should be aware of situations in which they are more likely to mislead than to inform. Judicial predictions of pretrial risk are one such example. Judges have a great deal of power, but, as we know from Peter Parker, with great power comes great responsibility. Judges—who are merely human, not super-human—have a lot of power to detain or release someone awaiting trial. They have a corresponding responsibility to exercise that power toward liberty, without letting their fear of a sensational, low-probability event cause indefinite harm to the people they detain.

of examining isolated team probabilities without considering the entire pool of potential champions).

²¹⁵ See, e.g., *Overview: Critical Resistance to the Prison-Industrial Complex*, 27 Soc. JUST. 1, 2 (2000).