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Judicial Council of California
Criminal Law Advisory Committee
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Re: Proposed California Rules of Court 4.10 and 4.40

On behalf of Upturn, The Leadership Conference on Civil and Human Rights, The Leadership Conference Education Fund, NYU Law’s Center on Race, Inequality, and the Law, The AI Now Institute, Color Of Change, and Media Mobilizing Project, we respectfully submit these comments regarding the Judicial Council of California’s proposed California Rules of Court 4.10 and 4.40. We appreciate the opportunity to engage with the Judicial Council on these critically important issues. We believe these rules must be substantially modified, as described further below, in order to maximize their chances of being constitutionally defensible and achieving the aims of bail reform.

This summer, a broad coalition of civil rights, digital justice, and community-based organizations jointly published “The Use of Pretrial ‘Risk Assessment’ Instruments: A Shared Statement of Civil Rights Concerns.”¹ That statement argues that jurisdictions should not use risk assessment instruments in pretrial decision-making, and instead focus their limited resources on other strategies to strengthen the presumption of release and to ensure meaningful hearings for all defendants. At the same time, the statement recognizes that many jurisdictions are pursuing risk assessment instruments and offers principles and guidance on how these tools can be made least harmful to civil rights. Our comments on the proposed rules are guided by the principles set forth in that document.

The text of S.B. 10 is disheartening, particularly in light of the public discussion that preceded its passage. The now-enacted law lacks critical safeguards that were included in earlier versions of the bill, safeguards that community advocates impacted by mass incarceration rightfully saw as necessary. As the Committee

¹ “The Use of Pretrial ‘Risk Assessment’ Instruments: A Shared Statement of Civil Rights Concerns,” available at <https://leadershipconferenceedfund.org/pretrial-risk-assessment/>.



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develops these rules and future rules, it must revive and mandate these much-needed protections.²

Comments on Rule 4.10

Proposed rule 4.10 misstates the purpose of pretrial risk assessment information, inaccurately describes proper uses, and inadequately describes improper uses. It also authorizes statistically irresponsible and potentially unconstitutional uses of risk assessment scores. If pretrial risk assessment instruments are to be used at all, the only legitimate purpose they can meaningfully serve is to identify which people can be released immediately and which people are in need of non-punitive or restrictive services.³ Both subsections (b) and (c) of the proposed rule are missing critical protections.

Proposed Rule 4.10(a) misstates the purpose of pretrial risk assessment information.

Given the state of today’s instruments, pretrial risk assessment information cannot responsibly be used to justify detention decisions. These instruments provide fairly limited information: the likelihood of certain outcomes — such as rearrest for any reason or failure to appear — under the condition that no assistance is provided to the accused. At most, pretrial risk information may help Pretrial Assessment Services (PAS) or a court quickly determine whether an individual is such a low risk that they should be released immediately, and to identify the smaller set of people who may benefit from additional supervision.⁴

Today’s risk assessment instruments make no attempt to measure the extent to which supportive services can reduce risk, nor do they contemplate the ways that risk may be modified as a result of supportive, supervisory conditions that a judge,

² Earlier versions of S.B. 10 — which many civil rights and community-based organizations supported — mandated that pretrial risk assessment instruments distinguish willful failure to appear from other missed court appointments; mandated that the validation process test systematically for predictive bias and disparate results across racial, ethnic, and gender differences; mandated that pretrial risk assessment instruments be equally accurate across all racial groups, ethnic groups, and genders; and called for courts to provide demographic data to the Judicial Council regarding those released and detained, among other requirements.

³ Preamble, “The Use of Pretrial ‘Risk Assessment’ Instruments: A Shared Statement of Civil Rights Concern.”

⁴ Principle 2, “The Use of Pretrial ‘Risk Assessment’ Instruments: A Shared Statement of Civil Rights Concern.” (“If in use, a pretrial risk assessment instrument must never recommend detention; instead, when a tool does not recommend immediate release, it must recommend a pretrial release hearing that observes rigorous procedural safeguards.”)



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state-level policy, or court-rule may impose in a particular case. And yet, it is precisely this *modified* level of risk — the level of risk after supportive services or supervisory conditions are taken into account — that the judge must use as the basis for a detention decision.⁵

Indeed, the relevant constitutional and legal question for detention decisions is whether there are no conditions that could reasonably assure an individual’s appearance or the safety of the community.⁶ Given that risk assessment tools do not consider the effect of such conditions, their purpose should not be to “assist Pretrial Assessment Services and the court to make release *and detention* decisions,” but rather to “assist Pretrial Assessment Services and the court to make release and supervision decisions.” Detention decisions must be rendered following an appropriate, individualized, adversarial hearing.

Finding that the defendant shares characteristics with a collectively higher risk group is the most specific observation that risk assessment instruments can make about any person. Such a finding does not answer, or even address, the question of whether detention is the only way to reasonably assure that person’s reappearance or the preservation of public safety. That question must be asked specifically about the individual whose liberty is at stake — and it must be answered in the affirmative in order for detention to be constitutionally justifiable.

This is not only the position of civil rights groups. The developer of one of the most popular pretrial risk assessment tools, the Laura and John Arnold Foundation, agrees: the foundation “encourages [jurisdictions] to understand the [relevant state] law in order to use the [Public Safety Assessment] in the most legally sound manner; this necessarily includes holding a due process hearing prior to intentional pretrial detention.”⁷

⁵ John Logan Koepke, David G. Robinson, *Danger Ahead: Risk Assessment and the Future of Bail Reform*, 93 Wash. L. Rev. (forthcoming 2019).

⁶ See § 1320(d)(1). (“At the detention hearing, the court may order preventive detention of the defendant pending trial or other hearing only if the detention is permitted under the United States Constitution and under the California Constitution, and the court determines by *clear and convincing evidence that no nonmonetary condition or combination of conditions of pretrial supervision will reasonably assure public safety or the appearance of the defendant in court as required.*”) (emphasis added).

⁷ Public Safety Assessment, “8. Guide to the Pretrial Decision Framework — Frequently Asked Questions,” available at <https://www.psapretrial.org/implementation/guides/managing-risk/guide-to-the-pretrial-decision-framework>.



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Proposed Rule 4.10(b)(1) insufficiently specifies proper use of pretrial risk assessment information and would not lead to uniform use.

Proposed rule 4.10(b)(1) requires that PAS and courts “give significant weight to the risk assessment score,” but does not detail what “significant weight” means. “Significant” can have a range of definitions: for example, it can mean “having meaning,”⁸ “having or likely to have influence or effect,”⁹ “large enough to be noticed or have an effect,”¹⁰ or “very important.”¹¹ This vague phrase would allow courts or PAS to use pretrial risk assessment information as they wish, so long as the information is not “determinative,”¹² or the “sole basis” for a decision regarding detention, release, or conditions of release.¹³ Moreover, given that proposed rule 4.10(b)(1) states that both courts and PAS “must give significant weight to the risk assessment score,” proposed rule 4.10(b)(3)’s admonition that the “risk score is not determinative but is a relevant factor” is confusing. Ultimately, the proposed rules provide inadequate guidance as to how the PAS and courts should understand and use pretrial risk assessment information. The shifting standards only compound the vagueness.

In the absence of clear, direct guidance, PAS and courts may use pretrial risk information in an inconsistent way, based on what best suits them in each individual case. This is a terrible result, and one that belies the “objectivity” and “evidence-based” processes promised by risk assessments in pretrial decision-making. In such a world, the Judicial Council may find that PAS and courts have low concurrence rates, diverging from the recommendations of pretrial risk assessment instruments and their associated decision-making frameworks.

Further, 4.10(b)(1) should be rewritten to reprioritize what the court and PAS must consider. Currently, as drafted, “the rights of the defendant” is the third item that either actor must consider, behind the “safety of the public” and the “safety and rights of the victim.” The rights of the defendant must be considered first, given the unique constitutional protections afforded to the accused.

⁸ “Significant.” Merriam-Webster Online Dictionary. 2018, available at <https://www.merriam-webster.com/dictionary/significant> (28 Nov. 2018).

⁹ *Id.*

¹⁰ “Significant.” Learner’s Dictionary. 2018, available at <http://www.learnersdictionary.com/definition/significant> (28 Nov. 2018).

¹¹ *Id.*

¹² See proposed rule 4.10(b)(3) (“The risk score is not determinative ...”).

¹³ See proposed rule 4.10(c)(1) (“Pretrial Assessment Services and the court must not use the risk score as the sole basis to detain or release a person ... nor subject a person to any particular or predetermined conditions of release ...”).



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Ultimately, pretrial risk assessment instruments must be implemented in ways that reduce and eliminate unwarranted racial disparities across the criminal justice system.¹⁴ Without clearer language on how PAS and courts may consider pretrial risk assessment information to further ensure that the vast majority of individuals are released, the proposed rule will not have an ameliorating effect and may actually lead to worse outcomes.

Proposed Rule 4.10(b)(3) authorizes statistically irresponsible and potentially unconstitutional uses of risk assessment scores.

Proposed Rule 4.10(b)(3)(A)

This proposed rule implies a direct connection between risk scores and detention decisions. As a result, it is neither responsible nor constitutional, and must be struck from the list of permissible uses for risk scores.

Risk scores were not designed, and cannot responsibly be used, to inform detention decisions. As noted above in our comments on proposed rule 4.10(a), these scores make no attempt to measure the only risk that matters to a detention decision — namely, the modified risk that remains after supportive services are provided or supervisory conditions are imposed. The tools instead measure the ex ante risk before any risk management, which is relevant information for setting conditions of release, but not for detention decisions.

Moreover, by S.B. 10’s own terms, the law “create[s] a presumption that the court will release the defendant on his or her own recognizance at arraignment with the least restrictive nonmonetary conditions that will reasonably assure public safety and the defendant’s return to court.” As such, subsection 4.10(b)(3)(a) should not contemplate using a risk score to inform the choice of “[w]hether” a defendant can be released. The presumption of release commands otherwise.

Instead, the rule should recognize that risk scores can only be a relevant consideration in determining “how” the court and PAS can ensure or promote release in the least restrictive ways possible. In order to ensure that pretrial detention remains the “carefully limited exception,” the Judicial Council should reference Principle 3 from the Shared Statement of Civil Rights Concerns regarding the

¹⁴ Principle 1, “The Use of Pretrial ‘Risk Assessment’ Instruments: A Shared Statement of Civil Rights Concern.”



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minimally necessary procedures and safeguards to determine when detention must be used as a last resort.¹⁵

Proposed Rule 4.10(b)(3)(B)

A pretrial risk assessment score may be a relevant factor in determining conditions of release, but should not be a relevant factor in determining the response to a violation of a condition of release. Therefore, this provision should refer only to “[t]he appropriate conditions of release.” When assessing a violation of a condition of release, PAS or courts should consider the *particular* condition of release at issue and the circumstances of the violation. An individual’s risk score, indicating a likelihood of failure to appear or rearrest, has no logical connection to this assessment. For example, if someone is unable to comply with a field visit by a pretrial supervision officer because of a family emergency, that person’s failure to appear or rearrest risk is irrelevant.

The only risk information that is relevant in order for PAS or a court to respond to a violation of a condition of release is that individual’s risk of continued, repeated violation of that same condition. PAS or a court may be able to determine that risk through other means, but risk scores are not applicable to this specific decision and should not be used.

Further, S.B. 10 commands that “the results of a risk assessment using a validated risk assessment instrument, shall not be used for any purpose other than that provided for in this chapter.” Given that S.B. 10 does not provide for how PAS or a court should respond to violations of conditions of release, neither PAS nor courts may permissibly use pretrial risk assessment information in response to violations.

Proposed Rule 4.10(b)(5) must communicate the many limitations of risk assessment tools more clearly.

It is important for Judicial Council to direct courts to consider the limitations of pretrial risk assessment tools. However, this proposed rule does not do an effective job at communicating these limitations. Further, the draft rule does not describe

¹⁵ Principle 3, “The Use of Pretrial ‘Risk Assessment’ Instruments: A Shared Statement of Civil Rights Concern.” (Detailing that an adversarial hearing must be held promptly where the prosecution must demonstrate that the accused presents an identifiable risk of flight or a specific, credible danger to specifically identified individuals in the community, and also detailing a range of other due process protections.)



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other important limitations that courts should consider. Both deficiencies must be addressed in ways we describe below.

Proposed Rule 4.10(b)(5)(A)

Proposed rule 4.10(b)(5)(A) rightly encourages courts to consider the limits of the data upon which pretrial risk assessment instruments were developed. But it stops short of describing two critical limitations: first, that the group data reflects decades of massive racial inequities within the criminal justice system and second, that the group data does not reflect the risk-mitigating effects of new bail reforms.

The Proposed rule should be explicit about the racial inequities reflected in the data on which pretrial risk assessment instruments are based.¹⁶ Our system of justice is profoundly flawed: it is systematically biased against and disproportionately impacts communities of color.¹⁷ (Indeed, the need to address this reality was a motivating factor behind earlier versions of S.B. 10.)¹⁸ Decades of research have shown that arrest data primarily documents the behavior and decisions of police officers and prosecutors, rather than the individuals or groups that the data claim to describe.¹⁹

¹⁶ The very system that created mass incarceration and massive racial inequities within the criminal justice system also provides the data upon which pretrial risk assessment instruments are based. Beyond acknowledging that group data is not predictive at the individual level, this rule must have courts consider the inherent limitations of the group data itself.

¹⁷ Principle 1, “The Use of Pretrial ‘Risk Assessment’ Instruments: A Shared Statement of Civil Rights Concerns.” (“While the methods of arrest, prosecution, and punishment have evolved over time, the imbalance in the allocation of burdens has not. Persistent racial disparities plague the system today. Armed with that knowledge, jurisdictions must work to remedy known, unwarranted racial disparities in the administration of criminal law. In this context, the term “racial disparity” refers to unjustifiable differences in the rates of contact by a racial group with any stage of the criminal justice system that are attributable to explicit bias, implicit bias, socioeconomic inequality, or facially race-neutral policies that produce a disparate racial impact.”)

¹⁸ S.B. 10 as amended in assembly, September 6, 2017. (“This bill would declare the intent of the Legislature to enact legislation that would safely reduce the number of people detained pretrial, while addressing racial and economic disparities in the pretrial system, and to ensure that people are not held in pretrial detention simply because of their inability to afford money bail.”)

¹⁹ Carl B. Klockars, *Some Really Cheap Ways of Measuring What Really Matters*, in *Measuring What Matters: Proc. from the Police Res. Inst. Meetings 201* (Nat’l Inst. of Justice (NIJ) 1999), *available at* <https://www.ncjrs.gov/pdffiles1/nij/170610.pdf>. (“It has been known for more than 30 years that, in general, police statistics are poor measures of true levels of crime. This is in part because citizens exercise an extraordinary degree of discretion in deciding what crimes to report to police, and police exercise an extraordinary degree of discretion in deciding what to report as crimes. Moreover, some unknown proportion of perpetrators are actively engaged in committing crimes in ways that make it unlikely that their crimes will ever be discovered. In addition, both crime and crime clearance rates can be manipulated dramatically by any police agency with a will to do so. It is also absolutely axiomatic that for certain types of crime (drug offenses, prostitution, corruption, illegal gambling, receiving stolen property, driving under the influence, etc.), police statistics are in no way reflective of the level of that



The Committee’s rules must speak much more explicitly about the limitations arising from this biased data.

Further, the Committee should make clear that the group data upon which pretrial risk assessment instruments are developed do not consider the risk-mitigating effects of other bail reform policies. For example, text message reminders and telephone check-ins have been shown to help reduce the rate of failure to appear. Indeed, there is an inherent tension between statistical prediction and other bail reform efforts. On one hand, to change a broken system, policymakers implement new procedures to support individuals and reduce the risk of rearrest and failure to appear. On the other hand, policymakers ask statistical tools to forecast *those very same risks based on data from the very system under reform*. In other words: the development sample or training data for pretrial risk assessment tools often comes from times and places that are materially different from those in which predictions are made. Without the right policies and procedures, pretrial risk assessment tools are blind to the helpful impact of new risk-mitigating policy changes, and may consistently overestimate risk.²⁰

Given this, the committee should ensure that Rule 4.10(b)(5) instructs courts to consider the following limitation of pretrial risk assessment information: that pretrial risk assessment instruments do not consider the risk-mitigating impact of certain least-restrictive conditions of release.

Proposed Rule 4.10(b)(5)(B)

Proposed rule 4.10(b)(5)(B) should not exist because it should not be necessary. Though outside the scope of these rules and proceedings, no proprietary pretrial risk assessment tool should be used in the state of California. We strongly urge the Judicial Council to ensure that when the Council “[c]ompiles and maintain[s] a list of validated pretrial risk assessment tools,” it does not include a tool whose maker claims trade secrecy or alleges that any relevant part of the tool is proprietary.²¹ At a minimum, the public, accused, and counsel must be given a meaningful

type of crime or of the rise and fall of it, but they are reflective of the level of police agency resources dedicated to its detection.”)

²⁰ John Logan Koepke, David G. Robinson, *Danger Ahead: Risk Assessment and the Future of Bail Reform*, 93 Wash. L. Rev. (forthcoming 2019).

²¹ Principle 4, “The Use of Pretrial ‘Risk Assessment’ Instruments: A Shared Statement of Civil Rights Concerns.” (“If in use, a pretrial risk assessment instrument must be transparent, independently validated, and open to challenge by an accused person’s counsel. *The design and structure of such tools must be transparent and accessible to the public.*”) (emphasis added).

opportunity to inspect how a pretrial instrument works. This includes access to the data used to develop and validate a tool; a complete description of the design and testing process used to create the tool; and all input factors and weights of those factors.²²

There is simply no defensible reason to use tools that cannot be completely audited within a system that has such substantial impact on human lives.

Proposed Rule 4.10(b)(5)(C)

Proposed rule 4.10(b)(5) indicates that a court must “consider any limitations of risk assessment tools in general,” and proposed rule 4.10(b)(5)(C) further specifies that a court must consider whether “any scientific research has raised questions that the particular instrument unfairly classifies offenders based on race, ethnicity, gender, or income level.” As the Judicial Council wades into the waters of whether or not pretrial risk assessment instruments “unfairly classif[y]” offenders, it must do so carefully and cautiously.

Research has shown that if the base rate of a predicted outcome (here, rearrest) differs across racial groups, it is impossible to achieve predictive parity, parity in false-positive rates, and parity in false-negative rates.²³ In other words, so long as the base rate of the predicted outcomes is racially imbalanced, it is *impossible* to both ensure that risk scores mean essentially the same thing regardless of a person’s race, and to ensure equal false positive²⁴ and false negative²⁵ rates across racial groups.²⁶ Computer scientists have detailed mathematical proofs of this fact.²⁷ When base rates of rearrest differ, “race-neutrality” is not attainable.

The correct consideration for a court is not whether “any scientific research has raised questions” that a *particular* tool “unfairly classifies offenders,” as scientific research has shown that *all* pretrial risk assessment instruments will in some way unfairly classify offenders. Predictive parity and error rate balance — both of which

²² *Id.*

²³ Sandra Mayson, *Bias In, Bias Out*, 128 Yale L. J. (forthcoming 2019).

²⁴ When a person is assessed as “high risk” but does not go on to be rearrested.

²⁵ When a person is assessed as “low risk” but does go on to be rearrested.

²⁶ For an especially concise overview of this literature and finding, see: Sam Corbett-Davies, Emma Pierson, Avid Feller, and Sharad Goel, “A computer program used for bail and sentencing decisions was labeled biased against blacks. It’s actually not that clear.” Washington Post, Oct. 17, 2016.

²⁷ Alexandra Chouldechova, Fair Prediction with Disparate Impact: A Study of Bias in Recidivism Prediction Instruments, BIG DATA (2017), <https://arxiv.org/abs/1703.00056>; Jon Kleinberg et al., Inherent Trade-Offs in the Fair Determination of Risk Scores 4 (2017), arxiv.org/abs/1609.05807v2.



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are important measures of fairness in their own respects — are mutually exclusive so long as the base rate of rearrest is unequal.

Proposed Rule 4.10(b)(5)(D)

It is difficult to comment on proposed rule 4.10(b)(5)(D) given that the Judicial Council will “[d]escribe the elements of ‘validation’”²⁸ in another rulemaking process, which will, in all likelihood, define what a “relevant population” means. We look forward to seeing and offering comments on the Judicial Council’s forthcoming rules regarding the elements of validation. Nevertheless, similar to proposed rule 4.10(b)(5)(B), proposed rule 4.10(b)(5)(D) should not exist because the Judicial Council should not allow a pretrial risk assessment instrument to be used if it is not validated on a relevant population. The validation of a pretrial risk assessment instrument on a relevant population is a necessary, not a sufficient condition of use.²⁹ Using pretrial risk assessment tools that are not validated on relevant populations would contradict principles 4 and 6 from the Shared Statement of Civil Rights Concern.³⁰

Several Necessary Protections are Missing from Proposed Rule 4.10(b), we recommend the following modifications:

Add a new provision describing the gap between predicted outcomes and legally significant outcomes.

The Judicial Council should add a provision to Rule 4.10(b)(5) describing one of the central limitations of pretrial risk assessment instruments: the gap between the outcomes that pretrial risk assessment tools predict (i.e., rearrest or failure to appear), and those that courts must assess (i.e., public safety and flight risk). In both instances, pretrial risk assessment instruments use *what can be measured to*

²⁸ § 1320.24(a)(2).

²⁹ Marissa Gerchick, Fiona Kelliher, Emily Lemmerman, “Bail reform bill considered by California Legislature,” Pleasanton Weekly, Aug. 14, 2018. (“There’s really no excuse for not validating the tool on your own population,” Edward Latessa, creator of ORAS.)

³⁰ Principle 4, “The Use of Pretrial ‘Risk Assessment’ Instruments: A Shared Statement of Civil Rights Concerns.” (“If in use, a pretrial risk assessment instrument must be transparent, *independently validated*, and open to challenge by an accused person’s counsel. The design and structure of such tools must be transparent and accessible to the public.”) (emphasis added). Principle 6, “The Use of Pretrial ‘Risk Assessment’ Instruments: A Shared Statement of Civil Rights Concerns.” (“If in use, a pretrial risk assessment instrument must be developed with community input, *revalidated regularly by independent data scientists with that input in mind*, and subjected to regular, meaningful oversight by the community.”) (emphasis added).



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speak to *what risks courts may care about*. Critically, the two concepts are not the same.

Pretrial risk assessment tools do not speak to “public safety.” In fact, they predict something much more limited: rearrest. Though the predicted outcome of rearrest is sometimes treated as a proxy for a person’s public safety threat, this practice is imperfect at best and dangerous at worst. To the extent that the relevant concern is preventing violent crime, risk scores that reflect the general probability of rearrest are counterproductive: individuals that are at the highest risk of *any* rearrest are *not* at the highest risk of arrest for *violent crime*.³¹ Worse, a focus on generalized rearrest as a proxy for public safety will unnecessarily compound racial disparities in prediction, given that arrests rates for low-level offenses and drug offenses are racially biased.

Similarly, while pretrial risk assessment tools predict future nonappearance in court, generalized nonappearance risk and flight risk are distinct. In most cases, nonappearance risk does not involve people who have the means or the desire to flee a jurisdiction, and is best addressed by means other than detention.³² As one scholar has argued, there are three “subcategories” of “nonappearing defendants”: true flight, local absconders (those who remain in the jurisdiction but actively and persistently avoid court), and low-cost appearances (defendants who remain in the jurisdiction but whose failures to appear are easily preventable and/or non-willful).³³ Risk scores do not capture these nuances, and courts should be warned of this fact.

To the extent that Rule 4.10(b)(5) directs courts to consider the limitations of pretrial risk assessment instruments, the Committee should draft language that clearly distinguishes between the predicted outcomes that pretrial risk assessment tools can measure on the one hand (rearrest and failure to appear), and the only risks courts may consider to order detention on the other (prevention of violent

³¹ Shima Baradaran & Frank L. McIntyre, *Predicting Violence*, 90 TEX. L. REV. 497, 528-529 (2012). (Finding that “the data show that those charged with violent crimes are not necessarily more likely to be rearrested pretrial.”) *Id.* at 527.

³² In fact, as recognized in the federal system, detention is improper for generalized nonappearance risk. *See United States v. Morgan*, No. 14cr10043, (C.D. Ill. July 9, 2014) (finding that “every Circuit which has done so has held that the federal bail statute “authorize[s] detention only upon proof of likelihood of flight, a threatened obstruction of justice or a danger of recidivism in one or more of the crimes actually specified by the bail statute.”); *also see United States v. Himler* 797 F.2d 156, 160 (3d. Circ. 1986) (finding that it is reasonable to interpret the federal bail statute as “authorizing detention only upon proof of a *likelihood of flight*, a threatened obstruction of justice or a danger of recidivism in one or more of the crimes actually specified by the statute.”) (emphasis added).

³³ Lauryn P. Gouldin, *Defining Flight Risk*, 85 U. Chi. L. Rev. 677, 683 (2018).



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crime and flight from the jurisdiction).

Add a provision directing PAS or the courts to consider the costs that supervision or jailing impose on defendants and communities.

The Committee should add a provision to 4.10(b)(1), which describes what information PAS or a court must consider, instructing the PAS or court to consider the negative effect that detention can have on a person's life.

A large body of scholarship shows that being sent to jail increases the likelihood the accused will plead guilty, even after controlling for the seriousness of the case and other factors.³⁴ While the literature recognizes that short-term detention does incapacitate individuals from re-offending pending adjudication of their case, it also finds that “pretrial detention increases new crime after case disposition through a medium-run criminogenic effect.”³⁵ On net, a careful econometric study³⁶ and a separate thorough literature review³⁷ have found that the public safety gains from pretrial jailing are nullified by the added risk of crime that is *created* by sending someone to jail.³⁸

As one study observed, most of the reduction in pretrial rearrests were “reversed as individuals who were detained pretrial are more likely to be rearrested after their cases are resolved.”³⁹ Relatedly, another study found that pretrial detention reduces employment,⁴⁰ especially for individuals who had the strongest ties to the labor market, and also reduces the likelihood of receiving unemployment insurance and EITC credits for wages earned while incarcerated.⁴¹

³⁴ See *Infra* fn. 35-41.

³⁵ Will Dobbie et al., *The Effects of Pre-Trial Detention on Conviction, Future Crime, and Employment: Evidence from Randomly Assigned Judges*, 108 *American Economic Review* 201, 227 (2018).

³⁶ *Id.*

³⁷ David Roodman, *The Impacts of Incarceration on Crime*, September 2017, available at <https://www.openphilanthropy.org/blog/impact-incarceration-crime>.

³⁸ Crystal S. Yang, *Toward an Optimal Bail System*, 92 *N.Y.U. L. Rev.* 1399, 1426 (2017). (“[A]vailable empirical evidence suggests that pre-trial detention is indeed criminogenic, *imposing long-term costs on society.*”) (emphasis added).

³⁹ Emily Leslie, Nolan G. Pope, *The Unintended Impact of Pretrial Detention on Case Outcomes: Evidence from NYC Arraignments*, Sept. 25, 2017, available at http://econweb.umd.edu/~pope/pretrial_paper.pdf.

⁴⁰ Will Dobbie, Jacob Goldin, Crystal Yang, *The Effects of Pre-Trial Detention on Conviction, Future Crime, and Employment: Evidence from Randomly Assigned Judges*, 108 *Am. Econ. Rev.* 201 (2018).

⁴¹ *Id.*, at 229-230.



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Given that proposed rule 4.40(b)(3)(D) requires, via local rule, PAS to consider the impact of detention on an individual assessed as medium risk pending arraignment, the Committee should ensure *all* individuals potentially subject to detention enjoy this crucial consideration by amending 4.10(b)(1).

Add a provision on how pretrial risk assessment information is communicated.

In accordance with basic concepts of fairness, the presumption of innocence, and due process, pretrial risk assessment instruments must frame their predictions in terms of success upon release, not failure.⁴²

Proposed Rule 4.10(c) does not adequately describe improper uses of pretrial risk assessment information.

Proposed Rule 4.10(c)(1)

We are heartened to see that the draft rule says that PAS and the court “must not use the risk score as the *sole basis* to detain ... a person,” other than as required by other troubling provisions of S.B. 10. Nevertheless, the Committee must be more assertive in protecting against improper uses. On this, we would point the Committee to a recent decision by the New Jersey Supreme Court. There, a previous court rule of procedure directed that:

“The Court may consider as *prima facie* evidence *sufficient to overcome the presumption of release* a recommendation by the Pretrial Services Program ... that the defendant’s release is not recommended (i.e. a determination that ‘release not recommended or if released, maximum conditions.’) (emphasis added).

The New Jersey Supreme Court concluded that “parts of the Rule should be revised,” because part of the original rule “suggests a court can order detention based solely on a recommendation against release.”⁴³ As Justice Albin’s concurrence noted, the

⁴² Principle 5, “The Use of Pretrial ‘Risk Assessment’ Instruments: A Shared Statement of Civil Rights Concerns.” (“If in use, a pretrial risk assessment instrument must communicate the likelihood of success upon release in clear, concrete terms.”)

⁴³ *State v. Mercedes*, 183 A.3d 914 (N.J. Sup. Ct. 2018).



recommendation, based on pretrial risk assessment information, “could have operated to undermine the rebuttable presumption favoring release.”

The Committee should update this rule to reflect the New Jersey Supreme Court’s wisdom: pretrial risk assessment information should never on its own constitute prima facie evidence sufficient to overcome the presumption of release.

Proposed Rule 4.10(c)(2)

Where PAS or the court seek to manage the risk of reoffense during the pretrial stage, they can only do so “during the pretrial stage of the case,” and cannot consider “the long-term risk of reoffense.”⁴⁴ This rule correctly prohibits courts and PAS from considering “long-term risk of reoffense” when evaluating public safety.

But this prohibition should not bar PAS or courts from considering the longer-term effect of detention on the individual. That’s because this effect would be *directly caused* by state action against an individual’s liberty. As we described in our general comments on proposed rule 4.10(b), the “available empirical evidence suggests that pre-trial detention is indeed criminogenic, imposing long-term costs on society.” It is well within the proper boundary of inquiry to understand the consequences of a state-imposed sanction on a presumptively innocent individual. The Committee should not blind PAS or courts to these very real consequences.

Separately, we note that different pretrial risk assessment tools work on different time horizons, which could create confusion about what counts as “long-term” for purposes of this rule. For example, the Ohio Risk Assessment System defines recidivism as any “arrest for a new crime” within one year from the date of assessment,⁴⁵ whereas COMPAS defines recidivism as any arrest within two years of the assessment,⁴⁶ whereas the Los Angeles Countywide Criminal Justice Coordination Committee defines recidivism within a three-year period following the individual’s release.⁴⁷ Given the variation between how tool developers define “the

⁴⁴ “The Use of Pretrial ‘Risk Assessment’ Instruments: A Shared Statement of Civil Rights Concerns.” (“Further, such tools should only predict events during the length of the trial or case – not after the resolution of the open case. Every tool should thus have a temporal cutoff for its prediction period – for example, six months – which local stakeholders may wish to track speedy trial laws.”)

⁴⁵ Edward Latessa et al., Univ. of Cincinnati, Creation and Validation of the Ohio Risk Assessment System: Final Report (2009), available at http://www.ocjs.ohio.gov/ORAS_FinalReport.pdf.

⁴⁶ Northpointe, *Practitioner’s Guide to COMPAS Core*, March 2015.

⁴⁷ Los Angeles Countywide Criminal Justice Coordination Committee, “CCJCC DEFINITION OF RECIDIVISM,” available at <http://ccjcc.lacounty.gov/LinkClick.aspx?fileticket=4zzcn9p2mQg%3D&portalid=11>.



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risk of reoffense during the pretrial stage of the case,” as well as variations among local jurisdictions, the Judicial Council should direct that judges be explicitly notified of the precise time horizon over which predictions are made.

Proposed Rule 4.10(c)(3)

This proposed rule stands in tension with the Committee’s proposed rule 4.10(b)(5)(B). Were the Judicial Council to allow the use of a proprietary pretrial risk assessment instrument — which, to reiterate, we strongly oppose — then it would likely follow that a judge would *not be able* to “be familiar with the factors included in the particular risk assessment tool,” or the weights of those factors.

Further, as proposed rule 4.10(b)(5)(B) describes, if a proprietary tool would “prevent the disclosure of information relating to how [the tool] *weighs risk factors*,” a judge would have an impossible task of understanding how to not “give additional undue weight to [those] factors,” given that a proprietary tool would likely not allow them to understand the tool’s weighting of those factors. The judge would not have a baseline to work from in order to ensure that they did not place “undue weight” on the factors or combination of factors present in the tool.

To resolve this conflict, the Judicial Council must ensure that no proprietary pretrial risk assessment instrument be used in California.⁴⁸

Several necessary protections are missing from 4.10(c), we recommend the following modifications:

Add a rule regarding subsequent use of pretrial risk assessment information.

The Criminal Law Advisory Committee should add a provision in Rule 4.10 prohibiting subsequent, downstream use of pretrial risk assessment information, bringing it in line with the clear requirements of S.B. 10. It would make most sense

⁴⁸ “The Use of Pretrial ‘Risk Assessment’ Instruments: A Shared Statement of Civil Rights Concerns.” (“The design of pretrial risk assessment instruments must be public, not secret or proprietary. This means adopting local legislation or enforceable regulations that enforce transparency by sharing the data and design with that specific jurisdiction, in addition to reporting requirements throughout the implementation process. The source code and training data (appropriately anonymized) should be made public. And all tools and their documentation must be clear about the source data and code underlying each conclusion in any report; in other words, whether any given conclusion is empirically derived or based on a political, moral or personal choice or assumption set by criminal justice decisionmakers or other government officers.”)



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for the Committee to do so in 4.10(c).

The plain language of § 1320.9(d) states that “The report described in subdivision (c), including the results of a risk assessment using a validated risk assessment instrument, *shall not be used for any purpose other than that provided for in this chapter.*” (emphasis added). Given that Rule 4.10 is about prescribing the “proper use of pretrial risk assessment information,” the Committee should consider adding the following language: “Pretrial risk assessment information shall not be used in any court proceeding or criminal justice decision point, other than pretrial.” This would prevent pretrial risk assessment information from being improperly used at sentencing — where, for example, the time horizon of a forecasted prediction may no longer be applicable.

Add a rule clearly allowing for independent study of pretrial risk assessment information.

The Committee should add a provision which allows for independent third-party testing for predictive bias and disparate outcomes in implementation.

Comments on Proposed Rule 4.40

It is difficult to provide detailed comments to the Committee on proposed rule 4.40 without knowledge of how many people will be assessed as medium risk. If a significant number of people are likely to be assessed as medium risk, then the Committee must make special effort to ensure that there are heightened requirements for local rules to add exceptions. In any case, it is improper to ask local courts to develop local rules regarding review and release standards for individuals assessed as medium risk without knowing what “medium risk” means. Therefore, the Council should consider delaying this rule until the risk level definitions are established.

Further, proposed rule 4.40 lacks critical protections for the setting of release conditions, the considerations for expanding the list of exclusions, and the requirements of courts in the development and review of local rules. Individuals assessed as medium risk should not lose their presumption of release on recognizance because of their pretrial risk assessment score.



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Proposed Rule 4.40(a) must further emphasize the presumption of release.

Proposed Rule 4.40(a)(2)

The Committee should revise this rule in two ways. First, the opening clause of the rule should read as follows: “Each local rule must *clearly* authorize release for as many arrested persons as possible.” Second, the Committee should add a sentence to this proposed rule which clarifies that each local rule must clearly state that individuals assessed as medium risk *enjoy the presumption of release on their own recognizance* with the least restrictive nonmonetary conditions that will reasonably assure public safety and their return to court.

Proposed Rule 4.40(b) must clarify the criteria and methods allowed to influence decisions about pretrial release.

Proposed Rule 4.40(b)(3)

Subsection (b)(3) should clarify the list of factors PAS must consider. This clarification should include definitions as well as explanations of the sources of information that will be accepted for consideration, including the types of prearrestment interviews. No one should be required to provide information to an employee of a law enforcement agency in order to be eligible for pretrial release.

Based on the text of S.B. 10, the Judicial Council’s own materials,⁴⁹ and the Committee’s draft rules, it is unclear how PAS will accomplish proposed rule 4.40(b)(3)(B), which calls for PAS to consider an arrested person’s “family and community ties.” Though § 1320.9(a)(3) directs PAS to obtain “[a]ny supplemental information *reasonably available* that directly addresses the arrested person’s risk to public safety or risk of failure to appear in court as required,” it remains unclear how PAS will accomplish this.

Here, it is difficult to comment because we do not know what procedure or set of procedures will be used to gather information regarding an individual’s family and community ties. It is important for the Committee and the Judicial Council to provide clearer guidance here. Are PAS expected to interview an individual about

⁴⁹ See, e.g., <http://www.courts.ca.gov/documents/sb10-infographic-prearraignment.pdf>; <http://www.courts.ca.gov/documents/sb10-flowchart-prearraignment-process.pdf>.



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their family and community ties? It is important for this information to be available and considered, but PAS should not interview clients who have not otherwise been appointed counsel.⁵⁰

Further, this information should only be used in a way that ensures release. Individuals should not be penalized if, for example, they have lost touch with their family or recently moved to California.

As for the consideration of “criminal history” in Rule 4.40(b)(3)(B), which the Committee requested specific comment on: the history considered should exclude arrests that did not result in the filing of charges. Moreover, in specifying that PAS consider additional factors including “criminal history, and record concerning appearance in court proceedings,” the proposed rule appears to contradict the intent of Rule 4.10 (c)(3), which specifies that additional undue weight should not be given to factors already considered by the risk assessment tool.

Finally, a new subcategory should be added to subsection (b)(3) that prioritizes consideration of the impact on dependent minor children of detainee parents.

Proposed Rule 4.40(b)(4)

Subsection (b)(4) is too vague, with many undefined terms. The phrase “substantial likelihood” is unclear and potentially invests too much discretionary power in PAS to retain an arrested person in custody. The proposed rules must define how PAS or a judge must make the determination of “substantial likelihood.” Does “substantial” mean a 5 percent likelihood? 20 percent? 50 percent? Without clearer language, PAS may interpret this standard in radically different ways. In order for these local rules to “authorize release for as many arrested persons as possible,” the Committee must establish a higher, clearer bar for local rules. Without guidance or limitation, subsection (b)(4) may be enforced inconsistently.

Proposed Rule 4.40(c) misses an important opportunity to limit the proliferation of intrusive conditions of release.

⁵⁰ The court should appoint an attorney for those who need one. Aligned with our principles in “The Use of Pretrial ‘Risk Assessment’ Instruments: A Shared Statement of Civil Rights Concerns,” a pretrial risk assessment instrument must be transparent, independently validated, and open to challenge by an accused person’s counsel. The design and structure of such tools must be transparent and accessible to the public.



This subsection must better-define rules for setting conditions of release. Although there is a presumption that a person will be released under the least restrictive nonmonetary conditions — and individuals cannot be required to pay for any supervision conditions that are imposed — the Committee should clearly define the “least restrictive” standard. The rules should define limits on when the most severe conditions are permissible and establish a process for modifying conditions of release based on progress and updated circumstances.

Proposed Rules 4.40(c)(1)-(4)

We support the Committee’s draft rules 4.40(c)(2) and 4.40(c)(4). The Committee should consider revising 4.40(c)(4) from “an undue burden” to “any undue burden” to strengthen its protections.

Regarding 4.40(c)(1), PAS are empowered to “exercise independent judgment and to tailor release conditions to the individual person,” essentially playing the role of judge or magistrate without the training or democratically bestowed authority.

We believe proposed rule 4.40(c)(3) misses the mark and potentially creates confusion regarding the standard in determining the potential conditions of release. PAS must only impose *the least restrictive conditions* that are reasonably related to assuring the individual’s return to court and public safety, a more specific requirement than conditions that are reasonably related to those aims. A hearing must be held promptly to determine whether there is a credible danger to specifically identified individuals in the community.⁵¹

Given that proposed rule 4.40(c)(6) already has this stronger language, we believe rule 4.40(c)(3) is unnecessary, and that proposed rule 4.40(c)(6) could take its place.

Proposed Rule 4.40(c)(5)

The Committee should require local rules to set a significantly higher bar for a finding that GPS or electronic monitoring is a necessary condition of release. Specifically, the Committee should require that local rules set a higher bar for making transdermal monitoring (4.40(c)(5)(J)) and passive or active GPS monitoring

⁵¹ Principle 3, “The Use of Pretrial ‘Risk Assessment’ Instruments: A Shared Statement of Civil Rights Concerns.” (“The hearing must be held promptly to determine whether the accused person presents a substantial and identifiable risk of flight or (in places where such an inquiry is required by law) specific, credible danger to specifically identified individuals in the community.”)



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(4.40(c)(5)(K)) a condition of release. For both, there should be a presumption *against* their use. They should be permitted only after a specific, written finding has been issued detailing why these conditions satisfy the “least restrictive condition” test articulated in proposed rule 4.40(c)(6).

As the Committee considers a higher standard for active or passive GPS monitoring, it should borrow heavily from the “Guidelines for Respecting the Rights of Individuals on Electronic Monitoring,”⁵² a set of guidelines endorsed by more than 50 organizations.⁵³ The Committee should also take note of New Jersey’s experience with electronic monitoring before trial. The New Jersey Judiciary told the state that “[e]lectronic monitoring has . . . been a significant challenge.”⁵⁴ Given electronic monitoring’s especially pernicious restraints and effects on the individual, electronic monitoring must only be issued in rare, specific circumstances.

Proposed Rule 4.40(c)(6)

This subsection should clarify that PAS must justify any conditions by their necessity to facilitate return to court and their necessity to guard against credible danger to specifically identified individuals in the community. Further, the subsection must state that punitive or rehabilitative conditions are inappropriate.

Proposed Rule 4.40(d) misses an opportunity to give clear guidance to ensure local rules authorize release for as many people as possible.

Proposed Rule 4.40(d)(1)

This proposed rule’s “[a]ll or nearly all” language is not only imprecise, but also aims for the wrong target. The relevant policy goal for the Committee with respect to pretrial release decisions is to ensure that release is authorized for as many people as possible. Accordingly, the Committee must set a brighter line than “all or nearly all.” There are many ways that the Committee could do this. For example, the Committee could set a defined threshold, reading as follows: “If a court chooses to

⁵² Guidelines for Respecting the Rights of Individuals on Electronic Monitors, *available at* <https://centerformediajustice.org/wp-content/uploads/2018/03/electronic-monitoring-guidelines-final.pdf>.

⁵³ A List of Our Endorsers, Guidelines for Respecting the Rights of Individuals on Electronic Monitors, *available at* <https://centerformediajustice.org/wp-content/uploads/2018/03/electronic-monitoring-list-of-endorsers.pdf>.

⁵⁴ See New Jersey Judiciary’s Responses to New Jersey Office of Legislative Services Analysis of the New Jersey Budget, Fiscal Year 2017-2018, *available at* https://www.njleg.state.nj.us/legislativpub/budget_2018/JUD_response.pdf.



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add to the list of exclusionary offenses or factors, the court must not adopt a rule that effectively excludes more than 25 percent of persons assessed as medium risk from prearrest release.”

The Committee should also consider adding robust procedural requirements for local courts to add exclusionary offenses or factors to local rules. For example, one such requirement could be that for every exclusion or factor a local court wishes to add, that decision must be unanimous among the relevant judges of the court. Another potential requirement could force local courts to seek permission from the Judicial Council and issue a public statement of reasons for their decision.

Proposed Rule 4.40(d)(6)

We are heartened to see that the Committee will require courts to consider the potential impact of new exclusions on marginalized groups. However, the Committee should go further than just requiring a court to consider this impact. The Committee should require courts to publicly state how the addition of an exclusion would not increase disparity in detention rates among marginalized groups in the local population.

Proposed Rule 4.40(e) is a step in the right direction, but the Judicial Council should require more.

Proposed Rule 4.40(e)(1)

We are encouraged to see that in developing the local rule, the court “must” meet with justice system partners, like the county behavioral health agency and community-based organizations. However, the “as appropriate” modifier, though well-intentioned, may lead some courts to believe this consultation is *pro forma*. The Committee should consider language to avoid this. For example, the Committee could consider language like: the court “must consult with other justice system resources on an ongoing basis,” or “must regularly consult with other justice system resources.” Such modification could help ensure that community-based organizations and directly-impacted communities have an empowered voice.

Further, the court should also seek guidance on “evidence-based practices in pretrial release and detention” from national organizations. The draft rule should be modified so that courts may avail themselves of the best possible resources.



Proposed Rule 4.40(e)(2)

This subsection mandates the creation of an annual review of racial and ethnic disparities in the criminal justice system to be conducted by local courts. That review must show consultation with community stakeholders and detailed analysis of race data. However, we do not know what metrics the courts will use to decide whether a tool or PAS is racially biased and there is no requirement to release the report. Such reports and findings risk being ineffective, inaccurate, and unpublicized.

It is important that this proposed rule directs local courts to study the impact of their rules on communities that are overrepresented in the criminal justice system. But local courts should not only “examine whether the rule has had a disproportionate impact based on race or ethnicity, gender or other demographics.” To the extent that a court’s examination finds a disproportionate impact, the Judicial Council should require that court to modify its rule or take some steps to remedy and reduce that burden. This subsection needs to have a requirement, standard, and process for changing any part of the local rule that is found to have a discriminatory impact.

For the reasons outlined above, we oppose the proposed rules and recommend the modifications listed above. If you have any additional questions, please feel free to contact Logan Koepke, Senior Policy Analyst, Upturn, at logan@upturn.org or Sakira Cook, Director, Justice Program, The Leadership Conference on Civil and Human Rights at cook@civilrights.org.

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