

Improving the California Bail Reform Act

Senate Bill 10

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EXECUTIVE SUMMARY

In the state of California, thousands of people are in jail because they can't afford their bail. Senate Bill 10 will heavily reduce the state's use of money bail and will mandate the use of risk assessments in pretrial release decisions. Risk assessments can allow for more defendants to be released pretrial while maintaining public safety. While we support this effort, we recommend changes to the language in SB 10 to promote the proper use of pretrial risk assessments. Specifically, SB 10 should be amended with respect to the design, deployment, and validation of pretrial risk assessments.

How risk assessments work

Pretrial risk assessments are questionnaires that gather information about a defendant's criminal and/or social history and use this information to output a risk score. Pretrial risk assessments intend to predict what a defendant would do if released before their trial: specifically, whether they will fail to appear in court and whether they are a risk to public safety. For each question used on the risk assessment, there is a demonstrated empirical relationship between a defendant's answer and their future risk.

Below is an example of a risk assessment used in California. It predicts a defendant's likelihood of failing to appear in court by looking at factors such as prior convictions and whether the person has previously failed to appear in court.

Failure to Appear (max total weight = 7 points)

Risk Factor	Weight	
Pending charge at the time of the offense	No = 0	Yes = 1
Prior conviction	No = 0	Yes = 1
Prior failure to appear pretrial in past 2 years	0 failures = 0	1 failure = 1 2 or more failures = 4
Prior failure to appear pretrial older than 2 years	No = 0	Yes = 1

The following chart is an assessment also used in California that considers a defendant's criminal history, age, and current offense in predicting their risk of committing a new violent crime if released.

New Violent Crime (max total weight = 7 points)

Risk Factor	Weight	
Current violent offense	No = 0	Yes = 2
Current violent offense and 20 years old or younger	No = 0	Yes = 1
Pending charge at the time of the offense	No = 0	Yes = 1
Prior conviction	No = 0	Yes = 1
Prior violent conviction	0 = 0	1 or 2 convictions = 1 3+ convictions = 2

Consider a hypothetical defendant who has just been arrested on a drug charge. The defendant is 25 years old, has two prior drug convictions, and has previously failed to appear in court twice. On the first risk assessment, the defendant would get 1 point for their prior convictions and 4 points for their history of failing to appear. This person would have a total score of 5 out of 7 on this scale, rating them as having a high risk of failing to appear in court if

released. On the second scale, the new violent crime scale, this same defendant would only get 1 point for their prior conviction. With a risk score of 1 out of 7, this person would be rated as low risk of committing a new violent crime.

Design

ISSUE: Some risk assessments currently in use in California produce a single score for a defendant’s risk of “any failure,” including failing to appear in court or committing a new crime. Using a single risk score to predict multiple distinct outcomes can be misleading, since a person who is at risk of failing to appear in court has different needs from a person likely to commit a new crime if released.

RECOMMENDATION: SB 10 should prohibit risk scores that combine different outcomes, and instead require a separate score for every outcome being predicted. This will allow judges to better gauge a defendant’s risk to public safety and determine what level of pretrial supervision is appropriate.

SB 10 requires that pretrial risk assessments measure both a defendant’s probability of failing to appear and their risk to public safety. In light of these mandates, we recommend the bill require risk assessments to produce at least two distinct risk scores: one for a defendant’s risk of failing to appear in court, and another for a defendant’s risk of committing a new violent or otherwise serious crime if released. Providing separate scores will give judges more specific information about the risks and needs of individual defendants.

Although it is common for existing risk assessment tools to predict the likelihood of *any* new crime, we believe that limiting to serious crime better aligns with SB 10’s goal of assessing a defendant’s risk to public safety. Further, for certain types of minor street crime, data on arrests and convictions may be poor proxies for actual criminal behavior. For example, even though rates of marijuana use are similar across races, black and Hispanic individuals are **charged** for marijuana use at far higher rates than whites. As a result, risk assessments that attempt to predict one’s likelihood of engaging in any new criminal activity may incorrectly rate minorities as higher risk than similarly situated whites.

ISSUE: SB 10 says that risk assessments must be “equally accurate” across genders, but does not allow assessments to consider gender as a factor. In practice, risk assessments sometimes overestimate the risk of female defendants. In these cases, equal accuracy is best achieved by using gender-specific risk assessments.

RECOMMENDATION: SB 10 should allow risk assessments to consider gender when necessary to ensure equal accuracy across genders.

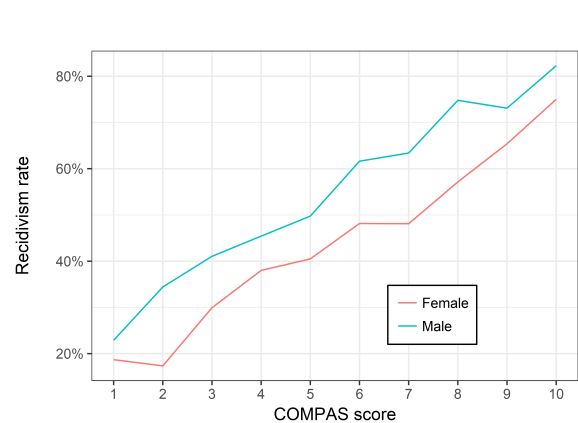


Figure 1: The COMPAS tool overestimates the recidivism risk of female defendants in Broward County, FL. Men consistently reoffend more often than women with the same COMPAS score.

SB 10 prohibits the use of gender in risk assessments, but says that assessments must be “equally accurate” across genders. (SB 10, Section 38 §1318.3(b) (2017)). This language, designed to protect against discrimination, may contradict itself in practice. Risk assessments that do not include gender often **overestimate** female defendants’ risk of committing new crimes compared to male defendants. Our analysis of pretrial release data from Florida’s Broward County demonstrates this. Broward County uses the COMPAS risk assessment tool, which does not include gender as a factor when calculating risk.

Figure 1 shows that for women and men given the same risk score by the COMPAS risk assessment, men have higher rates of recidivism than women. Women with a risk score of 7, for example, reoffend about 50% of the time, whereas men with a risk score of 7 reoffend more than 60% of the time.

Consequently, it is at times impossible for a risk assessment to be “equally accurate across all genders” when the use of gender is prohibited.

To fix this, some risk assessments (including a tool used for sentencing in Wisconsin) use separate risk scales for men and women. [New Jersey’s Bail Reform Law](#) allows for risk assessments to gather information about race, gender, and socio-economic status, but says that release recommendations can’t be discriminatory based on those factors. Research has shown that other demographic factors, such as race, do not need to be included in risk assessments to achieve equally accurate risk scores. These factors could continue to be excluded by the bill.

Deployment

ISSUE: If judges make a decision contrary to a risk assessment’s recommendation, SB 10 appropriately requires them to document the reason for their disagreement ([SB 10, Section 17 §1275\(c\) \(2017\)](#)). However, there is concern that this requirement will not be included in the final version of the bill.

RECOMMENDATION: SB 10 should continue requiring judges to provide a written statement of reasons in any case where their release decision deviates from the recommendation of the risk assessment. This statement of reasons will protect defendants’ due process rights and could be used to help improve risk assessments over time.

Judges should have discretion to override pretrial risk assessments when they disagree with the assessment’s recommendations. As currently drafted, the requirement for judges to document their disagreement from risk assessments will help SB 10 achieve its goal of reducing pretrial detention and will improve evidence-based practices going forward. Some, however, are concerned that this requirement represents a check on judicial authority, and so there is worry it will be excluded from the final bill. On the contrary, such a record will promote transparency and may improve risk assessments based on judge input. This statement of reasons could provide feedback for tool creators to revise the risk assessment or create a more rigorous matrix for translating risk scores into release decisions.

Validation

ISSUE: SB 10 currently only requires counties to report aggregate statistics, such as the number of defendants detained. This information is not enough to properly test risk assessments for bias and accuracy.

RECOMMENDATION: SB 10 should mandate the collection and reporting of *case-specific* information, including—for each defendant—their demographics, risk assessment, and release decision.

Validation of risk assessments can be costly and statistically challenging, and the bill’s current reporting requirements would not provide enough data for validation by the Judicial Council or a third party. To enable proper validation, each county should be required to report, for *every defendant*:

- (1) their demographics (including age, race, and gender)
- (2) the risk factors used to compute their risk score, and the risk score itself
- (3) the recommendation made by the pretrial services agency
- (4) the decision by the judge (including release conditions if applicable)
- (5) if released, the nature of any pretrial failure (including a new arrest or failing to appear)

If possible, counties should also collect this information about defendants between the time the bill is passed and the time it goes into effect on January 1, 2020. Collection of data in this time frame will help measure the difference made by SB 10 in each county.