



Bail Reform in California

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Disclaimer

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Executive Summary

On December 5, 2016, Assemblymember Rob Bonta, partnering with California State Senator Bob Hertzberg, introduced the California Money Bail Reform Act of 2017, which aims to reform the current commercial surety bail system. Our project will assist our client in evaluating policy alternatives to the commercial surety bail system.

In California, defendants who are assigned bail may contract with a bail bonds agency and pay a ten percent nonrefundable fee to be released from jail custody. This system is referred to as commercial surety bail. Because this system uses a financial condition in order to release defendants from jail, a majority of defendants incarcerated pretrial are incarcerated only because they cannot afford bail. According to the Executive Director of Equal Justice Under Law, Phil Telfeyan, “The problem we see with money bail is that it puts a price tag on freedom. Those who are rich get to pay their way out and those who aren’t get to languish in jail.” This system, which prioritizes a financial condition over a defendant’s potential risk to be rearrested or to fail to appear at court, does not ensure public safety.

Beginning in the 1960s, a nationwide bail reform trend began to take root, resulting in many states either abolishing or reforming this system. In an attempt to investigate how bail reform efforts would impact the state of California, we conducted policy analysis to compare the commercial surety bail system in California to an alternative system.

The alternative system we compare to commercial surety bail involves several important elements. The first element is risk assessment tools, which are predictive algorithms that assess the risk of a defendant failing to appear for a court date and of being rearrested. The second is non-bail release methods, which can include release on one’s own recognizance, supervised release, and unsecured bonds.

We conducted this analysis in two stages. First, we compared the screening process used in commercial surety bail to the screening process used with non-bail release. Under the commercial surety bail system, judges use bail schedules to screen defendants and assign bail amounts. Under non-bail release, judges use risk assessment tools to screen defendants and inform their release decisions. We analyzed how the bail schedule compares to risk assessment tools on two criteria: predictive accuracy and race neutrality. We found that risk assessment tools scored higher on both criteria. Based on this analysis, we recommend the adoption of a risk assessment tool to inform judicial decision-making.

The second stage of our analysis compares the commercial surety bail release method to non-bail release methods based on five criteria: effectiveness, economic bias, fiscal impact, social cost, and political feasibility. We employed a variety of methods in our analysis. We operationalized predictive accuracy, race neutrality, economic bias, and effectiveness by undertaking an intensive literature review. We used high-level cost calculations and estimations to analyze fiscal impact and social cost. Finally, we conducted interviews to operationalize political feasibility. We found that non-bail release methods scored higher than commercial surety bail on four out of the five criteria (all except for political feasibility). Therefore, based on this analysis, we recommend that non-bail release replaces the commercial surety bail system.

Risk assessment tools received higher scores than bail schedules in the first stage of analysis for both predictive accuracy and race neutrality. Non-bail release scored higher than bail release in the second stage of analysis for economic bias, effectiveness, fiscal impact, and social cost; it scored lower on political feasibility. Therefore, we recommend that the use of risk assessment tools paired with non-bail release replace the commercial surety bail system in California.

Glossary

Arraignment: “The initial step in a criminal prosecution whereby the defendant is brought before the court to hear the charges and to enter a plea.”¹

Bail: “The temporary release of a prisoner in exchange for security given for the prisoner's appearance at a later hearing.”²

Bail bondsman (bail agency): “One who guarantees a defendant’s appearance for court by promising to pay a financial condition of bond if the defendant does not appear for court. Bail bondsmen are typically licensed by the state and have an appointment from an insurance company to act as such. For their services, bail bondsmen charge defendants a non-refundable fee, and usually require the defendant (or his or her friends or family) to collateralize the full amount of the financial condition with cash or property.”³

Bail hearing: “A judge or magistrate will decide whether an arrested person may be released while his or her criminal case is pending. The initial hearing can have different names, but they all derive from the common-law practice of setting bail—traditionally an amount of money pledged by a surety—to ensure the defendant’s appearance at future proceedings.”⁴

Bail schedule: “A written listing of amounts of money to be used in bail setting based on the offense charged, regardless of the characteristics of any individual defendant.”⁵

Bond: A portion of the bail amount, paid for by an outside agent that acts as surety.⁶

Bond forfeiture: “When a defendant released on cash bail fails to appear in court, or otherwise violates a condition of their bail, the court can declare the bail bond forfeited.”⁷

Commercial surety bail: A system in which defendants have the option to contract with a bail bonds agency, paying a percentage (eight to ten percent in California) of their bail amount to a bail bonds agency to secure their pretrial release from jail.⁸

¹ *Black’s Law Dictionary*, ed. Bryan A. Garner (West Publishing Co., 1996), 46.

² “Bail,” Merriam Webster, Accessed February 10, 2017, <https://www.merriam-webster.com/dictionary/bail>.

³ “Bail Bondsman,” University of Pretrial Glossary, Accessed February 10, 2017, <https://university.pretrial.org/glossary/bail-bondsman>.

⁴ Alexander Bunin, “The Constitutional Right to Counsel at Bail Hearings,” *Criminal Justice* 31, no. 1 (2016): 23.

⁵ “Bail Schedule,” University of Pretrial Glossary, Accessed February 10, 2017, <https://university.pretrial.org/glossary/monetary-bail-bond-schedule-or-bail-schedule>.

⁶ *Black’s Law Dictionary*, ed. Bryan A. Garner (West Publishing Co., 1996), 84.

⁷ “Bail Forfeiture Procedures” (National Conference of State Legislatures, Washington D.C., 2013), <http://www.ncsl.org/research/civil-and-criminal-justice/bail-forfeiture-procedures.aspx>.

⁸ “Commercial Surety Bail,” University of Pretrial Glossary, Accessed February 10, 2017, <http://www.pretrial.org/glossary-terms/>.

Failure to appear: “The phrase typically used when a defendant or witness under subpoena does not show up for a scheduled court appearance.”⁹

Pretrial services agency/program: “Any organization created ideally to perform the three primary pretrial agency or program functions of: (1) collecting and analyzing defendant information for use by the court in assessing risk; (2) making recommendations to the court concerning bail bond conditions of release to address risk; and (3) monitoring and supervising defendants who are released from secure custody during the pretrial phase of their cases in order to manage their risk.”¹⁰

Release on own recognizance: “The pretrial release of an arrested person who promises, usually in writing but without supplying a surety or posting bond, to appear for trial at a later date.”¹¹

Risk assessment tool: A tool that enters variables proven to be statistically significant in predicting risk of rearrest and failure to appear into a scientifically predictive algorithm which computes a risk score.¹²

Supervised release: “If a defendant is not qualified for release on own recognizance, imposition of conditions of release should be considered. Any pretrial services agency or program that provides supervised release services should recommend the least restrictive release conditions necessary to assure the defendant’s appearance in court, to protect the safety of the community, and to safeguard the integrity of the judicial process.” Supervised release methods can include: imposing restrictions on activities, requiring check-ins with the pretrial services agency, or requiring substance abuse treatment and testing.¹³

Unsecured bond: A type of bond in which “The defendant pays no money to the court but is liable for the full amount of [bond] upon failure to appear in court.”¹⁴

Validated risk assessment tool: A risk assessment tool that has been tested for the “predictive power of its assessment instrument” on the population on which it is to be used.¹⁵

⁹ “Failure to Appear,” University of Pretrial Glossary, Accessed February 10, 2017, <https://university.pretrial.org/glossary/failure-to-appear-fta>.

¹⁰ “Pretrial Services Agency or Program,” University of Pretrial Glossary, Accessed February 10, 2017, <https://university.pretrial.org/glossary/pretrial-services-agency-or-program>.

¹¹ *Black’s Law Dictionary*, ed. Bryan A. Garner (West Publishing Co., 1996), 638.

¹² Edward Latessa, “Creation and Validation of the Ohio Risk Assessment System: Final Report,” (University of Cincinnati, Cincinnati, Ohio, 2009), 12, http://www.ocjs.ohio.gov/ORAS_FinalReport.pdf.

¹³ The Board of Directors of the California Association of Pretrial Services, “Release Standards and Recommended Procedures,” (California Association of Pretrial Services, California, 2007), 12.

¹⁴ “Bail Bond,” University of Pretrial Glossary, Accessed February 10, 2017, <https://university.pretrial.org/glossary/bailbond>.

¹⁵ Edward Latessa, “Creation and Validation of the Ohio Risk Assessment System: Final Report,” (University of Cincinnati, Cincinnati, Ohio, 2009), Executive Summary ii, http://www.ocjs.ohio.gov/ORAS_FinalReport.pdf.

Introduction

On December 5, 2016, Assemblymember Rob Bonta (*Figure 1*), in partnership with California State Senator Bob Hertzberg, introduced the California Money Bail Reform Act of 2017 (Assembly Bill 42 and Senate Bill 10). As an ally to communities of color, Bonta was driven to address the disparities created by the bail system.¹⁶ The legislation aims to better serve Californians by reforming the commercial surety bail system.¹⁷ The objective of our project is to assist our client in evaluating policy alternatives to the commercial surety bail system, which could significantly impact California's criminal justice system.



*Figure 1: Assemblymember Rob Bonta speaks at the Press Conference For the Introduction of Bail Reform Legislation on December 5, 2016.*¹⁸

California uses a system of commercial surety bail to regulate pretrial release for defendants. California has established the right to bail in the California Constitution.¹⁹ All defendants are guaranteed the right to bail, except for defendants charged with capital crimes and violent or sexual felonies when “there is a substantial likelihood the person’s release would result in great bodily harm to others.”²⁰

To streamline the bail process, the California Penal Codes require the creation of bail schedules,²¹ which match criminal charges with money bail amounts.²² Every county in California has its own

¹⁶ “California’s Bail System Punishes Poor People for Being Poor” (Press Release, California Assemblymember Bonta’s Office, 2016), <https://a18.asmdc.org/press-release/bonta-demands-bail-reform>.

¹⁷ “Bail Would Move Away From System That Discriminates Against the Poor” (Press Release, California Assemblymember Bonta’s Office, 2016), <https://a18.asmdc.org/press-release/bonta-legislation-will-reform-money-bail>.

¹⁸ Rob Bonta, California State Democrats, *Hertzberg, Bonta to Unveil Bail Reform Legislation*, YouTube video, 39:18, December 5th, 2016, <https://www.youtube.com/watch?v=w25bDzaLTKw>.

¹⁹ Cal. Const. art. I, § 12.

²⁰ Cal. Const. art. I, § 12.

²¹ Cal. Penal Code § 1269b(c) (West 2017).

²² “Felony Bail Schedule” (Public Document, Superior Court of California County Los Angeles, 2017) <https://www.lacourt.org/division/criminal/pdf/felony.pdf>.

bail schedule.²³ Judges are required to develop bail schedules annually.²⁴ When creating bail schedules, judges must “consider the seriousness of the offense charged.”²⁵ Judges can also consider “aggravating or enhancing factor[s],” such as gang affiliation.²⁶

Consider a hypothetical defendant charged with felony assault with a firearm.²⁷ The bail system starts after arrest when the defendant is booked into county jail.²⁸ Booking agents use the bail schedule to assign bail to the defendant.²⁹ Then the defendant has three options:

1. The defendant can pay the full bail amount, as dictated by the bail schedule.³⁰
2. The defendant can contract with a bail agency.³¹
3. The defendant can remain in custody at the county jail, waiting for his or her first court appearance.³²

Under the first option, the defendant pays the entire bail amount to the court.³³ For the hypothetical defendant charged with felony assault with a firearm, the defendant would be required to pay \$50,000 in Los Angeles County, \$125,000 in San Francisco County, or \$60,000 in Butte County to be released from jail, promising to appear at the next court hearing.³⁴ Additionally, enhancements could increase the bail amount. For example, gang affiliation in Los Angeles County adds \$40,000 to the base bail amount.³⁵ As long as the defendant appears at all court dates, the bail payment is ultimately refunded, regardless of case outcome.³⁶

Defendants who cannot afford the full bail amount can instead contract with a bail bonds agency.³⁷ This agency acts as an insurer, guaranteeing that defendants will appear at future court dates.³⁸ Defendants contract with a bail bonds agency and agree to pay a fee, generally ten percent of the bail amount.³⁹ Continuing with the example above, the hypothetical defendant would be required to pay \$5,000 in Los Angeles County, \$12,500 in San Francisco County, or \$6,000 in Butte County to the

²³ Cal. Penal Code § 1269b(e) (West 2017).

²⁴ *Ibid.*

²⁵ Cal. Penal Code § 1269b(e) (West 2017).

²⁶ Cal. Penal Code § 1269b(e) (West 2017); “Felony Bail Schedule” (Public Document, Superior Court of California County Los Angeles, 2017), <https://www.lacourt.org/division/criminal/pdf/felony.pdf>.

²⁷ Cal. Penal Code § 245(a)(2) (West 2017).

²⁸ Cal. Penal Code § 1269b(a)-(b) (West 2017).

²⁹ *Ibid.*

³⁰ Cal. Penal Code § 1279 (West 2017).

³¹ Cal. Penal Code § 1276, 1278, 1287 (West 2017).

³² “What Should I Know if I Am Arrested?” (Public Pamphlet, the State Bar of California, 2016), <http://www.calbar.ca.gov/Public/Pamphlets/Arrested.aspx>.

³³ Cal. Penal Code § 1279 (West 2017).

³⁴ “Felony Bail Schedule” (Public Document, Superior Court of California County Los Angeles, 2017), <https://www.lacourt.org/division/criminal/pdf/felony.pdf>; “Felony Misdemeanor Bail Schedule” (Public Document, Superior Court of San Francisco, 2016), <http://www.sfsuperiorcourt.org/sites/default/files/images/2016%20Bail%20Schedule.pdf>; “Butte County Uniform Bail and Penalty Schedules” (Public Document, Superior Court of Butte County, 2017), <http://www.buttecourt.ca.gov/FeeSchedule/docs/2017%20Butte%20County%20Uniform%20Bail%20and%20Penalty%20Schedules.pdf>.

³⁵ “Felony Bail Schedule” (Public Document, Superior Court of California County Los Angeles, 2017), <https://www.lacourt.org/division/criminal/pdf/felony.pdf>.

³⁶ Cal. Penal Code § 1269 (West 2017).

³⁷ Cal. Code Regs. tit. 10, § 205.3 (2017).

³⁸ Cal. Ins. Code § 1800.4 (West 2017).

³⁹ Cal. Code Regs. tit. 10, § 2081 (2017).

bail bonds agency.⁴⁰ This fee is nonrefundable, regardless of case outcome.⁴¹ Even if the charges against the defendant are dropped, the defendant is still responsible to pay the ten percent fee to the bail bonds agency.⁴²

If the defendant cannot afford either of the previous options, the defendant will remain in custody at the jail. The defendant should have his or her first court appearance within 48 hours of arrest.⁴³ However, these 48 hours do not include weekends or holidays.⁴⁴ For instance, if a defendant is arrested on a Thursday before a holiday weekend, the defendant could remain in custody awaiting arraignment for up to six days. While defendants await trial in jail custody, they are unable to attend to their obligations, such as working, going to school, paying rent, or caring for family members.⁴⁵

This is the status quo system Assemblymember Bonta, Senator Hertzberg, and their co-sponsors intend to reform with Assembly Bill 42 and Senate Bill 10.⁴⁶

⁴⁰ “Felony Bail Schedule” (Public Document, Superior Court of California County Los Angeles, 2017), <https://www.lacourt.org/division/criminal/pdf/felony.pdf>; “Felony and Misdemeanor Schedule” (Public Document, Superior Court of San Francisco, 2016), <http://www.sfsuperiorcourt.org/sites/default/files/images/2016%20Bail%20Schedule.pdf>; “Butte County Uniform Bail and Penalty Schedules” (Public Document, Superior Court of Butte County, 2017), <http://www.buttecourt.ca.gov/FeeSchedule/docs/2017%20Butte%20County%20Uniform%20Bail%20and%20Penalty%20Schedules.pdf>.

⁴¹ Margaret Dooley-Sammuli, “Money Bail: Freedom and Justice Out of Reach for Far Too Many Californians,” *San Diego ACLU* (blog), December 5, 2016, <https://medium.com/@SDACLU/california-bail-reform-f27a4b8de518#.3d4385zih>.

⁴² Alex Emslie, “Class Action Suit Against San Francisco Seeks to End Use of Cash Bail System,” *KQED News* (Northern California, CA), October 29, 2015.

⁴³ Cal. Penal Code § 825 (West 2017).

⁴⁴ *Ibid.*

⁴⁵ Nick Pinto, “The Bail Trap,” *New York Times* (New York City, NY), August 13, 2015, https://www.nytimes.com/2015/08/16/magazine/the-bail-trap.html?_r=0.

⁴⁶ Assemb. 42, 2017-2018 Leg., Reg. Sess. (Cal. 2016); S. 10, 2017-2018 Leg., Reg. Sess. (Cal. 2016).

Policy Problem & Significance

“California’s bail system punishes poor people simply for being poor. In many cases, if you have enough money to pay your bail, you can get out of jail regardless of whether you are a danger to the public or a flight risk. But if you’re poor and are not a flight risk or a danger to the public, you are forced to stay in jail even when the charge is a misdemeanor. That’s not justice.”⁴⁷

–Assemblymember Bonta

Throughout this section, we detail the problems with commercial surety bail. Comparing the cases of Sandra Bland and Robert Durst clearly illustrates the injustices of the commercial surety bail system.⁴⁸ Sandra Bland (*Figure 2*) was a young, Black woman who was initially stopped in Texas in July 2015 for failing to use a turn signal.⁴⁹ The situation with the Texas State Trooper escalated quickly, and Bland was arrested for assault on a public servant.⁵⁰ Bland spent three days in jail because she was unable to pay her \$500 bond. Bland’s story ended tragically when she committed suicide, allegedly because of her inability to afford bond.⁵¹



*Figure 2: Sandra Bland*²

⁴⁷ Jennifer Wadsworth, “California Lawmakers Unveil Bill to Reform Money Bail System,” *San Jose Inside*, (San Jose, California), December 6, 2016, <http://www.sanjoseinside.com/2016/12/06/california-lawmakers-unveil-bill-to-reform-money-bail-system/>.

⁴⁸ Gavin Newsom, (Speech, Bail Reform Press Conference, Sacramento, CA, December 5, 2016).

⁴⁹ Abby Ohlheiser, “I Will Light You Up!?: Traffic Officer Threatened Sandra Bland With Taser During Traffic Stop,” *the Washington Post*, (Washington D.C.), July 22, 2015, https://www.washingtonpost.com/news/morning-mix/wp/2015/07/21/much-too-early-to-call-jail-cell-hanging-death-of-sandra-bland-suicide-da-says/?utm_term=.c78acaa0d7d5.

⁵⁰ *Ibid.*

⁵¹ Associated Press, “Texas Officials say Sandra Bland, Who Died in Jail, Was Despondent Over Not Making Bail,” *Los Angeles Times*, (Los Angeles, California), November 13, 2015. <http://www.latimes.com/nation/nationnow/la-na-nn-sandra-bland-lawsuit-20151113-story.html>; Nick Wing, “Our Bail System is Leaving Innocent to Die in Jail Because They’re Poor,” *The Huffington Post*, February 23, 2017, http://www.huffingtonpost.com/entry/cash-bail-jail-deaths_us_57851f50e4b0e05f052381cb.

⁵² David A. Graham, “Sandra Bland and the Long History of Racism in Waller County, Texas” *The Atlantic Magazine*, July 2015, <https://www.theatlantic.com/politics/archive/2015/07/sandra-bland-waller-county-racism/398975/>.

In contrast, Robert Durst (*Figure 3*) was arrested in October 2001 for “dismember[ing] and behead[ing] his elderly neighbor.”⁵³ Durst posted \$250,000 in bail, was released from jail, and then fled.⁵⁴ Durst, a 58-year old white man, didn’t mind losing the \$250,000 he paid to the court because “he certainly didn’t need a quarter of a million dollars back.”⁵⁵ At the time, Durst was a suspect in the disappearance of his wife and the murder of his friend in Los Angeles.⁵⁶ Comparing these two cases demonstrates that the commercial surety bail system releases defendants based solely on their ability to pay, without regard for their public safety risk or probability of appearing at future court dates. Under this system, low-risk and low-income defendants like Bland will continue to lose their freedom solely based on their economic status, while defendants like Durst, who pose a high public safety risk, will be allowed to “purchase their freedom.”⁵⁷



*Figure 3: Robert Durst*⁵⁸

Injustices like these play out every day across California. The state operates 123 jails with a combined average daily population of over 72,500 inmates.⁵⁹ Between 60 and 70 percent of these inmates are unsentenced, including pretrial defendants, people in jail because of parole and probation violations, and people awaiting sentencing.⁶⁰ Under this system, taxpayer dollars fund jail beds for thousands of unconvicted defendants.⁶¹

⁵³ Charles V. Bagli & Kevin Flynn, “Durst Jumps Bail, and a Nationwide Dragnet Is On,” *The New York Times*, (New York City, NY), October 17, 2001, <http://www.nytimes.com/2001/10/17/nyregion/durst-jumps-bail-and-a-nationwide-dragnet-is-on.html>.

⁵⁴ Ibid.

⁵⁵ Polly Mosendz, “Robert Durst’s History of Skipping Bail Comes Back to Haunt Him,” *Newsweek*, March 23, 2015, <http://www.newsweek.com/robert-durst-jinx-denied-bail-316108>.

⁵⁶ Charles V. Bagli and Kevin Flynn, “Durst Jumps Bail, and a Nationwide Dragnet Is On,” *The New York Times*, (New York City, NY), October 17, 2001, <http://www.nytimes.com/2001/10/17/nyregion/durst-jumps-bail-and-a-nationwide-dragnet-is-on.html>.

⁵⁷ Gupta et al. “The High Cost of Bail: How Maryland’s Reliance on Money Bail Jails the Poor and Costs the Community Millions” (Report, Maryland Office of the Public Defender, 2016), 4.

⁵⁸ Sebastian Murdock, “Eccentric Multimillionaire Urinated on Candy at CVS,” *The Huffington Post*, December 18, 2014, http://www.huffingtonpost.com/2014/12/18/robert-durst-pees-on-candy_n_6348022.html?utm_hp_ref=robert-durst.

⁵⁹ Magnus Lofstrom and Brandon Martin, “Just the Facts: California’s County Jails” (Fact Sheet, Public Policy Institute of California, August 2016), http://www.ppic.org/main/publication_show.asp?i=1061.

⁶⁰ Todd Minton and Zhen Zeng, “Jail Inmates at Midyear 2014” (Report, U.S. Department of Justice, Bureau of Justice Statistics, June 2015), 1, <https://www.bjs.gov/content/pub/pdf/jim14.pdf>.

⁶¹ Sonya Tafoya, “Pretrial Detention and Jail Capacity in California” (Report, Public Policy Institute of California, July 2015), http://www.ppic.org/main/publication_quick.asp?i=1154.

Furthermore, median bail amounts in California are more than five times greater than in the rest of the country (\$50,000 in California; less than \$10,000 elsewhere).⁶² Across the country, approximately ninety percent of defendants who are detained pretrial remain in jail because they cannot afford bail.⁶³ This means that of the approximately 630,000 people in jails nationwide, about 340,000 are behind bars because of limited finances.⁶⁴

Further, people of color are disproportionately represented among the pretrial population.⁶⁵ Between 2005 and 2013, African Americans made up six percent of the California population but 17 percent of arrests.⁶⁶ Similarly, during this time, Latinxs accounted for 37 percent of California's population but 42 percent of arrests.⁶⁷ The commercial surety bail system may perpetuate these disparities because judges, who determine pretrial custody status, may have implicit or explicit biases against people of color.⁶⁸

Fifty-nine percent of arrestees in California are detained pretrial, compared to just 32 percent in the rest of the country.⁶⁹ Despite detaining a greater percentage of pretrial defendants than other states, California has higher rates of felony rearrest than the rest of the country (12.4 percent versus 10.1 percent) and higher failure to appear rates than other states (6.6 percent versus 2.9 percent).⁷⁰

It is clear that California's current pretrial release system does not more effectively maintain public safety. If the state continues to operate under this ineffective and unjust system, Californians will suffer. Society is more at risk under a system that detains only those who are unable to pay, rather than those who threaten public safety.⁷¹

Under the current system, low-income people and people of color suffer a loss of freedom and other social costs associated with being jailed pretrial.⁷² Assemblymember Bonta is committed to protecting poor communities and communities of color and therefore feels called to reform this unjust system.⁷³

⁶² Ibid.

⁶³ Bernadette Rabuy and Daniel Kopf, "Detaining the Poor", *Prison Policy Initiative*, May 10, 2016; Cherise Fanno Burdeen, "The Dangerous Domino Effect of Not Making Bail", *The Atlantic*, April 12, 2016; Brian A. Reaves, "Felony Defendants in Large Urban Counties, 2009 – Statistical Tables", *Bureau of Justice Statistics*, December 2013.

⁶⁴ Bernadette Rabuy and Peter Wagner, "Mass Incarceration: The Whole Pie 2017," *Prison Policy Initiative* (Blog), March 14, 2017, <https://www.prisonpolicy.org/reports/pie2017.html>.

⁶⁵ "Overview," *State of California Department of Justice - OpenJustice*, accessed February 3, 2017, <https://openjustice.doj.ca.gov/arrests/overview>.

⁶⁶ Ibid.

⁶⁷ Ibid.

⁶⁸ Judicial Council of California, "Demographic Data Provided by Justices and Judges Relative to Gender Race/Ethnicity, and Gender Identity/Sexual Orientation," (Judicial Council of California, December 31, 2016), 1, <http://www.courts.ca.gov/documents/2017-Demographic-Report.pdf>.

⁶⁹ Sonya Tafoya, "Pretrial Detention and Jail Capacity in California," (Report, Public Policy Institute of California, July 2015), http://www.ppic.org/main/publication_quick.asp?i=1154.

⁷⁰ Ibid.

⁷¹ "Risk Assessment Tools: How Science Is Making It Safe to Release," *Criminal Law & Policy* (Blog), April 18, 2016, <https://crimlawandpolicy.wordpress.com/2016/04/08/risk-assessment-tools-how-science-made-it-safe-to-release-again/>.

⁷² "Overview," *State of California Department of Justice - OpenJustice*, accessed February 3, 2017, <https://openjustice.doj.ca.gov/arrests/overview>.

⁷³ "Biography," *Assemblymember Rob Bonta District 18*, accessed January 13, 2017, <https://a18.asmdc.org/biography>.

Lastly, some jurisdictions have begun to challenge commercial surety bail on the basis of constitutionality, arguing that money-based systems detain defendants solely based on their inability to afford bail.⁷⁴ Organizations such as Equal Justice Under Law have filed lawsuits alleging that commercial surety bail violates the Equal Protection Clause of the Fourteenth Amendment.⁷⁵ Currently, there are two such lawsuits pending in Sacramento and San Francisco.⁷⁶

Normally a national leader for progressive policy, California should consider following the example of other states to reform the commercial surety bail system.

Bail Reform

Bail reform in the United States began in earnest in the 1960's with the Manhattan Bail Project, which encouraged the use of non-financial pretrial release.⁷⁷ More recently, an increasing number of states are abandoning money-based systems and adopting risk-based systems. Many counties and states have pretrial services agencies that use risk assessment tools to screen defendants for risk before making pretrial release decisions.⁷⁸ Additionally, almost every state has implemented some form of non-financial release which is used in conjunction with bail.⁷⁹ A few states have abolished commercial surety bail altogether: Kentucky, Wisconsin, Illinois, and Oregon.⁸⁰

Many states implemented bail reform without increasing crime rates or failure to appear rates. For example, Kentucky releases around 70 percent of pretrial defendants and, of those, 90 percent are

⁷⁴ *Pierce v. City of Velda City*, No. 4:15-cv-570, 2015 WL 10013006 (E.D. Mo. June 3, 2015); Brief for United States as Amici Curiae Supporting Plaintiff-Appellee, *Walker v. City of Calhoun*, No. 16-10521-HH, 2016 WL 4417421 (N.D. Ga. filed Aug. 18, 2016); Lorelei Laird, "ABA Urges 11th Circuit to Strike Down Bail Schedules as Unconstitutional," *American Bar Association* (August 18, 2016),

http://www.abajournal.com/news/article/aba_urges_11th_circuit_to_strike_down_bail_schedules_as_unconstitutional.

⁷⁵ *Pierce v. City of Velda City*, No. 4:15-cv-570, 2015 WL 10013006 (E.D. Mo. June 3, 2015); *Pugh v. Rainwater*, 572 F.2d 1053 (5th Cir. 1978); Brief for United States as Amici Curiae Supporting Plaintiff-Appellee, *Walker v. City of Calhoun*, No. 16-10521-HH, 2016 WL 4417421 (N.D. Ga. filed Aug. 18, 2016).

⁷⁶ Class Action Complaint, *Buffin v. City & County of San Francisco*, No. 15-CV-04959-YGR (N.D. Cal. filed Oct. 28, 2015); Answer to Plaintiffs' Third Amended Complaint by Sheriff Vicki Hennessy, *Buffin v. City & County of S.F.*, No. 15-CV-04959-YGR (N.D. Cal. filed Nov. 1, 2016); *Welchen v. County of Sacramento*, No. 2:16-cv-00185-TLN-KJN, slip op. (E.D. Cal. Oct. 10, 2016); Lorelei Laird, "San Francisco City Attorney Won't Defend City's Bail Schedule from Civil Rights Lawsuit," *ABA Journal* (November 2016),

<http://www.abajournal.com/news/article/san-francisco-city-attorney-wont-defend-citys-bail-schedule-from-civil-rights>.

⁷⁷ Timothy R. Schnacke. "Best Practices in Bond Setting: Colorado's New Pretrial Law" (Center for Legal and Evidence-Based Practices, 2013), 2, <https://www.pretrial.org/download/law-policy/Best%20Practices%20in%20Bond%20Setting%20-%20Colorado.pdf>.

⁷⁸ Raw data on file with author. "Pretrial Progress: A Survey of Pretrial Practices and Services in California," *Community Resources for Justice*, accessed on October 28, 2016, <http://www.crj.org/cji/entry/pretrial-progress-a-survey-of-pretrial-practices-and-services-in-california>.

⁷⁹ "Pretrial Release Conditions," *National Conference of State Legislatures*, September 15, 2016, <http://www.ncsl.org/research/civil-and-criminal-justice/pretrial-release-conditions.aspx#/>.

⁸⁰ *Ibid.*

not rearrested.⁸¹ Similarly, Washington, D.C. releases 90 percent of defendants.⁸² While D.C. did not abolish commercial surety bail, reforms prevent pretrial defendants from being held in jail because of an inability to pay bail.⁸³ D.C.'s pretrial agency reports that about 90 percent of those released pretrial were not arrested within five years.⁸⁴

New Jersey also passed reform legislation. This legislation is relevant because California's reform bills are modeled after New Jersey's bill.⁸⁵ In 2014, New Jersey passed legislation encouraging non-financial release, which went into effect statewide in January 2017.⁸⁶ The bill mandates the use of a scientific risk assessment tool to screen defendants for their probability of being rearrested or failing to appear at their next court appearance.⁸⁷ While commercial surety bail was not abolished, the bill requires that "release, where appropriate, will be ordered in lieu of money bail."⁸⁸ Since this law went into effect, the jail population has decreased by 27 percent compared to last year, and less than ten percent of defendants are detained pretrial.⁸⁹

This is the type of reform that California intends to implement. California's bill will encourage the use of non-financial release methods without explicitly abolishing commercial surety bail.⁹⁰ It is important to know that while there has been no statewide bail reform legislation passed in California, 46 of 58 counties have a pretrial services agency, and every county uses some form of non-financial release in conjunction with bail.⁹¹ Some counties also use risk assessment tools.⁹² The goal of Assemblymember Bonta's bill is to expand pretrial services to every county in California, to mandate the use of a risk assessment tool, and to explicitly encourage the use of non-financial release in lieu of commercial surety bail. To assist our client in comparing this reform to the current system, we will examine the following policy question.

⁸¹ "Pretrial Reform in Kentucky" (Pretrial Services, Administrative Office of Courts, Kentucky Court of Justice, 2013), 16, <https://www.pretrial.org/download/infostop/Pretrial%20Reform%20in%20Kentucky%20Implementation%20Guide%202013.pdf>.

⁸² Anne E. Marimow, "When it comes to pretrial release, few other jurisdictions do it DC's Way," *Washington Post*, July 4, 2016, https://www.washingtonpost.com/local/public-safety/when-it-comes-to-pretrial-release-few-other-jurisdictions-do-it-dcs-way/2016/07/04/8eb52134-e7d3-11e5-b0fd-073d5930a7b7_story.html?utm_term=.b46940f7df85.

⁸³ *Ibid.*

⁸⁴ *Ibid.*

⁸⁵ Margaret Dooley-Sammuli (Criminal Justice and Drug Policy Director for ACLU of California) in discussion with the authors, February 2017. See **Appendix F** for interview questions.

⁸⁶ Glenn A. Grant, "Criminal Justice Reform Annual Report to Legislature" (Report, New Jersey, 2015), [https://www.judiciary.state.nj.us/criminal/cjr/Criminal Justice Reform Report to the Legislature 12 01 15.pdf](https://www.judiciary.state.nj.us/criminal/cjr/Criminal%20Justice%20Reform%20Report%20to%20the%20Legislature%2012%2001%2015.pdf).

⁸⁷ *Ibid.*

⁸⁸ *Ibid.*, 2.

⁸⁹ "CDR2 Warrants Issued," *New Jersey Courts*, accessed on February 20, <http://www.judiciary.state.nj.us/criminal/cjr/cjrsummaryrpts.pdf>.

⁹⁰ There is an individual right to "bail by sufficient sureties" in the California Constitution. The current reforms will not amend the state constitution. Therefore, commercial surety bail will not be abolished. Cal. Const. art. I, § 12.

⁹¹ Raw data on file with author. "Pretrial Progress: A Survey of Pretrial Practices and Services in California," *Community Resources for Justice*, accessed on October 28, 2016, <http://www.crj.org/cji/entry/pretrial-progress-a-survey-of-pretrial-practices-and-services-in-california>.

⁹² *Ibid.*

Policy Question

How does the use of risk assessment tools and non-bail release compare to the current commercial surety bail system in California?

Policy Alternatives & Scoring

Nationally, federal and state governments are eliminating or minimizing commercial surety bail systems and creating pretrial services agencies.⁹³ A primary function of these agencies is to screen defendants to determine their risk of failing to appear or being rearrested.⁹⁴ Pretrial services agencies conduct these screenings with the help of risk assessment tools.⁹⁵ After screening defendants, pretrial services agents prepare reports that aid judges in making decisions about pretrial custody status.⁹⁶ Depending on the release options available to the judge, pretrial services agencies may also supervise defendants who are released pretrial.⁹⁷

To analyze the status quo and policy alternative, we separated our analysis into two stages. The first stage analyzes the screening process whereby judges make decisions about defendants' pretrial custody status. The status quo for the first stage is judicial decision-making informed by bail schedules. The policy alternative is judicial decision-making informed by risk assessment tools. The second stage analyzes release methods. Under the status quo release method, bail agencies contract with and supervise defendants released pretrial. Our policy alternative includes non-bail forms of release, such as release on own recognizance, supervision, and unsecured bonds. These policy alternatives will be explained in greater detail below. We chose our policy alternatives based on these factors: client preference, availability of research, national trends, and whether or not the alternative is widely used.

⁹³ "Pretrial Services Historical Perspective," *U.S. Pretrial Services Northern District of Illinois*, accessed on February 20, 2017, http://www.ilnpt.uscourts.gov/historical_perspective.pdf; "ABA Standards for Criminal Justice, Third Edition, Pretrial Release" (American Bar Association, Washington D.C., 2007), 5, http://www.americanbar.org/content/dam/aba/publications/criminal_justice_standards/pretrial_release.authcheckdam.pdf.

⁹⁴ "ABA Standards for Criminal Justice, Third Edition, Pretrial Release" (American Bar Association, Washington D.C., 2007), 1, http://www.americanbar.org/content/dam/aba/publications/criminal_justice_standards/pretrial_release.authcheckdam.pdf.

⁹⁵ "ABA Standards for Criminal Justice, Third Edition, Pretrial Release" (American Bar Association, Washington D.C., 2007), 5, http://www.americanbar.org/content/dam/aba/publications/criminal_justice_standards/pretrial_release.authcheckdam.pdf.

⁹⁶ *Ibid.*

⁹⁷ *Ibid.*

Stage One: Screening Processes

“Screening process” refers to judicial decision-making about the pretrial custody status of defendants. The purpose of screening processes is to assess a defendant’s risk of being rearrested or failing to appear at their next court date.⁹⁸ We compare the impact of bail schedules and risk assessment tools on judicial decision-making about pretrial custody status.

Bail Schedule

A bail schedule is a list of criminal charges and aggravating factors associated with a bail amount.⁹⁹ The judges in each county create bail schedules annually, so there are 58 bail schedules in California¹⁰⁰ “Judges [must] consider the seriousness of the offense charged” when setting bail amounts.¹⁰¹ All defendants are eligible for bail except for defendants charged with specific offenses outlined in the California Constitution.¹⁰² These specified offenses include: capital crimes, violent felonies, felony sexual assault, and criminal threats that may be carried out during pretrial release.¹⁰³ The Penal Code outlines that judges are entitled to consider ability to pay, “the seriousness of the offense charged, the previous criminal record of the defendant, [] the probability of his or her appearing at the trial or hearing of the case,” and public safety.¹⁰⁴ However, judges primarily rely on bail schedules, which only “consider the seriousness of the offense charged.”¹⁰⁵ An excerpt from the Los Angeles County Superior Court bail schedule is included below in *Figure 4*.

⁹⁸ “Public Safety Assessment: Risk Factors and Formula” (Laura and Arnold Foundation), 1, <http://www.arnoldfoundation.org/wp-content/uploads/PSA-Risk-Factors-and-Formula.pdf>.

⁹⁹ Cal. Penal Code § 1269b(f) (West 2017).

¹⁰⁰ Cal. Penal Code § 1269b(c) (West 2017).

¹⁰¹ Cal. Penal Code § 1269b(e) (West 2017).

¹⁰² Cal. Const. art. 1 § 12.

¹⁰³ Cal. Const. art. 1 § 12.

¹⁰⁴ Cal. Const. art. 1 § 12; Cal. Penal Code § 1270, 1272.1 (West 2017).

¹⁰⁵ Cal. Penal Code § 1269b(e) (West 2017).

Figure 4: Excerpt from the Los Angeles County Superior Court 2017 Bail Schedule¹⁰⁶

PENAL CODE SECTION	OFFENSE	PENAL CODE	PRESUMPTIVE BAIL
192(c)(1)	VEHICULAR MANSLAUGHTER - Driving vehicle with gross negligence		50,000
192(c)(3)	VEHICULAR MANSLAUGHTER - Accident caused for financial gain		100,000
192.5	VEHICULAR MANSLAUGHTER - Operating a vessel		
192.5(a)	DUI with gross negligence		100,000
192.5(b)	DUI without gross negligence		50,000
192.5(c)	With gross negligence		50,000
203	MAYHEM		100,000
205	AGGRAVATED MAYHEM (LIFE)		1,000,000
207	KIDNAPPING		100,000
	Kidnapping child under age 14 to deprive custody (P.C. 667.85)		150,000
	Kidnapping for purpose of felony sexual offense (P.C. 667.8(a) and (b))		1,000,000
209	KIDNAPPING FOR RANSOM, ROBBERY, SEX OFFENSE, etc. (LIFE)		1,000,000
	Including kidnapping child under age 14 to deprive custody (P.C. 667.85), and kidnapping for purpose of felony sexual offense (P.C. 667.8(a) and (b))		
209.5	KIDNAPPING DURING A CARJACKING (LIFE)		1,000,000

The bail amount is initially set when the defendant is booked into jail.¹⁰⁷ After the bail amount is set, the defendant has three options. First, the defendant can pay the full bail amount, which is refundable after trial, to the court.¹⁰⁸ Second, the defendant can pay ten percent of the bail amount, plus fees, to a bail agency annually.¹⁰⁹ Third, if the defendant is unable to afford the first two options, the defendant will remain in custody pretrial at the county jail.¹¹⁰ Our status quo policy for stage one of our analysis focuses on judicial decision-making about the bail amount using a bail schedule.

Risk Assessment Tools

Risk assessment tools are used to “identify the likelihood of failure to appear in court and the danger to the community posed by a defendant pending trial.”¹¹¹ These tools input variables proven to be

¹⁰⁶ “Felony Bail Schedule” (Bail schedule, Los Angeles County, 2017), 6, <https://www.lacourt.org/division/criminal/pdf/felony.pdf>.

¹⁰⁷ Cal. Penal Code § 1269b(a) (West 2017).

¹⁰⁸ Cal. Penal Code § 1269b(g) (West 2017).

¹⁰⁹ Cal. Penal Code § 1276, 1278, 1287 (West 2017).

¹¹⁰ “What Should I Know if I Am Arrested?” (Public Pamphlet, the State Bar of California, 2016), <http://www.calbar.ca.gov/Public/Pamphlets/Arrested.aspx>.

¹¹¹ Marie VanNostrand and Kenneth J. Rose. “The Virginia Pretrial Risk Assessment Instrument” (Report, Luminosity Inc., 2009), 3, <http://www.pretrial.org/download/risk-assessment/VA%20Risk%20Report%202009.pdf>.

statistically significant in predicting the probability of being rearrested and failing to appear into a predictive algorithm that computes a risk score.¹¹²

The variables considered by risk assessment tools vary.¹¹³ Common variables include: history of drug abuse, current charge, criminal history, age at first arrest, employment status, and residential stability. Pretrial services agencies gather information about defendants on relevant variables through criminal history records and/or interviews with the defendant.¹¹⁴ The information is then entered into the tool's predictive algorithm, which computes a risk score. **Table 1** below includes four risk assessment tools we will refer to throughout the analysis, the number of factors they consider, and how they categorize risk levels. **Figure 5** shows an example of how a risk assessment tool classifies and scores defendants.

¹¹² Latessa et al. "Creation and Validation of the Ohio Risk Assessment System: Final Report" (Report, University of Cincinnati School of Criminal Justice Center for Criminal Justice Research, 2009), http://www.ocjs.ohio.gov/ORAS_FinalReport.pdf.

¹¹³ Risk assessment tool factors in **Appendix A**.

¹¹⁴ Raw data on file with author. "Pretrial Progress: A Survey of Pretrial Practices and Services in California," *Community Resources for Justice*, accessed on October 28, 2016, <http://www.crij.org/cji/entry/pretrial-progress-a-survey-of-pretrial-practices-and-services-in-california>.

Table 1: Risk Assessment Tools

	Created by	Number of risk factors	Risk categories and corresponding scores
Virginia Pretrial Assessment Instrument (VPRAI)¹¹⁵	Luminosity	8	Low (0-1), Below Average (2), Average (3), Above Average (4), High (5-9)
Ohio Risk Assessment System (ORAS)¹¹⁶	University of Cincinnati, Center for Criminal Justice	7	Low (0-3), Moderate (4-6), High (7-10)
Pretrial Risk Assessment (PTRA)¹¹⁷	Luminosity	20	Risk Level 1-5
Pretrial Risk Assessment (PSA)¹¹⁸	Laura and John Arnold Foundation	9	Risk Level 1-6
Correctional Offender Manager Profiling for Alternative Sanctions¹¹⁹	Northpointe	16	Low (1-4), Moderate (5-7), High (8-10)

¹¹⁵ Marie VanNostrand and Kenneth J. Rose. “The Virginia Pretrial Risk Assessment Instrument” (Report, Luminosity Inc., 2009), 3, <http://www.pretrial.org/download/risk-assessment/VA%20Risk%20Report%202009.pdf>.

¹¹⁶ Latessa et al. “Creation and Validation of the Ohio Risk Assessment System: Final Report” (Report, University of Cincinnati School of Criminal Justice Center for Criminal Justice Research, 2009), http://www.ocjs.ohio.gov/ORAS_FinalReport.pdf.

¹¹⁷ “Federal Pretrial Risk Assessment” (Pretrial Justice Institute), <http://www.pretrial.org/download/risk-assessment/Federal%20Pretrial%20Risk%20Assessment%20Instrument%20%282010%29.pdf>.

¹¹⁸ “Public Safety Assessment: Risk Factors and Formula” (Laura and John Arnold Foundation), <http://www.arnoldfoundation.org/wp-content/uploads/PSA-Risk-Factors-and-Formula.pdf>.

¹¹⁹ “Practitioners Guide to COMPAS” (Report, Northpointe, 2012), http://www.northpointeinc.com/files/technical_documents/FieldGuide2_081412.pdf.

Figure 5: Ohio Risk Assessment Tool Report¹²⁰

Pretrial Items		Verified
1.1. Age at First Arrest	<input type="text"/>	<input type="checkbox"/>
0=33 or older		
1=Under 33		
1.2. Number of Failure-to-Appear Warrants Past 24 Months	<input type="text"/>	<input type="checkbox"/>
0=None		
1=One Warrant for FTA		
2=Two or more FTA Warrants		
1.3. Three or more Prior Jail Incarcerations	<input type="text"/>	<input type="checkbox"/>
0=No		
1=Yes		
1.4. Employed at the Time of Arrest	<input type="text"/>	<input type="checkbox"/>
0= Yes, Full-time		
1= Yes, Part-time		
2= Not employed		
1.5. Residential Stability	<input type="text"/>	<input type="checkbox"/>
0=Lived at Current Residence Past Six Months		
1=Not Lived at Same Residence		
1.6. Illegal Drug Use during Past Six Month	<input type="text"/>	<input type="checkbox"/>
0=No		
1=Yes		
1.7. Severe Drug Use Problem	<input type="text"/>	<input type="checkbox"/>
0=No		
1=Yes		
Total Score:		<input type="text"/>

Scores	Rating	% of Failures	% of Failure to Appear	% of New Arrest
0-2	Low	5%	5%	0%
3-5	Moderate	18%	12%	7%
6+	High	29%	15%	17%

After the defendant is placed in a risk category, the pretrial services agency uses this information to compile a pretrial risk assessment report and recommendation for release.¹²¹ This information is given to the judge, who has the ultimate authority to make a release decision.¹²² Risk assessments tools, therefore, complement judicial authority instead of replacing it.

¹²⁰ Latessa et al. “Creation and Validation of the Ohio Risk Assessment System: Final Report” (Report, University of Cincinnati School of Criminal Justice Center for Criminal Justice Research, 2009), 49, http://www.ocjs.ohio.gov/ORAS_FinalReport.pdf.

¹²¹ The Board of Directors of the California Association of Pretrial Services, “Release Standards and Recommended Procedures,” (California Association of Pretrial Services, California, 2007), 12, http://pretrialservicesca.org/public/css/CAPS_Standards_022807_Approved.pdf.

¹²² “ABA Standards for Criminal Justice, Third Edition, Pretrial Release” (American Bar Association, Washington D.C., 2007), 1, http://www.americanbar.org/content/dam/aba/publications/criminal_justice_standards/pretrial_release.authcheckdam.pdf.

Stage Two: Release Methods

In stage two, we compare the conditions of release that defendants face under commercial surety bail to the conditions that would be used under a non-bail release system.

Commercial Surety Bail

Defendants have two release options under the commercial surety bail system.¹²³ In the second stage analysis, we will focus only on the option where defendants contract with bail bonds agencies and pay ten percent of their bail amount.

For defendants who contract with bail bonds agencies, the agencies act as insurers, guaranteeing that defendants will appear for court dates. This can take many forms, such as requiring defendants to check-in by phone or in-person, or requiring that defendants wear electronic monitoring devices. We interviewed six bail agents from different counties throughout California. In these interviews, multiple bail agents indicated that they do not supervise defendants.¹²⁴ One agent mentioned that he does not like to “baby-sit,”¹²⁵ and another said that his work is “on the front end,” attempting to ensure that the defendants he contracts with will be reliable and attend court dates.¹²⁶ If a defendant who has contracted with a bail bonds agency misses a court date and is never located, the bail bonds agency must “pay the full amount of the [defendant’s bail] to the court.”¹²⁷

Non-bail Release

Non-bail release methods do not require that defendants pay to secure their release from jail. These methods include supervised release, release on own recognizance, unsecured bonds, or a combination of these. Because many non-bail release methods are used in combination, we do not score them as individual alternatives. Instead, we combine the three alternative release methods to create an aggregated score for non-bail release.

Supervised release means that defendants are assigned supervision conditions based on risk level.¹²⁸ In states using supervised release, conditions can include regular check-ins, electronic monitoring,

¹²³ Cal. Penal Code § 1269b(a)-(b) (West 2017).

¹²⁴ Bail Agents in discussion with the authors, January 2017. See *Appendix G* for interview questions.

¹²⁵ Bail Agent (Absolutely Affordable Bail Bonds) in discussion with the authors, November 2016. See *Appendix G* for interview questions.

¹²⁶ Bail Agent (House of Bail Bonds) in discussion with the authors, November 2016. See *Appendix G* for interview questions.

¹²⁷ “Bail Bonds - How They Work,” *California Bail Agents Association*, accessed on February 16, 2017, https://www.cbaa.com/How_Bail_Works.html; Liese Sherwood-Fabre, “An Evaluation of Federal Pretrial Services Agencies’ Impact on Pretrial Decisions and Outcomes,” *Evaluation Review* 11, no. 1 (2016): 29, <http://journals.sagepub.com/doi/pdf/10.1177/0193841X8701100101>.

¹²⁸ The Board of Directors of the California Association of Pretrial Services, “Release Standards and Recommended Procedures,” (California Association of Pretrial Services, California, 2007), 12, http://pretrialservicesca.org/public/css/CAPS_Standards_022807_Approved.pdf.

drug testing, and more.¹²⁹ Judges may release low- and moderate-risk defendants with conditions that allow them to maintain employment and avoid other social costs.¹³⁰ Thirty-eight counties in California currently offer supervised release.¹³¹

Release on own recognizance is a release method that does not impose any conditions on defendants. Defendants are released on their promise to appear at the next court hearing.¹³² According to California Penal Code § 1270, anyone who is arrested for a non-capital offense is legally entitled to be considered for release on own recognizance and may be released by a judge.¹³³ Judges usually consider the defendant's public safety threat and risk score, as determined by a risk assessment tool, when making this determination.¹³⁴

The final form of non-bail release we consider is unsecured bonds, which require no upfront payment. With unsecured bonds, defendants are released with the promise to pay the full amount of their bond if they fail to appear for a court date.¹³⁵ The bond amount is usually smaller than the amounts in bail schedules under the commercial surety bail system.¹³⁶ Unsecured bonds are used in 38 states.¹³⁷

Scoring

To recommend a policy, we will evaluate the status quo and policy alternatives described above using seven criteria, two criteria for stage one and five criteria for stage two. The status quo and policy alternatives will receive a score for each criterion. This score is on an ordinal scale; alternatives will be ranked comparatively and relative to one another. A score of "1" will be given to the worse alternative, while a score of "2" will be given to the better alternative. This scoring system is applicable to all seven criteria. Within each stage of analysis (screening and release), the scores will be weighted. The weighting system is based on the recommendations of our client. The weights will be discussed in greater detail within each stage. After weighting the scores in each stage, the scores will be summed. This will reveal a policy recommendation for each stage: a recommended screening policy and a recommended release policy.

¹²⁹ VanNostrand et al, "State of the science of Pretrial Release Recommendations and Supervision," (Report, Pretrial Justice Institute, 2011) 15-32, <http://luminosity-solutions.com/site/wp-content/uploads/2014/02/State-of-the-Science-Pretrial-Recommendations-and-Supervision-5.pdf>.

¹³⁰ The Board of Directors of the California Association of Pretrial Services, "Release Standards and Recommended Procedures," (California Association of Pretrial Services, California, 2007), 12, http://pretrialservicesca.org/public/css/CAPS_Standards_022807_Approved.pdf.

¹³¹ Raw data on file with author. "Pretrial Progress: A Survey of Pretrial Practices and Services in California," *Community Resources for Justice*, accessed on October 28, 2016, <http://www.crij.org/cji/entry/pretrial-progress-a-survey-of-pretrial-practices-and-services-in-california>.

¹³² Example of OR Form from Riverside. "Agreement for Own Recognizance Release" (Superior Court of California, County of Riverside), <http://www.riverside.courts.ca.gov/localfrms/ri-cr013.pdf>.

¹³³ Cal. Penal Code § 1270 (West 2017).

¹³⁴ Cal. Penal Code § 1270(a) (West 2017).

¹³⁵ "Pretrial Release Conditions," *National Conference of State Legislatures*, September 15, 2016, [http://www.ncsl.org/research/civil-and-criminal-justice/pretrial-release-conditions.aspx#/.](http://www.ncsl.org/research/civil-and-criminal-justice/pretrial-release-conditions.aspx#/)

¹³⁶ Maureen Cain and Jud Lohnes, "Overview of Colorado's New Bond Statues (Colorado Criminal Defense Institute), http://www.ccdinstitute.org/wp-content/uploads/sites/23/2014/08/Overview_of_Colorado%E2%80%99s_New_Bond_Statues-1.pdf.

¹³⁷ "Pretrial Release Conditions," *National Conference of State Legislatures*, September 15, 2016, [http://www.ncsl.org/research/civil-and-criminal-justice/pretrial-release-conditions.aspx#/.](http://www.ncsl.org/research/civil-and-criminal-justice/pretrial-release-conditions.aspx#/)

First Stage of Analysis: Screening Processes

The first stage of analysis is based on two criteria: predictive accuracy and race neutrality. Judicial decision-making informed by bail schedules will be compared to judicial decision-making informed by risk assessment tools.

Predictive Accuracy

Predictive accuracy is the degree to which an alternative correctly predicts a defendant’s risk of being rearrested or failing to appear while released pretrial. Predictive accuracy is significant because judges are tasked by the California Constitution with accurately predicting the defendant’s risk of rearrest and failing to appear while released. The California Constitution states: “In setting, reducing, or denying bail, the judge or magistrate shall take into consideration the protection of the public, the safety of the victim... and the probability of his or her appearing at the trial or hearing of the case. Public safety and the safety of the victim shall be the primary considerations.”¹³⁸ Judges may use bail schedules or risk assessment tools to inform this decision-making.

To evaluate the predictive accuracy of judicial decision-making using a bail schedule, we analyzed ethnographic “Bail Watch” data collected by the ACLU in the fall of 2016 at California Superior Courts.¹³⁹ Additionally, after a comprehensive review of research on the accuracy of judges’ decision-making using a bail schedule, we found only one experimental study on this topic, which we included in our analysis. To evaluate risk assessment tools, we found three validation studies that published results on the tools’ predictive accuracy, and two case studies that address how risk assessment tools can improve judicial decision-making (*Appendix B*).

Bail Schedule

Under the commercial surety bail system, judges screen defendants using a bail schedule, which connects the current charge to a bail amount.¹⁴⁰ The National Association of Pretrial Services Agencies’ (NAPSA) Standard indicates:

“[A] bail amount may be set by a judicial officer exercising unbridled discretion, without procedural safeguards for the defendant, without a full evidentiary hearing, and without giving the defendant any real opportunity to challenge the grounds for setting the bail at an amount virtually certain to result in detention.”¹⁴¹

Judges in California have the discretion to consider only “the seriousness of the offense charged, the previous criminal record of the defendant, and the probability of his or her appearing at the trial or

¹³⁸ Cal. Const. art. I, § 28(f)(3).

¹³⁹ Data from Los Angeles, Santa Clara, Alameda, Contra Costa and San Diego counties. ACLU Bail Watch Data, on file with the ACLU at Destiny Lopez, dlopez@aclusandiego.org.

¹⁴⁰ Cal. Penal Code § 1269b(f) (West 2017).

¹⁴¹ National Association of Pretrial Services Agencies, Standards on Pretrial Release, Third Edition, Commentary to Standard 1.5, <https://napsa.org/eweb/DynamicPage.aspx?Site=NAPSA&WebCode=standards>.

hearing of the case.”¹⁴² Despite being allowed the discretion to consider the probability that a defendant will appear at trial, judges are not provided with any objective information that would lead them to infer how likely a defendant is to fail to appear.¹⁴³ The bail schedule itself only considers current charge.¹⁴⁴ So the judge is left with two options: use the bail schedule and make a pretrial decision based only on current charge, or make a decision based on their best guess at a defendant’s probability to reappear.

We found one study that evaluated the predictive accuracy of judicial decision-making using bail schedules. This experimental study showed that judges’ pretrial bail decisions were fairly predictive of the defendants’ risk of failure to appear and rearrest.¹⁴⁵ The author researched a natural experiment in Philadelphia comparing defendants who were originally released by a judge (“initial release”) with defendants who were initially detained by a judge but who were later released because of emergency jail overcrowding (“emergency release”).¹⁴⁶ Comparing the two defendant populations, “initial release” and “emergency release,” the study found that the “emergency release” population failed to appear 3.5 times more than the “initial release” population and were rearrested 2.3 times more than the “initial release” population.¹⁴⁷ This experiment demonstrates that judicial decision-making accurately predicted that the “emergency release” population was more at-risk for failure to appear and rearrest than the “initial release” population.

Despite the potential for accurate prediction, judges do not incorporate the careful consideration required to accurately predict the risk level of defendants beyond using the bail schedule. The “Bail Watch” data collected by the ACLU showed that less than 1.5 percent of defendants were “asked about their ability to pay” bail, and the most common factor considered by judges was the current charge.¹⁴⁸ Bail hearings lasted from under one minute to ten minutes, with a median of only two minutes.¹⁴⁹ It is reasonable to assume that two minutes is inadequate for judges to consider anything more than the bail schedule and their immediate biases.¹⁵⁰

Furthermore, bail schedules in California are set independently by Superior Court Judges in each county, based on an evaluation of the “seriousness of the offense charged.”¹⁵¹ This results in the arbitrary assignment of bail amounts that vary widely across the state. For example, for “misdemeanor battery on a peace officer, fireman, or other specified public servant,” the bail amounts range from \$500 in Merced County to \$50,000 in San Joaquin County.¹⁵² Bail schedules vary based solely on the county of arrest.

¹⁴² Cal. Const. art. 1, § 12.

¹⁴³ Cal. Penal Code § 1269b(e) (West 2017).

¹⁴⁴ Cal. Penal Code § 1269b(f) (West 2017).

¹⁴⁵ John S. Goldkamp, “Questioning the Practice of Pretrial Detention: Some Empirical Evidence from Philadelphia,” *Journal of Criminal Law and Criminology* 74, no. 4 (1983): 1574-1585; Shima Baradaran Baughman and Frank McIntyre, “Predicting Violence,” *Texas Law Review* 90, no. 3 (2012): 545-548.

¹⁴⁶ John S. Goldkamp, “Questioning the Practice of Pretrial Detention: Some Empirical Evidence from Philadelphia,” *Journal of Criminal Law and Criminology* 74, no. 4 (1983): 1563-1565.

¹⁴⁷ *Ibid.* 1575.

¹⁴⁸ ACLU Bail Watch Data, on file with the ACLU at Destiny Lopez, dlopez@aclusandiego.org.

¹⁴⁹ *Ibid.*

¹⁵⁰ *Ibid.*

¹⁵¹ Cal. Penal Code § 1269b(e) (West 2017).

¹⁵² Range of bail amounts was the result of an analysis of all misdemeanor bail schedules for the years 2014-2017 in California, depending on availability. Total counties: 48. The remaining counties did not have a publicly accessible misdemeanor bail schedules. Superior Court of California, County of Merced, “Misdemeanor Bail Schedule,” (July 2014):

Because the status quo alternative does not provide judges with objective information to predict failure to appear, judges are only officially considering one risk factor—current charge. To compensate for this lack of information, judges use more discretion, which may include implicit biases, to attempt to predict failure to appear. Furthermore, the bail schedule itself is an unscientific tool that randomly assigns money bail amounts. Basing release decisions on a subjective and random instrument will significantly limit the predictive accuracy of the screening process.

Risk Assessment Tools

Alternatively, risk assessment tools can inform judicial decision-making. These tools are designed to objectively and scientifically predict rearrest and failure to appear. They generate risk scores, which are included in a risk assessment report created by pretrial services agencies. The reports are distributed to judges to help them determine whether to release defendants and the conditions of their release. Three validation studies of risk assessment tools demonstrate that all variables in the tools are statistically significant in predicting failure to appear and rearrest.¹⁵³

The validation study of the Virginia Pretrial Risk Assessment Instrument (VPRAI) showed that the tool “is statistically significant in predicting pretrial outcomes,” with a p-value of 0.000.¹⁵⁴ This tool goes beyond what is considered in the bail schedule (only current charge) to include additional factors (see **Appendix A** for risk assessment tool variables).¹⁵⁵ The study also demonstrates that each factor is statistically significantly correlated with rearrest and failure to appear. The validation study of the Federal Pretrial Risk Assessment Instrument (PTRA) shows similar results. The PTRA includes “nine statistically significant and policy relevant predictors of pretrial failure.”¹⁵⁶ The validation study of the Ohio Risk Assessment System–Pretrial Assessment Tool shows that “each

2. http://www.mercedcourt.org/files/2014_Misdemeanor.pdf. Superior Court of California, County of San Joaquin, “San Joaquin County 2016 Felony Bail Schedule,” (July 2016): 15. <https://www.sjcourts.org/wp-content/uploads/FELONY-BAIL-SCHEDULE.pdf>.

¹⁵³ Danner et al., “Risk-Based Pretrial Release Recommendation and Supervision Guidelines,” (report, Luminosity, 2015), <http://luminosity-solutions.com/site/wp-content/uploads/2014/02/Risk-Based-Pretrial-Guidelines-August-2015.pdf>; Latessa et al., “Creation and Validation of the Ohio Risk Assessment System Final Report,” *University of Cincinnati* (July 2009): 21, http://www.ocjs.ohio.gov/ORAS_FinalReport.pdf; Cynthia A. Mamalian, “State of the Science of Pretrial Risk Assessment,” *Pretrial Justice Institute* (March 2011): 16, https://www.bja.gov/publications/pji_pretrialriskassessment.pdf; Office of Probation and Pretrial Services, “Federal Pretrial Risk Assessment User’s Manual and Scoring Guide,” (March 2010), <https://university.pretrial.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=cafab20-a824-136a-fb2c-36785168616f&forceDialog=0>.

¹⁵⁴ Danner et al., “Risk-Based Pretrial Release Recommendation and Supervision Guidelines,” (report, Luminosity, 2015), <http://luminosity-solutions.com/site/wp-content/uploads/2014/02/Risk-Based-Pretrial-Guidelines-August-2015.pdf>.

¹⁵⁵ Kenneth Rose, “Risk-Informed Pretrial Decision Making in the Commonwealth of Virginia,” Virginia Department of Criminal Justice Services (February 2016): 4, <http://nccali.org/wp-content/uploads/2016/02/Commission-Presentation-1.pdf>.

¹⁵⁶ Cynthia A. Mamalian, “State of the Science of Pretrial Risk Assessment,” *Pretrial Justice Institute* (March 2011): 16, https://www.bja.gov/publications/pji_pretrialriskassessment.pdf; Office of Probation and Pretrial Services, “Federal Pretrial Risk Assessment User’s Manual and Scoring Guide,” (March 2010), <https://university.pretrial.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=cafab20-a824-136a-fb2c-36785168616f&forceDialog=0>.

risk level is associated with progressively higher rates of recidivism,” with an R² value of 0.22 and a p-value of 0.00.¹⁵⁷

Two case studies found that risk assessment tools help judges make more accurate decisions than bail schedules about pretrial release. These studies conducted in Lucas County, Ohio,¹⁵⁸ and Santa Clara County, California¹⁵⁹ showed that risk assessment tools help judges release more defendants while reducing or keeping constant failure to appear and rearrest rates.

Unlike judges using bail schedules, pretrial services agencies are tasked with providing reliable information to the court.¹⁶⁰ Additionally, NAPSA Standards advocate for an objective process that limits judicial discretion through the use of a risk assessment tool. If pretrial release is not recommended, judges “should include in the [court] record a statement, written or oral, of the reasons for this decision.”¹⁶¹ The record of the judicial decision about pretrial release allows for later appeal of this discretion.¹⁶²

The use of risk assessment tools by pretrial services agencies and judges creates a reliable system backed by systematically gathered information entered into a scientifically validated tool.

Predictive Accuracy Scoring

Our policy alternatives will be scored relatively. The better alternative will receive a score of “2” while the worse alternative will receive a score of “1.”

Because the validation studies demonstrate that risk assessment tools use statistically significant variables in a scientifically validated algorithm to predict failure to appear and rearrest, risk assessment tools receive a score of “2.” Because bail schedules are unscientific, random instruments, they receive a score of “1.” The scoring matrix for predictive accuracy can be viewed below in **Table 2**.

¹⁵⁷ Latessa et al., “Creation and Validation of the Ohio Risk Assessment System Final Report,” *University of Cincinnati* (July 2009): 21, http://www.ocjs.ohio.gov/ORAS_FinalReport.pdf.

¹⁵⁸ Laura and John Arnold Foundation, “New data: Pretrial risk assessment tool works to reduce crime, increase court appearances,” (August 2016), <http://www.arnoldfoundation.org/new-data-pretrial-risk-assessment-tool-works-reduce-crime-increase-court-appearances/>.

¹⁵⁹ County of Santa Clara Bail and Release Work Group, “Consensus Report on Optimal Pretrial Justice,” (Santa Clara County Government).

¹⁶⁰ National Association of Pretrial Services Agencies, Standards on Pretrial Release, Third Edition, Commentary to Standard 3.1, <https://napsa.org/eweb/DynamicPage.aspx?Site=NAPSA&WebCode=standards>.

¹⁶¹ National Association of Pretrial Services Agencies, Standards on Pretrial Release, Third Edition, Commentary to Standard 2.3(c), <https://napsa.org/eweb/DynamicPage.aspx?Site=NAPSA&WebCode=standards>. For an example of how judges document their decisions to override the score from a RAT for future appeal, see: Kristy Pierce-Danford and Meghan Guevara, “Creating an Effective Pretrial Program,” *Crime and Justice Institute* (June 2013): 7, http://libcloud.s3.amazonaws.com/211/9f/a/223/CSJ_pretrial_toolkit.pdf.

¹⁶² National Association of Pretrial Services Agencies, Standards on Pretrial Release, Third Edition, Commentary to Standard 2.3, <https://napsa.org/eweb/DynamicPage.aspx?Site=NAPSA&WebCode=standards>.

Table 2: Predictive Accuracy Scoring Matrix

	Score	Definition: A screening process that uses...
Judges with Risk Assessment Tools	2	multiple variables that are designed to predict failure to appear and rearrest.
Judges with Bail Schedules	1	only one variable or random variables, which do not consider failure to appear and rearrest.

Race Neutrality

A race neutral screening process transparently measures and minimizes racial bias.¹⁶³ Racial bias occurs when groups face differential outcomes based on race. This criterion is significant because our client is dedicated to reducing racial injustices in California.¹⁶⁴ In addition to our client's preferences, all defendants have the right to be treated equally without regard to race.

We evaluated the prevalence of racial bias perpetuated by judges' screening decisions by analyzing four studies that published results on the differential treatment of white defendants as compared to nonwhite defendants by judges. Because less research has been conducted on racial bias perpetuated by risk assessment tools, we analyzed this alternative based on three studies that published conclusions on how two risk assessment tools currently perpetuate racial bias, and how they can be corrected to reduce racial bias (*Appendix C*).

Bail Schedules

Every study found some degree of racial bias in judicial decision-making. For example, four studies showed that defendants of color "were less likely to be released pretrial than white defendants."¹⁶⁵ One of these studies found that being black increased the probability of staying in jail pretrial by 25 percent.¹⁶⁶ Another study used logistic regression which controlled for relevant factors, such as criminal history, and found that Hispanic defendants' probability of release was 55 percent, in contrast to white defendants, whose probability of release was 68 percent.¹⁶⁷ Two studies similarly

¹⁶³ Danner et al., "Race and Gender Neutral Pretrial Risk Assessment, Release Recommendations, and Supervision: VPRAI and Praxis Revised," (report, Luminosity, 2016) 1, <http://luminosity-solutions.com/site/wp-content/uploads/2014/02/Race-and-Gender-Neutral-Pretrial-Risk-Assessment-November-2016.pdf>.

¹⁶⁴ Assemblymember Rob Bonta, "Biography," *Official Website—Assemblyman Rob Bonta Representing the 18th California Assembly District*, accessed December 20, 2016, <https://a18.asmdc.org/biography>.

¹⁶⁵ Tina L. Freiburger and Carly M. Hilinski, "The Impact of Race, Gender, and Age on the Pretrial Decision," *Criminal Justice Review* 35, no. 3 (2010): 320, <http://scholarworks.gvsu.edu/cgi/viewcontent.cgi?article=1008&context=scipeerpubs>.

¹⁶⁶ Cynthia Jones, "'Give Us Free': Addressing Racial Disparities in Bail Determinations," *Digital Commons @ American University Washington College of Law* (2013): 942, http://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1304&context=facsch_lawrev.

¹⁶⁷ Thomas H. Cohen, Brian A. Reaves, "Pretrial Release of Felony Defendants in State Courts," *Bureau of Justice Statistics Special Report* (November 2007): 6, <https://www.bjs.gov/content/pub/pdf/prfdsc.pdf>.

find that Black and Hispanic defendants have a higher probability of being held pretrial.¹⁶⁸ One of these studies used nonparametric methods to construct a simple model of bail setting in order to prove a causal relationship between judges' decisions and the race of the defendant, and another used multivariate regression analysis to control for any relevant variables to prove that race alone had a significant effect on the probability of release.¹⁶⁹

Race can also play a role in bail determinations. One study showed that bail amounts for black defendants are systematically higher than white defendants, and another study showed that average bail amounts for Black and Hispanic males are 35 percent and 19 percent higher—a statistically significant difference.¹⁷⁰

As discussed in the previous section on predictive accuracy, judges only officially consider the bail schedules when making pretrial release decisions. But because the status quo screening process does not provide judges with objective information on the risk of rearrest and failure to appear for defendants, they are likely to fill in this information gap with their own assumptions and biases. While only one bail schedule is applied to all defendants within a county, we conclude that racial disparities perpetuated by pretrial detention decisions must be a result of these implicit biases.

It is well-known that judges exhibit implicit biases.¹⁷¹ One study surveyed judges about these biases. They found that “[n]inety-seven percent (35 out of 36) of the judges placed themselves in the top half and 50 percent (18 out of 36) placed themselves in the top quartile”¹⁷² when asked about “their ability to ‘avoid racial prejudice in decision-making’ relative to other judges who were attending the same conference.”¹⁷³ This is “mathematically impossible.”¹⁷⁴ Additionally, if judges believe that they make objective decisions, this could increase their bias.¹⁷⁵ Operating in a system with unchecked

¹⁶⁸ Shawn D. Bushway and Jonah B. Gelback, “Testing for Racial Discrimination in Bail Setting Using Nonparametric Estimation of a Parametric Model,” (unpublished article, University of Pennsylvania Law School, 2010): 1, <https://www.law.upenn.edu/live/files/1142-gelbachbailracialdiscriminationpdf>; Stephen Demuth, “Racial and Ethnic Differences in Pretrial Release Decisions and Outcomes: A Comparison of Hispanic, Black, and White Felony Arrestees,” *Criminology* 41, no. 3 (2003): 895.

¹⁶⁹ *Ibid.*

¹⁷⁰ Ian Ayres and Joel Waldfogel, “A Market Test for Race Discrimination in Bail Setting,” *Yale Law School Legal Scholarship Repository* (January 1994): 1010, http://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=2526&context=fss_papers.

¹⁷¹ American Bar Association, “Implicit Bias and De-Biasing Strategies: A Workshop for Judges and Lawyers,” *American Bar Association Judicial Division* (August 2016), http://www.americanbar.org/content/dam/aba/events/criminal_justice/2016/annual16_jointbias.authcheckdam.pdf; http://www.abajournal.com/news/article/implicit_bias_is_a_challenge_even_for_judges. It is so well-known that judges experience implicit bias that the National Center for State Courts conducted a pilot program trying to identify methods of reducing the implicit biases of judges. Casey et al., “Helping Courts Address Implicit Bias: Resources for Education,” *National Center for State Courts*, (2012),

http://www.ncsc.org/~media/Files/PDF/Topics/Gender%20and%20Racial%20Fairness/IB_report_033012.ashx.

¹⁷² Rachlinski et al., “Does Unconscious Racial Bias Affect Trial Judges?” *Scholarship@Cornell Law: A Digital Repository* (March 2009): 1225, <http://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=1691&context=facpub>.

¹⁷³ *Ibid.*

¹⁷⁴ Kang et al., “Implicit Bias in the Courtroom,” *UCLA Law Review* 59 (2012): 1172, <https://faculty.washington.edu/agg/pdf/Kang&al.ImplicitBias.UCLALawRev.2012.pdf>.

¹⁷⁵ Kang et al., “Implicit Bias in the Courtroom,” *UCLA Law Review* 59 (2012): 1173, <https://faculty.washington.edu/agg/pdf/Kang&al.ImplicitBias.UCLALawRev.2012.pdf>; Eric Luis Uhlmann and Geoffrey L. Cohen, “‘I Think It, Therefore it’s True’: Effects of Self-Perceived Objectivity on Hiring Discrimination,” *Organizational Behavior and Human Decision Processes* 104 (2007): 211, <http://www.socialjudgments.com/docs/Uhlmann%20and%20Cohen%202007.pdf>.

discretion to set bail using bail schedules, judges are likely influenced by implicit biases, which results in disparate outcomes for defendants based on race.

When combined with broad discretion and the implicit biases of judges, judicial decision-making informed by bail schedules is not race neutral.

Risk Assessment Tools

There is a lack of research on racial bias in risk assessment tools. Although risk assessment tools must be validated to prove predictive accuracy, an extensive review of pre-existing studies on risk assessment tools found that only two tools have been independently studied for racial bias.

One of these is the VPRAI, which was validated for race and gender neutrality in Virginia in 2016.¹⁷⁶ According to this validation study, race- and gender-neutral tools are free from predictive bias. The author defines predictive bias as when a given risk score is associated with different failure rates between racial groups. An example of predictive bias is if a Black defendant receives a risk score of four, and that score is associated with a different predicted failure to appear and rearrest rate than a similarly scored white defendant.¹⁷⁷ This results in one group being over- or under-classified as high risk, and therefore receiving different treatment. To address and correct for predictive bias, the VPRAI researchers tested whether or not each factor statistically significantly predicted failure to appear and rearrest rates for both white defendants and defendants of color.¹⁷⁸ When they found a discrepancy in the predictive accuracy of a variable between racial groups, they amended or excluded that factor.¹⁷⁹ Their final conclusion stated that each factor, as well as the tool as a whole, accurately predicted failure to appear and rearrest for both white and nonwhite defendants.¹⁸⁰ They therefore concluded that the VPRAI is race- and gender-neutral.¹⁸¹

However, two ProPublica studies tell a different story.¹⁸² The studies, backed by researchers at Google, the University of Chicago, and Carnegie Mellon University,¹⁸³ analyzed racial bias perpetuated by the COMPAS risk assessment tool. They found that Black defendants were two

¹⁷⁶ Danner et al., “Race and Gender Neutral Pretrial Risk Assessment, Release Recommendations, and Supervision: VPRAI and Praxis Revised,” (report, Luminosity, 2016) 1, <http://luminosity-solutions.com/site/wp-content/uploads/2014/02/Race-and-Gender-Neutral-Pretrial-Risk-Assessment-November-2016.pdf>.

¹⁷⁷ Marie VanNostrand, “Pretrial Risk Assessment: Perpetuating or Disrupting Racial Bias,” *Pretrial Justice Institute* (December 2016), https://www.youtube.com/watch?time_continue=804&v=kx22IO7h88.

¹⁷⁸ Danner et al., “Race and Gender Neutral Pretrial Risk Assessment, Release Recommendations, and Supervision: VPRAI and Praxis Revised,” (report, Luminosity, 2016) 1, <http://luminosity-solutions.com/site/wp-content/uploads/2014/02/Race-and-Gender-Neutral-Pretrial-Risk-Assessment-November-2016.pdf>.

¹⁷⁹ Marie VanNostrand, “Pretrial Risk Assessment: Perpetuating or Disrupting Racial Bias,” *Pretrial Justice Institute* (December 2016), https://www.youtube.com/watch?time_continue=804&v=kx22IO7h88.

¹⁸⁰ *Ibid.*

¹⁸¹ *Ibid.*

¹⁸² Julia Angwin and Jeff Larson, “Bias in Criminal Risk Scores is Mathematically Inevitable, Researchers Say,” *ProPublica* (December 30, 2016), <https://www.propublica.org/article/bias-in-criminal-risk-scores-is-mathematically-inevitable-researchers-say>; Angwin et al., “Machine Bias,” *ProPublica* (May 23, 2016), <https://www.propublica.org/article/machine-bias-risk-assessments-in-criminal-sentencing>.

¹⁸³ Hardt et al., “Equality of Opportunity in Supervised Learning” (journal article, University of Chicago, 2016), <http://ttic.uchicago.edu/~nati/Publications/HardtPriceSrebro2016.pdf>; Alexandra Chouldechova, “Fair Prediction with Disparate Impact: A Study of Bias in Recidivism Prediction Instruments” (conference article, Cornell University Library, 2016), <https://arxiv.org/abs/1610.07524>.

times more likely to be misclassified as high risk (45 percent) than white defendants (23 percent). The tool also misclassified white defendants as being less risky than they actually were.¹⁸⁴ They argue that racial bias includes more than just the narrow definition of predictive bias outlined above.¹⁸⁵ Because the COMPAS tool accurately predicts rearrest and failure to appear equally for both Black and white defendants, as does the VPRAI, Black defendants receive more “false positives” than white defendants, meaning they are more frequently incorrectly labeled high-risk when they are actually low-risk. For the same reason that you wouldn’t consider a medical test accurate if it correctly identified the number of patients with cancer but gave out false positives to hundreds of patients who did not have cancer, these researchers argue that this system is not equitable for both Black and white defendants.¹⁸⁶ Therefore, these researchers conclude that COMPAS is not race-neutral, and it perpetuates racial bias.

There is disagreement within the academic community about how to achieve race neutrality in risk assessment tools. However, researchers agree that it is possible. The VPRAI researchers claim that race neutrality in risk assessment tools can be achieved through improved predictive accuracy alone. Alternatively, the ProPublica studies quote researchers who believe in a different approach. Carnegie Mellon Professor Alexandra Chouldechova is currently studying how the risk assessment algorithm can be adjusted for a wider definition of race neutrality.¹⁸⁷ Furthermore, racial bias can be explicitly measured in every risk assessment tool, and therefore the tools have potential for progress. Even though there is no consensus that a pre-existing tool effectively reduces racial bias, its ability to at least measure bias has potential.

While there is some evidence that risk assessment tools perpetuate racial biases, there is also evidence that they can be corrected and can achieve race neutrality. Risk assessment tools will limit judicial discretion by providing an official recommendation for judges. As discussed in our predictive accuracy section, judicial decision-making used in conjunction with risk assessment tools limits judicial discretion. One report shows that when judges are presented with risk assessment tool recommendations, they follow the recommendation 75 percent of the time.¹⁸⁸ Based on this evidence, we believe that judges using risk assessment tools are better equipped to achieve race neutrality than judges using bail schedules.

Race Neutrality Scoring

The policy alternatives of bail schedules and risk assessment tools will be scored relatively. The better alternative will receive a score of “2” while the worse alternative will receive a score of “1.”

¹⁸⁴ Julia Angwin and Jeff Larson, “Bias in Criminal Risk Scores is Mathematically Inevitable, Researchers Say,” *ProPublica* (December 30, 2016), <https://www.propublica.org/article/bias-in-criminal-risk-scores-is-mathematically-inevitable-researchers-say>; Angwin et al., “Machine Bias,” *ProPublica* (May 23, 2016), <https://www.propublica.org/article/machine-bias-risk-assessments-in-criminal-sentencing>.

¹⁸⁵ Julia Angwin and Jeff Larson, “Bias in Criminal Risk Scores is Mathematically Inevitable, Researchers Say,” *ProPublica* (December 30, 2016), <https://www.propublica.org/article/bias-in-criminal-risk-scores-is-mathematically-inevitable-researchers-say>.

¹⁸⁶ *Ibid.*

¹⁸⁷ Alexandra Chouldechova, “Fair prediction with disparate impact: A study of bias in recidivism prediction instruments” (Study, Cornell University Library, 2016), <https://arxiv.org/abs/1610.07524>.

¹⁸⁸ County of Santa Clara Bail and Release Work Group, “Consensus Report on Optimal Pretrial Justice,” (Santa Clara County Government), 45.

Because it is difficult to measure judges’ implicit biases, judges using bail schedules receive a “1.” Because of the potential to measurably improve risk assessment tools, judges using risk assessment tools receive a score of “2.” The scoring matrix for race neutrality can be viewed below in **Table 3**.

Table 3: Race Neutrality Scoring Matrix

	Score	Definition: A screening process that...
Judges with Risk Assessment Tools	2	measures and minimizes racial bias.
Judges with Bail Schedules	1	does not measure and minimize racial bias.

First Stage of Analysis: Recommendation

Bail schedules received a score of “1” for predictive accuracy and racial neutrality, respectively. Risk assessment tools received a score of “2” for predictive accuracy and racial neutrality, respectively. Risk assessment tools scored higher than bail schedules on both criteria in the first stage of analysis.

These scores will be weighted based on the preferences of our client. Our client maintains that predictive accuracy is the most important factor to consider when evaluating screening processes, followed closely by race neutrality. Therefore, predictive accuracy will be weighted more (0.6) than race neutrality (0.4). The weighted and unweighted scores can be viewed in **Table 4**. After weighing the scores, bail schedules received a total weighted score of “1,” and risk assessment tools received a total weighted score of “2.” Thus, we recommend using a risk assessment tool to inform and improve judicial decision-making when screening defendants.

Table 4: First Stage of Analysis Scoring Matrix

Criterion	Judges with Bail Schedules			Judges with Risk Assessment Tools		
	Preliminary score	Weight	Final Score	Preliminary score	Weight	Final Score
Predictive accuracy	1	0.6	0.6	2	0.6	1.2
Race neutrality	1	0.4	0.4	2	0.4	0.8
Total			1			2

Second Stage of Analysis: Release Methods

For the second stage of analysis, we will compare the release methods of commercial surety bail to non-bail using five criteria: effectiveness, economic bias, fiscal impact, social cost, and political feasibility.

Effectiveness

An effective release method results in a released pretrial defendant avoiding rearrest within two years of initial arrest,¹⁸⁹ and appearing at all mandated court appointments.

We compare the status quo of commercial surety bail to non-bail release methods, including release on supervision, unsecured bonds, and release on own recognizance. Many studies evaluate the effects of multiple non-bail release methods simultaneously, so we cannot make recommendations based on specific types of non-bail release. Our final analysis is based on ten studies that discuss failure to appear rates, rearrest rates, or both, in the context of at least one of the non-bail release methods (*Appendix D*).

A study in Colorado proved that unsecured bonds were as effective as surety bail in reducing failure to appear and rearrest.¹⁹⁰ The study showed a 15 percent rearrest rate for unsecured bonds, compared to a 24 percent rearrest rate for commercial surety bonds.¹⁹¹ The same study also showed a 12 percent failure to appear rate for unsecured bonds, compared to a 19 percent failure to appear rate for commercial surety bail.¹⁹²

A case study in Kentucky examined the use of a validated risk assessment tool and non-bail release methods. The release methods included a mix of unsecured bonds, release on own recognizance, and supervision, which resulted in an increased release rate of five percent. Despite releasing more defendants pretrial, Kentucky saw decreases in its failure to appear rate (11 percent to ten percent) and its rearrest rate (nine percent to eight percent).¹⁹³

Another study from Virginia showed that defendants released on supervision “were 1.3 times less likely to fail to appear” or be rearrested.¹⁹⁴ A case study from Iowa showed that using supervised

¹⁸⁹ Sonya Tafoya, “Pretrial Detention and Jail Capacity in California” (Report, Public Policy Institute of California, July 2015), http://www.ppic.org/main/publication_quick.asp?i=1154.

¹⁹⁰ Michael R Jones, “Unsecured Bonds: The As Effective and Most Efficient Pretrial Release Option,” (Report, Pretrial Justice Institute, October, 2013).
<http://www.pretrial.org/download/research/Unsecured+Bonds,+The+As+Effective+and+Most+Efficient+Pretrial+Release+Option+-+Jones+2013.pdf>.

¹⁹¹ Ibid.

¹⁹² Ibid.

¹⁹³ Tara Boh Klute and Mark Heyerly, “Report on Impact of House Bill 463: Outcomes Challenges and Recommendations,” (Kentucky Pretrial Services, 2012), <https://www.pretrial.org/download/law-policy/Kentucky%20Pre%20Post%20HB%20463%20First%20Year%20Pretrial%20Report.pdf>.

¹⁹⁴ Danner et al., “Risk-Based Pretrial Release Recommendation and Supervision Guidelines,” (report, Luminosity, 2015), <http://luminosity-solutions.com/site/wp-content/uploads/2014/02/Risk-Based-Pretrial-Guidelines-August-2015.pdf>; John Clark, “Finishing the Job: Modernizing Maryland’s Bail System,” *The Abell Report* 29, no. 2 (2016): 12, http://home.ubalt.edu/id86mp66/PTJC/SymposiumReadings/Finishing_the_Job.pdf.

release led to a 16 percent increase in release rate, as well as a decreased failure to appear rate (5.3 percent to 2.3 percent) and a decreased rearrest rate (4.4 percent to 2.3 percent).¹⁹⁵

Two studies in Philadelphia and Kentucky showed that supervision decreases pretrial success for low-risk defendants, but increases pretrial success for medium- and high-risk defendants.¹⁹⁶ In Kentucky, “low-risk defendants who were [detained] for two to three days were 40 percent more likely” to be rearrested than low-risk defendants held 24 hours.¹⁹⁷ These studies show that detention increases rearrest rates for low-risk defendants, and that release without conditions is more effective in reducing rearrest.

Of these ten studies, four are experimental or quasi-experimental, which allow for causal conclusions. The first experimental study, in Manhattan, demonstrated that defendants who are released on their own recognizance had lower failure to appear rates (1.6 percent) than defendants released on commercial surety bail (three percent).¹⁹⁸ In the second experimental study, in Philadelphia, rates of rearrest and failure to appear for medium-risk defendants decreased for groups on supervised release, and rates of failure to appear decreased for high-risk defendants on supervised release.¹⁹⁹

A third quasi-experimental study from Colorado shows a 21 percent rearrest rate for unsecured bonds, as compared to a 23 percent rearrest rate for commercial surety bonds, and a ten percent failure to appear rate for unsecured bonds, compared to a 15 percent failure to appear rate for commercial surety bonds.²⁰⁰ This study did not show a statistically significant difference in the rearrest or failure to appear rates between the two types of bonds, leading the researchers to conclude that rearrest and failure to appear remain constant under unsecured bonds and commercial surety bonds.²⁰¹ The final study, a meta-analysis of multiple experimental studies, showed that reminder calls to defendants (a form of supervision) reduced failure to appear rates from 23 percent

¹⁹⁵ Marie VanNostrand, “Alternatives to Pretrial Detention: Southern District of Iowa,” (Case Study, Luminosity, June 30, 2010), <https://www.pretrial.org/download/risk-assessment/Alternatives%20to%20Pretrial%20Detention%20Southern%20District%20of%20Iowa%20-%20VanNostrand%202010.pdf>.

¹⁹⁶ John S. Goldkamp and Michael D. White, “Restoring Accountability in Pretrial Release: the Philadelphia Pretrial Release Supervision Experiments,” *Journal of Experimental Criminology*, no 2 (2006): 143; Margaret Talbot, “The Case Against Cash Bail,” *New Yorker* (New York City, NY), August 25, 2015 <http://www.newyorker.com/news/news-desk/the-case-against-cash-bail>; Lowenkamp et al., “The Hidden Costs of Pretrial Detention (Report, Laura John Arnold Foundation, November, 2013), http://www.arnoldfoundation.org/wp-content/uploads/2014/02/LJAF_Report_hidden-costs_FNL.pdf.

¹⁹⁷ Margaret Talbot, “The Case Against Cash Bail,” *New Yorker* (New York City, NY), August 25, 2015 <http://www.newyorker.com/news/news-desk/the-case-against-cash-bail>; Lowenkamp et al., “The Hidden Costs of Pretrial Detention (Report, Laura John Arnold Foundation, November, 2013), http://www.arnoldfoundation.org/wp-content/uploads/2014/02/LJAF_Report_hidden-costs_FNL.pdf; Timothy R. Schnacke, *Money as a Criminal Justice Stakeholder: The Judge’s Decision to Release or Detain a Defendant Pretrial* (U.S. Department of Justice National Institute of Corrections, 2014), 47, http://www.clebp.org/images/2014-09-04_Money_as_a_Criminal_Justice_Stakeholder.pdf.

¹⁹⁸ Scott Kohler, “Vera Institute of Justice: Manhattan Bail Project,” (Case, Ford Foundation, 1962), https://cspcs.sanford.duke.edu/sites/default/files/descriptive/manhattan_bail_project.pdf.

¹⁹⁹ John S. Goldkamp and Michael D. White, “Restoring Accountability in Pretrial Release: the Philadelphia Pretrial Release Supervision Experiments,” *Journal of Experimental Criminology*, no 2 (2006): 143.

²⁰⁰ Michael R Jones, “Unsecured Bonds: The as Effective and Most Efficient Pretrial Release Option,” (Report, Pretrial Justice Institute, October, 2013), <http://www.pretrial.org/download/research/Unsecured+Bonds,+The+As+Effective+and+Most+Efficient+Pretrial+Release+Option+-+Jones+2013.pdf>.

²⁰¹ Ibid.

to 11 percent in Colorado and from 25.4 percent to 12.9 percent in Arizona.²⁰² However, the study did not show a correlation between drug testing (another form of supervision) and a reduction in the failure to appear rate in any county.²⁰³

Lastly, one study concluded that failure to appear rates were lower for defendants under the commercial surety system.²⁰⁴ This study was done using the State Court Processing Statistics (SCPS) data, a statistical series by the Bureau of Justice Statistics.²⁰⁵ The Bureau of Justice Statistics released a data advisory against the SCPS data warning that it should not be used to explain causal associations.²⁰⁶ The study also only uses data from ten counties but labels the study as a national study. Four of the ten counties are from Texas, which makes the study geographically biased. Collectively, these studies show that non-bail release methods in general have lower failure to appear and rearrest rates compared to the commercial surety system.

Effectiveness Scoring

The policy alternatives of commercial surety bail and non-bail release will be scored relatively. The better alternative will receive a score of “2” while the worse alternative will receive a score of “1.”

Because some studies conclude that non-bail release methods reduce failure to appear and rearrest rates, but other studies find that the rates remain constant as compared to commercial surety bail, non-bail release is assigned a score of “2.” Because most studies conclude that commercial surety bail results in either higher or constant failure to appear and rearrest rates as compared to non-bail release, commercial surety bail receives a score of “1.” The scoring matrix for effectiveness can be viewed below in *Table 5*.

Table 5: Effectiveness Scoring Matrix

	Score	Definition: Most studies conclude that this release method results in...
Non-bail Release	2	lower rates of failure to appear and rearrest.
Commercial Surety Bail	1	higher rates of failure to appear and rearrest.

²⁰² Cynthia E. Jones, “‘Give Us Free’: Addressing Racial Disparities in Bail Determinations,” *Legislation and Public Policy*, no. 16 (2013): 919.

²⁰³ *Ibid.*

²⁰⁴ Thomas Cohen “Data Advisory,” (Memo, Bureau of Justice Statistics, March 2010), 1, https://www.bjs.gov/content/pub/pdf/scpsdl_da.pdf.

²⁰⁵ *Ibid.*

²⁰⁶ *Ibid.*

Economic Bias

An economically biased release method imposes a financial condition on defendants, resulting in unequal outcomes between high-income and low-income defendants.

Economic bias is a leading instigator of the legal arguments for bail reform. For example, the United States Department of Justice, in a brief for the plaintiff-appellee in *Walker v. City of Calhoun, Georgia* stated, “[A] bail scheme that imposes financial conditions, without individualized consideration of ability to pay and whether such conditions are necessary to assure appearance at trial, violates the Fourteenth Amendment.”²⁰⁷ This sentiment is further emphasized by our client, who maintains the perspective that an economically biased pretrial release system is not only unconstitutional, but unethical. Therefore, economic bias is a crucial criterion to consider when evaluating pretrial release methods.

We evaluate the prevalence of economic bias in each alternative by first examining the definition of each proposed policy. Definitions that include a financial condition will result in a lower score for economic bias. We supplement this evidence of economic bias with eight studies that point to whether defendants received differential treatment based on income under each alternative.

Commercial Surety Bail

Under the commercial surety bail system, defendants can either pay the full bail amount determined by a judge at their bail hearing, or they can contract with a bail bonds agency that assumes responsibility for their bail amount, “in exchange for a non-refundable fee” of ten percent annually.²⁰⁸ If they cannot afford either of these options, they will remain incarcerated pretrial. Bail bond agencies are commercial, private businesses and are therefore motivated primarily by profits. Their goal is to bail out defendants who can pay the nonrefundable fee.²⁰⁹ This non-refundable fee can have drastic financial consequences for low-income and indigent defendants. It is not waived or returned even if the defendant is found innocent or if the charges are dismissed.²¹⁰ Many defendants cannot afford to pay their way out of jail pretrial, and instead remain incarcerated, despite the fact that they have not been convicted of any crime. Nationally, almost ninety percent of unsentenced defendants are in jail because they cannot afford to pay bail.²¹¹

²⁰⁷ Brief for United States as Amici Curiae Supporting Plaintiff-Appellee, *Walker v. City of Calhoun*, No. 16-10521-HH, 2016 WL 4417421 (N.D. Ga. filed Aug. 18, 2016).

²⁰⁸ County of Santa Clara Bail and Release Work Group, “Consensus Report on Optimal Pretrial Justice,” *Santa Clara County Government*; Heaton et al., “The Downstream Consequences of Misdemeanor Pretrial Detention,” *SSRN* (2016): 5, <http://ssrn.com/abstract=2809840>.

²⁰⁹ Spike Bradford, “For Better or For Profit: How the bail bonding industry stands in the way of fair and effective pretrial justice,” *Justice Policy Institute*, September 2012, http://www.justicepolicy.org/uploads/justicepolicy/documents/for_better_or_for_profit.pdf.

²¹⁰ *Ibid.*

²¹¹ Bernadette Rabuy and Daniel Kopf, “Detaining the Poor”, *Prison Policy Initiative*, May 10, 2016; Cherise Fanno Burdeen, “The Dangerous Domino Effect of Not Making Bail”, *The Atlantic*, April 12, 2016; Brian A. Reaves, “Felony Defendants in Large Urban Counties, 2009 – Statistical Tables”, *Bureau of Justice Statistics*, December 2013.

Furthermore, defendants who cannot afford the full bail amount and must contract with bail agencies are often charged twice. First, they pay a non-refundable fee to compensate the bail agencies that are assuming the risk that the defendant will fail to appear and the bail agency will have to forfeit the full bail amount to the court. Many bail agencies also have defendants and their families sign contracts stating that the agencies will legally seize their assets if they fail to appear.²¹² Therefore, defendants pay both the nonrefundable fee, as well as assume the risk that their assets will be seized.

Economic bias occurs when a low-income defendant who is unable to pay faces a different outcome than a high-income defendant who is able to pay. With commercial surety bail, this is the case. Low-income defendants who cannot afford to either pay bail or contract with a bond agency remain incarcerated. Additionally, low-income defendants who do contract with a bail agency will have to pay a ten percent nonrefundable fee even if they appear at all court dates and/or are acquitted or their charges are dropped.

Non-bail Release Methods

To evaluate non-bail release methods, we will assess the economic bias of three such methods: release on own recognizance, supervised release, and unsecured bonds. Because pretrial services agencies often use these methods in combination, we will aggregate the results from each method to generate a total score for this alternative.

One non-bail release method that we will consider is release on own recognizance. The technical definition of release on own recognizance is “the release of a defendant in a criminal case in which the court takes the defendant’s word that he or she will appear for a scheduled matter or when told to appear; this type of release dispenses with the necessity of the defendant’s posting money or having a surety sign a bond with the court.”²¹³ Because this alternative does not impose any financial condition on defendants, it is not economically biased.

Another non-bail release method is supervised release. The California Association of Pretrial Services (CAPS) defines release on supervision as the use of least restrictive terms to ensure that the defendant will not fail to appear or be rearrested.²¹⁴ These supervision methods can include required substance abuse testing, limiting the activities or residence of a defendant, or requiring in-person check-ins with a pretrial services agency. Furthermore, CAPS states that supervised release can include “imposing financial conditions only when no other conditions of release will provide reasonable assurance that the defendant will appear in court.” Therefore, according to the pretrial standards set by CAPS, supervision should be included as a non-financial alternative to pretrial incarceration, and should not include financial conditions, except under extenuating circumstances.

²¹² Spike Bradford, “For Better or For Profit: How the bail bonding industry stands in the way of fair and effective pretrial justice,” *Justice Policy Institute*, September 2012, http://www.justicepolicy.org/uploads/justicepolicy/documents/for_better_or_for_profit.pdf.

²¹³ *Black’s Law Dictionary*, ed. Bryan A. Garner (West Publishing Co., 1996), 638.

²¹⁴ The Board of Directors of the California Association of Pretrial Services, “Release Standards and Recommended Procedures”, (California Association of Pretrial Services, California, 2007), 12.

However, in some counties defendants do have to pay a supervision fee. For example, defendants in Broward County, Florida must pay a \$5 daily fee for their supervision.²¹⁵ However, according to the Pretrial Justice Institute, it is possible that defendants who are indigent and unable to pay these fees could undergo an ability-to-pay hearing and be exempt.²¹⁶ In Broward County, this is the case; indigent defendants are not required to pay the \$5 fee. There is no national or state-wide data that outlines how many pretrial services agencies charge defendants for their own supervision. However, because the standards set by CAPS do not recommend a fee and consider supervision to be a non-financial alternative, we can reasonably assume that if California adopts supervision as a non-bail release method, it will only sparingly include financial conditions. Therefore, this alternative is not considered to contain significant economic bias.

Unsecured bonds are another alternative to commercial surety bail. An unsecured bond is defined as “a bond where money is promised to be paid if the defendant fails to appear for court, but money does not have to be paid to gain release from custody. This type of bond may or may not have a co-signer who promises to pay the court the full monetary bond amount if the defendant fails to appear.”²¹⁷ Unsecured bonds have the potential to be economically biased because they impose a financial condition if the defendant does not appear at court. In this case, low-income defendants who fail to appear could suffer an unequal burden as compared to high-income defendants because a set financial condition is a harsher penalty for a low-income defendant. However, there is no requirement of an upfront nonrefundable fee to be released from jail. Therefore, unsecured bonds may or may not perpetuate economic bias.

Economic Bias Scoring

The policy alternatives of commercial surety bail and non-bail release will be scored relatively. The better alternative will receive a score of “2” while the worse alternative will receive a score of “1.”

Commercial surety bail always imposes an upfront financial condition, which creates different outcomes for low- and high-income defendants. Therefore, commercial surety bail is scored as “1.” Non-bail release methods vary in whether or not they impose a financial condition. Release on own recognizance imposes no financial condition on defendants. Supervision primarily does not impose a financial condition, and unsecured bonds have the potential to impose a financial condition as a sanction for failing to appear. However, none of these non-bail release methods impose a financial condition prior to release from jail. Therefore, this alternative receives a score of “2.” The scoring matrix for economic bias can be viewed below in ***Table 6***.

²¹⁵ Evan A. Lukic, “Evaluation of the Pretrial Services Program Administered by the Broward Sheriff’s Office,” (auditor’s report, Broward County, 2009), 12, https://www.broward.org/Auditor/Documents/pretrial_final060909.pdf.

²¹⁶ VanNostrand et al., “State of the Science Pretrial Recommendations and Supervision,” (Report, Pretrial Justice Institute, June 2011), 12.

²¹⁷ Schnacke et al., “The Jefferson County Bail Project: Lessons Learned from a Process of Pretrial Change at the Local Level,” (Report, Pretrial Justice Institute, June 2014).

Table 6: Economic Bias Scoring Matrix

	Score	Definition: A release method which imposes...
Non-bail Release	2	no financial condition prior to release.
Commercial Surety Bail	1	a financial condition prior to release.

Fiscal Impact

The fiscal impact of a policy alternative is the degree to which it financially burdens taxpayers.²¹⁸ This criteria is one of the most important to our client because constituents and policymakers are concerned about how taxpayer dollars are spent. Pretrial detention currently costs the state almost 30 billion dollars each year.²¹⁹ However, reform will require investment to expand pretrial services to all 58 counties, properly staff all pretrial services agencies, and continue operating agencies into the future.²²⁰ The fiscal impacts of commercial surety bail release and non-bail release methods are critical to our understanding of reform.

We analyzed the fiscal impact of commercial surety bail and non-bail release methods on three dimensions: Average yearly cost of incarceration for the total jail population, pretrial services agencies wages and benefits, and pretrial services agencies supplies and supervision costs. See **Table 7** for a summary of the fiscal impact of each dimension.

²¹⁸ “Definition of Fiscal Impact Statement,” *Oregon Laws*, accessed January 5, 2017, https://www.oregonlaws.org/glossary/definition/fiscal_impact_statement.

²¹⁹ See **Table 7**.

²²⁰ Knowledge of the existing pretrial services infrastructure was gathered from the raw survey data analyzed in the following article. Raw data on file with author. Californians for Safety and Justice, “Pretrial Progress: A Survey of Pretrial Practices and Services in California,” *Californians for Safety and Justice* (August 2015), http://libcloud.s3.amazonaws.com/211/95/d/636/PretrialSurveyBrief_8.26.15v2.pdf.

Table 7: Fiscal Impact²²¹

	Fiscal Impact of Status Quo Release Method (Commercial Surety Bail) (60% detained)	Fiscal Impact of Non-Bail Release Methods (40% detained)	Fiscal Impact of Non-Bail Release Methods (10% detained)
Total number of pretrial defendants detained in jail per year	675,614	450,409	112,603
Average yearly cost of incarceration for total jail population	(\$113.87/per inmate * 675,614) * 365 = \$28,080,240,656/yr	(\$113.87/per inmate * 450,409) * 365 = \$18,720,146,583/yr	(\$113.87/per inmate * 112,603) * 365 = \$4,680,067,818/yr
Pretrial Services Staff Salary and Benefits	46 counties: \$29,923,310/yr	58 counties: \$152,373,288/yr	
Pretrial Services Agencies Supplies and Supervision Costs	46 counties: \$18,222,656/yr	58 counties: \$28,740,620/yr	58 counties: \$43,110,929/yr
TOTAL	\$28,128,386,622	\$18,901,260,491	\$4,875,552,035

Below we describe our calculations. First, we calculated the number of defendants detained under the status quo and under two non-bail release methods scenarios. In California in 2014,²²² there were 1,126,022 felony and misdemeanor arrests of adults.²²³ The average number of defendants in custody in California per year is 675,614.²²⁴ We then conducted a sensitivity analysis, comparing the 60 percent detainment rate of the status quo to two hypothetical detainment rates that could be achieved using non-bail release methods: 40 percent (450,409 detained) and ten percent (112,603 detained).

²²¹ All Figures are in 2014 Dollars.

²²² 2014 is the most recent year for which complete California adult arrest data is available from the California Attorney General.

²²³ “Data Characteristics and Known Limitations,” Office of the Attorney General, <https://oag.ca.gov/sites/all/files/agweb/pdfs/cjsc/stats/arrest-limitations.pdf>.

²²⁴ Sonya Tafoya, “Pretrial Detention and Jail Capacity in California” (Report, Public Policy Institute of California, July 2015), http://www.ppic.org/main/publication_quick.asp?i=1154.

Next, we determined the average yearly cost of incarceration for the total jail population. We multiplied the number of detained defendants by the average daily cost of a jail bed in California, which is \$113.87,²²⁵ and then multiplied that product by 365 days. Under the status quo, with the 60 percent detainment rate, this totals more than \$28 billion. With a 40 percent detainment rate, the total is \$18.7 billion. With a ten percent detainment rate, the total is \$4.7 billion.

Although California currently relies on a commercial surety bail system, pretrial services offices have already been established in 46 of 58 counties.²²⁶ However, many of these offices are currently understaffed and under-resourced.²²⁷ These 46 counties continue to rely on bail in addition to non-bail release methods to varying degrees. If non-bail release methods are adopted to replace or supplement commercial surety bail statewide, pretrial services agencies would need to be strengthened in the 46 counties with existing pretrial services and expanded to the 12 counties without pretrial services.²²⁸ Currently, the cost of incarceration and pretrial services is borne by the counties.²²⁹ However, if the alternative is adopted, the costs might be centralized under the state, making it look more expensive than it actually is.²³⁰

The total cost of expanding pretrial services agencies statewide includes the cost of expanding pretrial services staff salaries and benefits to all 58 counties. We modeled our statewide estimates from Santa Clara County's FY 2015 budget because Santa Clara has the most comprehensive pretrial services agency in the state.²³¹ Therefore, it is a good example of best practices and represents a good estimate of the fiscal impact of pretrial services. In Santa Clara, 38,379 adults were arrested in 2014.²³² In FY 2015, Santa Clara had 41 full-time equivalent (FTE) staff working in pretrial services.²³³ Using these numbers, there were 936 arrests per staff member. In California, 1,126,022 adults were arrested in 2014. Dividing total arrests by arrests per staff member equals 1,203 total required FTE staff in California (including the 236.25 FTE staff currently working in pretrial services statewide).²³⁴ The total salary and benefits for pretrial services in Santa Clara was \$5,193,040 in FY 2015. Dividing that by 41 FTE staff members equals an average of \$126,659.51 in salary and benefits per employee. Multiplying this by the total FTEs in the state (1,203) equals \$152,373,287.65, which is the cost of pretrial services staff salaries and benefits statewide.

To calculate the cost of the existing pretrial services staff salaries and benefits in 46 counties, we use data from Californians for Safety and Justice.²³⁵ Currently, there are 236.25 FTE staff working in

²²⁵ Gary Wion, "Average Daily Cost to House Inmates In Type II and III Local Detention Facilities," (memorandum to Sheriffs, Local Department of Corrections Directors, and Type II and III Jail Managers, 2012), 2.

²²⁶ "Pretrial Progress: A Survey of Pretrial Practices and Services in California," (report, 2015), 6.

²²⁷ Raw data on file with author. Californians for Safety and Justice, "Pretrial Progress: A Survey of Pretrial Practices and Services in California," *Community Resources for Justice*, accessed on October 28, 2016, <http://www.crj.org/cji/entry/pretrial-progress-a-survey-of-pretrial-practices-and-services-in-california>.

²²⁸ Assemb. 42, 2017-2018 Leg., Reg. Sess. (Cal. 2016); S. 10, 2017-2018 Leg., Reg. Sess. (Cal. 2016).

²²⁹ Gary Graves, "Fiscal Year 2016-2017 Recommended Budget," (Budget, County of Santa Clara, 2016).

²³⁰ Assemb. 42, 2017-2018 Leg., Reg. Sess. (Cal. 2016); S. 10, 2017-2018 Leg., Reg. Sess. (Cal. 2016).

²³¹ Roger Mialocq, "Management Audit of the Office of Pretrial Services," (report, San Jose, 2012).

²³² Arrest data from California Criminal Justice Statistics Center, which can be accessed here: <https://oag.ca.gov/crime/cjsc/stats/arrests>.

²³³ Gary Graves, "Fiscal Year 2016-2017 Recommended Budget," (Budget, County of Santa Clara, 2016), 352.

²³⁴ Raw data on file with author. "Pretrial Progress: A Survey of Pretrial Practices and Services in California," *Community Resources for Justice*, accessed on October 28, 2016, <http://www.crj.org/cji/entry/pretrial-progress-a-survey-of-pretrial-practices-and-services-in-california>.

²³⁵ Ibid.

pretrial services in 46 counties. We multiplied 236.25 FTE staff by the salary and benefits per employee, \$126,659.51, and found that the state currently spends \$29,923,309.80 on salary and benefits for existing pretrial programs.

Finally, we calculated the cost of pretrial services supplies and supervision under the three release scenarios. Santa Clara County spent \$653,093 on services and supplies in FY 2015.²³⁶ This amounts to \$42.54 for services and supplies per released defendant in Santa Clara County. To calculate the cost of services and supplies under the status quo, we multiplied this number by 40 percent of arrests in the 46 counties that currently have established pretrial services programs ($0.40 \times 428,365$), and we estimate that current, statewide spending on pretrial services supplies and supervision is \$18,222,656.²³⁷ Similarly, under the 60 percent release scenario, we multiplied the cost of services and supplies per released defendant (\$42.54) by 60 percent of the total arrests in California (675,614), resulting in \$28,740,619 for services and supplies. Finally, under the 90 percent release scenario, we multiplied the cost of services and supplies per released defendant by 90 percent of the total arrests in California (1,013,421), resulting in \$43,110,929. As more defendants are released and supervised, the cost of services and supplies expectedly increases.

Another fiscal impact factor is bail bond forfeitures, which is the amount that bail companies owe the state if a defendant fails to appear.²³⁸ If the state adopts non-bail release methods, it will, theoretically, be impacted by revenue loss from fewer bond forfeitures. However, evidence suggests that weak enforcement because of powerful bail industry lobbying groups leads bail companies to delay or avoid paying these forfeitures to the state.²³⁹ There are no state records showing the total amount bail companies owe the state in forfeitures, but records from Los Angeles County show that the county was owed \$9.1 million in uncollected forfeitures between 2001 and 2003.²⁴⁰ Courts do not have the infrastructure to follow-up and file lawsuits, and because the bail industry is a for-profit industry, they do not pay expenditures they are not forced to pay.²⁴¹ Counties are required to essentially sue the bail companies to receive forfeitures;²⁴² this court process is lengthy and costly to taxpayers.

If a defendant flees and is recovered by law enforcement, bond companies are no longer required to pay the forfeiture amount. This scenario occurs frequently.²⁴³ Because of the lack of precise data on how much money bail companies owe the state in bond forfeitures, we are unable to include this factor in our quantitative analysis but this is still relevant to our scoring of fiscal impact.

²³⁶ Gary Graves, "Fiscal Year 2016-2017 Recommended Budget," (Budget, County of Santa Clara, 2016).

²³⁷ Raw data on file with author. "Pretrial Progress: A Survey of Pretrial Practices and Services in California," *Community Resources for Justice*, accessed on October 28, 2016, <http://www.crj.org/cji/entry/pretrial-progress-a-survey-of-pretrial-practices-and-services-in-california>.

²³⁸ "Forfeited Bail: How Much is Forfeited Per Year?," *Criminal Law and Policy* (blog), March 30, 2016, <https://crimlawandpolicy.wordpress.com/2016/03/30/forfeited-bail-how-much-is-forfeited-per-year/>.

²³⁹ <https://crimlawandpolicy.wordpress.com/2016/03/30/forfeited-bail-how-much-is-forfeited-per-year/>.

²⁴⁰ Wendy Thermos and Anna Gorman, "Probes Target Bail Bonds Firms," *The Los Angeles Times*, Jul. 25, 2004, <http://articles.latimes.com/2004/jul/25/local/me-bail25>.

²⁴¹ "Forfeited Bail: How Much is Forfeited Per Year?," *Criminal Law and Policy* (blog), March 30, 2016, <https://crimlawandpolicy.wordpress.com/2016/03/30/forfeited-bail-how-much-is-forfeited-per-year/>.

²⁴² Spike Bradford, "For Better or For Profit: How the bail bonding industry stands in the way of fair and effective pretrial justice," *Justice Policy Institute*, September 2012, http://www.justicepolicy.org/uploads/justicepolicy/documents/for_better_or_for_profit.pdf.

²⁴³ *Ibid.*

The total fiscal impact of the status quo system of commercial surety bail, combining the average yearly cost of incarceration for the total jail population, the costs of pretrial services staff salary and benefits, and the costs of pretrial services agencies supplies and services while 60 percent of arrestees are detained, is \$28.1 billion. With a 40 percent detainment rate, the total would be \$18.9 billion. With a ten percent detainment rate, the total would \$4.9 billion.

Fiscal Impact Scoring

The policy alternatives of commercial surety bail and non-bail release will be scored relatively. The better alternative will receive a score of “2,” while the worse alternative will receive a score of “1.”

Based on our analysis of the costs associated with the policy alternatives (over \$28 billion for the status quo versus \$4.9-18.9 billion for non-bail release), commercial surety bail receives a score of “1,” and non-bail release receives a score of “2.” The scoring matrix for fiscal impact can be viewed in **Table 8**.

Table 8: Fiscal Impact Scoring Matrix

	Score	Definition: A release method that is...
Non-bail Release	2	less costly.
Commercial Surety Bail	1	more costly.

Social Cost

The social cost of a policy alternative is the degree to which it reduces the welfare of people affected directly and indirectly by the policy. Social costs are important because, like negative externalities, they do not appear in government budgets. Calculating social costs can be challenging because they are often difficult or impossible to monetize. Examining social costs enriches our analysis by providing a more complete understanding of how release methods affect defendants, their families, communities, and society.

We will analyze the monetizable social costs of commercial surety bail and non-bail release methods on three dimensions: lost wages of the jail population, the cost of sexual assaults among the jail population, and the cost of suicides among the jail population. We will also consider other social costs including the increase in recidivism for low-risk defendants who are incarcerated pretrial, the greater likelihood of being convicted and receiving a harsher sentence due to pretrial incarceration, and jobs lost if the bail industry is abolished.

To ascertain the social costs of lost wages, sexual assaults, and suicides among the jail population, we used a study published in October 2016 by the Institute for Advancing Justice Research and

Innovation at Washington University in St. Louis’s George Warren Brown School of Social Work.²⁴⁴ We used this study because the data is recent (all costs are in 2014 dollars), it is based on national cost data, and it is published by a reputable source.

We focus on lost wages, the cost of sexual assaults, and the cost of suicides among the jail population because these social costs are monetizable and impose significant burdens on incarcerated people, their families and communities, and society. See **Table 9** below for a summary of these social costs.

Table 9: Social Costs²⁴⁵

	Social Costs of Status Quo (60% of defendants detained)	Social Costs of Non-Bail Release Methods (40% of defendants detained)	Social Costs of Non-Bail Release Methods (10% of defendants detained)
Total number of pretrial defendants detained in jail per year ²⁴⁶	675,614	450,409	112,603
Lost wages of jail population	\$33,066 (average wages lost per defendant per year) * 675,614 = \$22,339,852,524/yr	\$14,893,223,994/yr	\$3,723,330,798/yr
Number of sexual assaults for jail population	21,620 (3.2%) jail inmates sexually assaulted per year * \$324,690 for the cost of one rape = \$7,019,797,800/yr	14,414 sexual assaults \$4,679,756,970/yr	3,604 sexual assaults \$1,169,954,178/yr
Cost of suicide for jail population	112 (0.0165%) jailed inmates commit suicide per year * \$8.66 million cost of human life = \$2,338,200,000/yr	75 suicides \$643,589,420/yr	19 suicides \$160,898,427/yr
TOTAL	\$31,697,850,324/yr	\$20,216,570,384/yr	\$5,054,183,403/yr

²⁴⁴ McLaughlin et al, “The Economic Burden of Incarceration in the U.S.” (Report, St. Louis, MO, 2016). <https://joinnia.com/wp-content/uploads/2017/02/The-Economic-Burden-of-Incarceration-in-the-US-2016.pdf>

²⁴⁵ All Figures are in 2014 Dollars.

²⁴⁶ Calculated by multiplying the pretrial detention rate for California and the total number of yearly arrests in California: Sonya Tafoya, “Pretrial Detention and Jail Capacity in California,” *Public Policy Institute of California*, July 2015, http://www.ppic.org/main/publication_quick.aspx?i=1154.

First, we calculated the number of defendants detained under the three scenarios. From the fiscal impact section, we find that 675,614 defendants are detained under the status quo, 450,409 are detained under the 40 percent detainment scenario, and 112,603 are detained under the ten percent detainment scenario.

Next, we determined lost wages for the jail population. This calculation consists of multiplying the average wages lost per defendant per year, which is \$33,066,²⁴⁷ by the number of defendants held under each detainment scenario. We calculated lost wages of \$22.3 billion per year under the status quo, \$14.9 billion per year under the 40 percent detainment scenario, and \$3.7 billion per year under the ten percent detainment scenario.

Next, we determined the cost of sexual assaults among the jail population. The number of jail detainees who are sexually assaulted each year (3.2 percent)²⁴⁸ was multiplied by the estimated cost of a sexual assault (\$324,690).²⁴⁹ This calculation reveals that currently, the jail population experiences 21,620 sexual assaults per year with a social cost of more than \$7 billion. Under the 40 percent detainment scenario, 7,206 sexual assaults would be avoided compared to the status quo, which results in \$2.3 billion saved. Under a ten percent detainment scenario, 18,016 sexual assaults would be avoided, saving \$5.8 billion compared to the status quo.

Finally, we determined the cost of suicides among the jail population. This calculation consists of multiplying the number of jail detainees who commit suicide in jail each year (0.0165 percent)²⁵⁰ by the estimated cost of a human life (\$8.66 million).²⁵¹ We find that currently, 112 jail inmates commit suicide each year with a social cost of \$2.3 billion. Under the 40 percent detainment scenario, 37 suicides would be avoided and \$1.7 billion would be saved compared to the status quo. Under a ten percent detainment scenario, 93 suicides would be avoided and \$2.2 billion would be saved compared to the status quo.

Some social costs cannot be monetized. For example, it is difficult to monetize the increase in recidivism among low-risk defendants. Low-risk defendants held in jail “for two to three days [are] 40 percent more likely to commit [a] crime” than defendants who are held for 24 hours or less.²⁵² Within 18 months of the bail hearing, jail “detention is associated with a 30 percent increase in felonies and a 20 percent increase in misdemeanors.”²⁵³

Another significant but non-monetizable social cost of pretrial incarceration is the greater likelihood of being convicted and receiving a harsher sentence. Research indicates that defendants who are

²⁴⁷ McLaughlin et al., “The Economic Burden of Incarceration in the U.S.” (Report, St. Louis, MO, 2016), 8, <https://joinnia.com/wp-content/uploads/2017/02/The-Economic-Burden-of-Incarceration-in-the-US-2016.pdf>.

²⁴⁸ Ibid., 10.

²⁴⁹ Ibid.

²⁵⁰ Ibid.

²⁵¹ Ibid.

²⁵² “Pretrial Criminal Justice Research” (research summary, Laura and John Arnold Foundation, 2013), 4; Timothy R. Schnacke, *Money as a Criminal Justice Stakeholder: The Judge’s Decision to Release or Detain a Defendant Pretrial* (U.S. Department of Justice National Institute of Corrections, 2014), 47, http://www.clebp.org/images/2014-09-04_Money_as_a_Criminal_Justice_Stakeholder.pdf.

²⁵³ Heaton et al., “The Downstream Consequences of Misdemeanor Pretrial Detention,” (Univ. of Pa. Inst. for Law & Econ., Philadelphia, 2016), 4.

incarcerated pretrial are between 13 and 25 percent more likely to be convicted,²⁵⁴ and 25 percent more likely to plead guilty.²⁵⁵ Another study conducted on 238,474 defendants in Philadelphia and Miami-Dade, Florida found that defendants incarcerated pretrial are 15.6 percentage points more likely to be found guilty, and 12 percentage points more likely to plead guilty.²⁵⁶ Additionally, defendants who are incarcerated pretrial are 43 percent more likely to be sentenced to incarceration.²⁵⁷ Those who are detained pretrial and then convicted receive sentences that are, on average, two times longer than defendants who were not detained pretrial.²⁵⁸ It is hypothesized that pretrial incarceration causes adverse case outcomes because detained defendants are in a worse bargaining position than released defendants and because detained defendants are stigmatized during court hearings by virtue of being incarcerated.²⁵⁹

Pretrial incarceration is also linked to worse labor market outcomes for defendants incarcerated pretrial.²⁶⁰ Detained defendants “are 5.1 percentage points [less] likely to be employed within two years of the bail hearing.”²⁶¹ Pretrial detention also negatively impacts tax filings and the receipt of government benefits. Defendants who are released pretrial are “9.5 percentage points more likely to file a tax return one to two years post-bail.”²⁶² Within one to two years, defendants incarcerated pretrial received approximately \$185 less in Earned Income Tax Credit (EITC).²⁶³ Over three to four years, defendants who were incarcerated pretrial receive approximately \$343 less in Unemployment Insurance and \$239 less in EITC.²⁶⁴ The negative labor market outcomes associated with pretrial incarceration may be impacted by the fact that defendants are unable to work while in jail, lose their jobs while in jail, and because of the “stigma of a criminal conviction” or arrest on job applications.²⁶⁵

Pretrial incarceration also significantly impacts the children of defendants. Unfortunately, data about the number of children who enter the foster care system because of a parent being incarcerated pretrial are not available. However, in the year 2000 approximately 97,000 California children had at least one parent in jail.²⁶⁶ These children are being raised by grandparents, other family members and friends, and in foster care. They are profoundly affected by the incarceration of a parent, from psychological problems and mental health problems to poor school performance and a greater

²⁵⁴ Megan Stevenson, “Distortion of Justice: How the Inability to Pay Bail Affects Case Outcomes” (article, Philadelphia, 2016), 1; Heaton et al., “The Downstream Consequences of Misdemeanor Pretrial Detention” (Univ. of Pa. Inst. for Law & Econ., Philadelphia, 2016), 4.

²⁵⁵ Heaton et al., “The Downstream Consequences of Misdemeanor Pretrial Detention” (Univ. of Pa. Inst. for Law & Econ., Philadelphia, 2016), 21.

²⁵⁶ Dobbie et al., “The Effects of Pretrial Detention Conviction, Future Crime, and Employment: Evidence from Randomly Assigned Judges” (article, Princeton, NJ, 2016), 3, 19.

²⁵⁷ Heaton et al., “The Downstream Consequences of Misdemeanor Pretrial Detention” (Univ. of Pa. Inst. for Law & Econ., Philadelphia, 2016), 4.

²⁵⁸ Heaton et al., “The Downstream Consequences of Misdemeanor Pretrial Detention” (Univ. of Pa. Inst. for Law & Econ., Philadelphia, 2016), 4.

²⁵⁹ Dobbie et al., “The Effects of Pretrial Detention Conviction, Future Crime, and Employment: Evidence from Randomly Assigned Judges” (article, Princeton, NJ, 2016), 25.

²⁶⁰ *Ibid*, 22.

²⁶¹ *Ibid*, 22.

²⁶² This is statistically significant at the 5% level. *Ibid*, 23.

²⁶³ This is statistically significant at the 10% level. *Ibid*, 23.

²⁶⁴ UI is not statistically significant; EITC is statistically significant at the 10% level. *Ibid*, 23.

²⁶⁵ *Ibid*, 25-26.

²⁶⁶ Charlene Wear Simmons, “Children of Incarcerated Parents” (report for California Research Bureau, Sacramento, 2000), 3.

likelihood of future incarceration.²⁶⁷

While adopting non-bail release methods would clearly impose fewer social costs on defendants and much of society, it is also important to consider those who will be negatively impacted by the adoption of non-bail release methods: bail bonds agents. Approximately 3,240 bail bonds agents in California could lose their jobs if non-bail release methods are adopted.²⁶⁸ Because there is no reliable estimate the average salary of bail agents' in California, this factor was not monetized.

We calculated the social costs under the status quo and our two hypothetical release scenarios (40 and ten percent detainment rates) and found significant cost savings under the hypothesized release conditions. We found decreases in lost wages, sexual assaults, and suicide under alternative release totaling between \$11.5-26.6 billion yearly. Additionally, there are non-monetizable factors that could be improved under higher release scenarios. For example, as more defendants are released pretrial, we found evidence that the recidivism rate will decrease, case outcomes will become more equitable, and there will be better labor market and child welfare outcomes. The only negative impact that could result from non-bail release and higher release rates is the labor market impact on the bail industry, but we do not expect this cost to outweigh the savings. Overall, non-bail release methods provide substantial savings for social costs of incarceration and supervision.

Social Cost Scoring

The policy alternatives of commercial surety bail and non-bail release will be scored relatively. The better alternative will receive a score of “2,” while the worse alternative will receive a score of “1.”

Our analysis found that non-bail release will produce cost savings of approximately \$11.5-26.6 billion yearly, as compared to commercial surety bail. Additionally, the non-bail release alternative will yield savings on a majority of the non-monetizable costs considered in this analysis. Because of the savings generated under the non-bail release alternative, non-bail release is scored as “2,” and commercial surety bail is scored as “1.” The scoring matrix for social cost can be viewed below in *Table 10*.

Table 10: Social Cost Scoring Matrix

	Score	Definition: A release method which incarcerates...
Non-Bail Release	2	fewer defendants and results in lower social costs.
Commercial Surety Bail	1	more defendants and results in higher social costs.

²⁶⁷ Ibid, 4.

²⁶⁸ Kendra Zoller, “AB 2449 by Assembly Member Eggman” (California Department of Insurance fact sheet, 2016).

Political Feasibility

Political feasibility is the likelihood that a policy alternative will be adopted based on the political environment and support of the public and elected officials.

To evaluate the political feasibility of the status quo and non-bail release methods, we interviewed Justin Rausa, Principal Field Representative for Assemblymember Bonta, and Margaret Dooley-Sammuli, Criminal Justice and Drug Policy Director of the ACLU of California. Rausa's insight and opinions on this matter represent our client's. Additionally, he is well-informed about the politics of the California Legislature. Dooley-Sammuli is knowledgeable about the political feasibility of bail reform in California because she is heading the ACLU's Bail Reform Campaign Research Committee.

Support for non-bail release methods within the legislature is strong because the legislation was introduced by a Democrat and there is currently a Democratic supermajority in the California Legislature. The fact that bail reform has been achieved via bipartisan legislation in other states, like New Jersey, leads our client to believe that the bill will receive bipartisan support.²⁶⁹ Within the legislature, the bill will first move through the Public Safety Committee, which has staff with institutional knowledge on how to create legislation that will pass.²⁷⁰ Because people of color now make up a majority of the California electorate,²⁷¹ and this legislation aims to reform a system that has historically discriminated against people of color, Rausa believes the bill will receive strong public support.²⁷² This is substantiated by the passage of Proposition 47 in 2014 and Proposition 57 in 2016, both of which were progressive ballot measures that worked towards reforming the criminal justice system.²⁷³ Our client also believes that the recent surge in liberal political activism due to the new federal administration will work in favor of reform because the general population is paying attention to progressive policy reforms.²⁷⁴

Although the Democrats have a supermajority in the legislature, there are varying degrees of support for progressive issues within the party. In the legislature, there is a caucus of moderate Democrats,

²⁶⁹ "Winning Bail Reform in New Jersey," *Drug Policy Alliance*, accessed on February 10, <http://www.drugpolicy.org/about-us/departments-and-state-offices/new-jersey/new-solutions-campaign/bail-reform/winning-bail-re>.

²⁷⁰ Justin Rausa (Principal Field Representative for Assemblymember Rob Bonta) in discussion with the authors, February 2017. See **Appendix F** for interview questions.

²⁷¹ Baldassare et al. "Race and Voting in California" *Public Policy Institute of California*, September 2016, http://www.ppic.org/main/publication_show.asp?i=264.

²⁷² Justin Rausa (Principal Field Representative for Assemblymember Rob Bonta) in discussion with the authors, February 2017. See **Appendix F** for interview questions.

²⁷³ "California Proposition 57, Parole for Non-Violent Criminals and Juvenile Court Trial Requirements (2016)," *Ballotpedia*, accessed February 13, 2017, [https://ballotpedia.org/California_Proposition_57,_Parole_for_Non-Violent_Criminals_and_Juvenile_Court_Trial_Requirements_\(2016\)](https://ballotpedia.org/California_Proposition_57,_Parole_for_Non-Violent_Criminals_and_Juvenile_Court_Trial_Requirements_(2016));

"What You Need to Know About Proposition 47," *California Department of Corrections and Rehabilitation*, accessed February 13, 2017, <http://www.cdcr.ca.gov/news/prop47.html>.

²⁷⁴ "Democrats are learning to invoke states' rights," *The Economist*, Jan. 21, 2017, <http://www.economist.com/news/united-states/21715039-americas-most-progressive-state-set-lead-new-fight-against-federal>.

known as the “Mod Caucus,”²⁷⁵ which includes around 24 lawmakers who are pro-business and might support the bail industry.²⁷⁶

Dooley-Sammuli echoed several of Rausa’s thoughts, highlighting the bill’s support from universities, criminal justice reform groups, anti-poverty groups, mental health groups, immigration groups, ethnic groups, faith communities, and politicians including Lieutenant Governor of California Gavin Newsom. The ACLU is undertaking public education efforts and is sharing the stories of families that are affected by the commercial surety bail system.²⁷⁷ Dooley-Sammuli explained that innocent family members of defendants (often mothers, grandmothers, wives, and girlfriends) are the ones who pay the price imposed by the bail industry by bearing greater family and financial burdens to make up for absent defendants.²⁷⁸

Dooley-Sammuli also indicated concern about the bail industry’s powerful lobbying potential²⁷⁹ and “access to unlimited resources to buy political support.”²⁸⁰ The bail industry donated over \$700,000 to lawmakers in California between 2002 and 2011.²⁸¹ In contrast, Rausa is not concerned about campaign donations because on a per legislator basis, the donation amount is insignificant. Records from the donations made to State Senators and Assemblymembers from the past 12 years show that only a small portion of the legislators’ total donation (less than 1 percent for all current state legislators—see *Appendix E*) comes from the bail industry.²⁸² Therefore, although campaign donations are a consideration, they do not seem to pose a threat to the passage of the bill.

Adopting non-bail release methods is challenging because it requires investment in pretrial services agencies, which might not be possible in the current federal climate.²⁸³ Rausa expressed concern that California might not be willing to spend money on pretrial services if, for example, the Affordable Care Act (ACA) is repealed without replacement.²⁸⁴ Dooley-Sammuli also mentioned that if ACA is repealed, there will be a significant hole in California’s budget. In that scenario, the state would have to allocate funding for healthcare, and bail reform would not be a priority.

²⁷⁵ Jeremy B. White, “Jim Cooper, Rudy Salas chosen to lead California Assembly moderate Democrats,” *The Sacramento Bee*, Dec. 8, 2015, <http://www.sacbee.com/news/politics-government/capitol-alert/article48702715.html>.

²⁷⁶ Melanie Mason, “Business-friendly Democrats pick new leaders for informal, but powerful Sacramento caucus,” *The Los Angeles Times*, Dec. 9, 2015, <http://www.latimes.com/politics/la-pol-sac-moderate-democrats-leaders-20151209-story.html>.

²⁷⁷ Rob Bonta, California State Democrats, *Hertzberg, Bonta to Unveil Bail Reform Legislation*, YouTube video, 39:18, December 5th, 2016, <https://www.youtube.com/watch?v=w25bDzaLTKw>.

²⁷⁸ Bernadette Rabuy and Daniel Kopf, “Detaining the Poor: How money bail perpetuates an endless cycle of poverty and jail time,” *Prison Policy Initiative*, May 10, 2016, <https://www.prisonpolicy.org/reports/incomejails.html>.

²⁷⁹ Spike Bradford, “For Better or For Profit: How the bail bonding industry stands in the way of fair and effective pretrial justice,” *Justice Policy Institute*, September 2012, http://www.justicepolicy.org/uploads/justicepolicy/documents/for_better_or_for_profit.pdf.

²⁸⁰ Margaret Dooley-Sammuli (Criminal Justice and Drug Policy Director for ACLU of California) in discussion with the authors, February 2017. See *Appendix F* for interview questions.

²⁸¹ *Ibid*.

²⁸² “Quick Search,” *Alex Padilla Secretary of State*, accessed February 28, 2017, <http://powersearch.sos.ca.gov/quick-search.php>.

²⁸³ George Skelton, “Should California really brace itself to lose lots of federal money under Trump?” *The Los Angeles Times*, Feb. 6, 2017, <http://www.latimes.com/politics/la-pol-sac-donald-trump-federal-dollars-california-20170206-story.html>.

²⁸⁴ Pugh et al., “GOP reveals Obamacare repeal plan, alarming California Democrats,” *The Sacramento Bee*, Mar. 6, 2017, <http://www.sacbee.com/news/local/health-and-medicine/article136854973.html>.

Dooley-Sammuli also discussed the challenges posed by critics of risk assessment tools, which are criticized for being racially biased.²⁸⁵ She said, “It’s a concern we all share, but we have to try to move something politically. It’s OK for people to critique risk assessment tools, which does not inherently go against the campaign.”²⁸⁶ She acknowledges that the legislation is a starting point, and improving the tools will be an ongoing process.

Another factor to consider when discussing political feasibility is the lawsuits that have been filed by Equal Justice Under Law in Sacramento and San Francisco counties.²⁸⁷ These lawsuits challenge the constitutionality of bail in California and could positively impact the passage of the bill if the plaintiffs win. Dooley-Sammuli stated that if these lawsuits result in wins for the plaintiffs, it could help raise the profile of the broken bail system in California. However, if they lose, it could present a challenge because they would garner negative press for the reform effort.

Assemblymember Bonta’s staff surveyed approximately 100 constituents, and found that, in general, people are unaware of problems with commercial surety bail. However, the same survey showed that people were very supportive of reform after learning of the existing problems.²⁸⁸ This illustrates that legislators and lobbyists must focus their efforts on public education about the problems inherent in the commercial surety bail system.

Maintaining the status quo is almost always more politically feasible than adopting reform because it requires no action. Reform efforts would clearly require considerable public education efforts. However, California is in a very good position to pass progressive reforms based on the political factors outlined above.

Political Feasibility Scoring

The policy alternatives of commercial surety bail and non-bail release will be scored relatively. The better alternative will receive a score of “2,” while the worse alternative will receive a score of “1.”

As the status quo, commercial surety bail requires no action to continue operating. Thus, bail release is more politically feasible than non-bail release, which requires legislative reform. For this reason, we score status quo as “2” and non-bail release as “1.” The scoring matrix for political feasibility can be viewed below in ***Table 11***.

²⁸⁵Jennifer Doleac and Megan Stevenson, “Are criminal risk assessment scores racist?” *The Brookings Institution*, Aug. 22, 2016, <https://www.brookings.edu/blog/up-front/2016/08/22/are-criminal-risk-assessment-scores-racist/>.

²⁸⁶ Margaret Dooley-Sammuli (Criminal Justice and Drug Policy Director for ACLU of California) in discussion with the authors, February 2017. See ***Appendix F*** for interview questions.

²⁸⁷ *Welchen v. County of Sacramento*, No. 2:16-cv-00185-TLN-KJN, slip op. (E.D. Cal. Oct. 10, 2016); *Class Action Complaint, Buffin v. City & County of San Francisco*, No. 15-CV-04959-YGR (N.D. Cal. filed Oct. 28, 2015).

²⁸⁸ Justin Rausa (Principal Field Representative for Assemblymember Rob Bonta) in discussion with the authors, February 2017. See ***Appendix F*** for interview questions.

Table 11: Political Feasibility Scoring Matrix

	Score	Definition: A release method with...
Commercial Surety Bail	2	fewer challenges to adoption.
Non-bail Release	1	more challenges to adoption.

Final Recommendation

The first stage of our analysis compares screening processes (judges and bail schedules vs. judges and risk assessment tools) on two criteria: predictive accuracy and race neutrality. The second stage compares release methods (commercial surety bail vs. non-bail release) on five criteria: effectiveness, economic bias, fiscal impact, social cost, and political feasibility. The mix of quantitative and qualitative criteria necessitate a variety of methodologies. We employed a review of existing studies and literature, high-level cost calculations and estimations, and interviews with experts to operationalize all of our criteria. Alternatives are always scored relative to one another, on a scale of 1 (worse) to 2 (better). After analyzing both alternatives according to each criterion, we scored the alternatives using weights developed in consultation with our client.

In the first stage of analysis, judges using risk assessment tools scored higher than judges using bail schedules because risk assessment tools are better at predicting risk. Additionally, risk assessment tools have the potential to measure and minimize racial bias more effectively than judges using bail schedules. In the second stage of the analysis, non-bail release methods score higher than bail release for effectiveness, economic bias, fiscal impact, and social cost, but not for political feasibility. After completing both stages of analysis, we compiled the final scores. **Table 12** and **Table 13**, below, are the final criteria alternative matrices for our recommendations.

Table 12: First Stage of Analysis: Scoring Matrix for Screening Processes

	Judges with Bail Schedules			Judges with Risk Assessment Tools		
Criteria	Preliminary score	Weight	Final Score	Preliminary score	Weight	Final Score
Predictive accuracy	1	0.6	0.6	2	0.6	1.2
Race neutrality	1	0.4	0.4	2	0.4	0.8
Total			1			2

Table 13: Second Stage of Analysis: Scoring Matrix for Release Methods

	Commercial Surety Bail			Non-Bail Release		
Criteria	Preliminary Score	Weight	Final Score	Preliminary Score	Weight	Final Score
Effectiveness	1	0.25	0.25	2	0.25	0.5
Economic Bias	1	0.125	0.125	2	0.125	0.25
Fiscal Impact	1	0.25	0.25	2	0.25	0.5
Social Cost	1	0.125	0.125	2	0.125	0.25
Political Feasibility	2	0.25	0.5	1	0.25	0.25
Total			1.25			1.75

As shown in the section entitled “First Stage of Analysis: Recommendations,” judges and risk assessment tools received a higher weighted score (2) than judges and bail schedules (1). This led us to recommend that judges utilize a risk assessment tool when screening defendants to assess probability of rearrest and failure to appear.

Regarding the two criteria in the first stage of analysis, our client decided that predictive accuracy should be weighted slightly more heavily (0.6) than race neutrality (0.4). The unweighted and weighted scores for each criteria are in **Table 12**.

In the second stage of our analysis, we compared commercial surety bail to non-bail release methods: release on own recognizance, supervision, and unsecured bonds. Commercial surety bail received a score of “1” for effectiveness, economic bias, fiscal impact, and social cost. It received a score of “2” for political feasibility. Non-bail release received a “2” for effectiveness, economic bias, fiscal impact, and social cost. It received a “1” for political feasibility.

The scores for the second stage of analysis are also weighted based on the preferences of our client. Our client emphasizes effectiveness, fiscal impact, and political feasibility (0.25 each) more than economic bias and social cost (0.125 each). The weighted and unweighted scores can be viewed in **Table 13**.

After weighting the preliminary scores for the alternatives in the “Second Stage of Analysis,” commercial surety bail scored “1” while non-bail release scored “1.75.” Therefore, we recommend replacing commercial surety bail with different forms of non-bail release to increase the fairness and success of pretrial release.

Our overall policy recommendation is to combine the use of a validated risk assessment tool with non-bail release, such as release on own recognizance, supervision, or unsecured bonds. We do not recommend the continued use of bail schedules, judicial decision-making in isolation, or commercial surety bail.

Limitations

Throughout our analysis, we encountered various limitations. Overall, we discovered that there is a scarcity of research on the commercial surety bail system, risk assessment tools, and non-bail release. More specifically, we noted that the three validation studies used to evaluate the predictive accuracy of risk assessment tools were completed by the tool creators themselves, and therefore have the potential to incorporate bias. Furthermore, we found only one study that evaluates the predictive accuracy of judges using bail schedules. Additionally, we noted a lack of research on racial bias in risk assessment tools. Only one tool, COMPAS, has been studied by an independent unbiased researcher,²⁸⁹ and another tool, VPRAI, was analyzed for racial bias,²⁹⁰ but the analysis was conducted by the tool creator and therefore has the potential to be biased.

In addition to a lack of research, we also faced challenges when attempting to estimate fiscal impact and social costs. We found it impossible to monetize some social costs, such as the impact of the pretrial custody status of defendants on the foster care system. We based our fiscal impact estimates for non-bail release on Santa Clara’s fiscal year 2015 budget.²⁹¹ We used this budget because the ACLU and California Forward consider Santa Clara to be a good example of a functioning pretrial

²⁸⁹ Julia Angwin et al., “Machine Bias,” *ProPublica*, May 23, 2016, <https://www.propublica.org/article/machine-bias-risk-assessments-in-criminal-sentencing>.

²⁹⁰ Marie VanNostrand, “Race and Gender Neutral Risk Assessment, Release Recommendations, and Supervision,” (report, Luminosity, 2016).

²⁹¹ Gary Graves, “Fiscal Year 2016-2017 Recommended Budget,” (Budget, County of Santa Clara, 2016), <https://www.sccgov.org/sites/scc/gov/Documents/fy16-17-recommended-budget.pdf>.

services agency.²⁹² While the Santa Clara County Office of Pretrial Services' budget is a good example, it could be problematic to assume that all counties in California will operationalize their pretrial services agencies budgets in the same way. It is more likely that costs will vary across counties if risk assessment tools and non-bail release are implemented in California; therefore, our fiscal impact numbers are a rough estimate. Furthermore, we could not find data on all costs that may influence the fiscal impact criteria, such as bail bond forfeitures owed to the state.²⁹³

The limitations we encountered lead us to believe that more research should be done on the commercial surety bail system and its outcomes, as well as on risk assessment tools and non-bail release. This research should be done by neutral third parties—not by entities with connections to the bail bonds industry or to the companies that create risk assessment tools.²⁹⁴ In particular, more research on racial bias in risk assessment tools will also inform the debate about replacing the commercial surety bail system with a system based on predictive algorithms.

Despite these limitations, all assumptions were made with careful considerations, and the best available research was used when evaluating both of these policy alternatives. Therefore, our recommendations are based on data-driven objective policy analysis, and we do not hesitate in recommending the use of risk assessment tools and non-bail release. After our careful analysis, we support the passage of Assembly Bill 42 and Senate Bill 10.²⁹⁵

²⁹² Sharon Aungst, "Pretrial Detention and Community Supervision," (Report, California Forward, September 2012), 14. https://caforward.3cdn.net/7a60c47c7329a4abd7_2am6iyh9s.pdf.

²⁹³ "Forfeited Bail: How Much Is Forfeited Per Year?" *Criminal Law and Policy* (blog), March 3, 2016, <https://crimlawandpolicy.wordpress.com/2016/03/30/forfeited-bail-how-much-is-forfeited-per-year/>.

²⁹⁴ Examples include: ACLU, Luminosity, private consultants like Cathy O'Neil, ProPublica, California Forward, Californians for Safety and Justice, etc.

²⁹⁵ Assemb. 42, 2017-2018 Leg., Reg. Sess. (Cal. 2016); S. 10, 2017-2018 Leg., Reg. Sess. (Cal. 2016).

Appendix A: Risk Assessment Tool Factors

Risk Assessment Tool	Risk Factors
Virginia Pretrial Assessment Instrument (VPRAI) ²⁹⁶	<ul style="list-style-type: none"> ● “Current Charge(s) ● Pending Charges at Time of Arrest ● History of Criminal Arrests and Convictions ● Active Community Supervision at Time of Arrest (e.g. Pretrial, Probation, Parole) ● History of Failure to Appear ● History of Violence ● Residence Stability ● Employment Stability ● Community Ties ● Substance Abuse”
Ohio Risk Assessment System (ORAS) ²⁹⁷	<ul style="list-style-type: none"> ● “Age at first arrest” ● “Number of Failure-to-Appear Warrants Past 24 Months” ● “Three or more Prior Jail Incarcerations” ● “Employed at the Time of Arrest” ● “Residential Stability” ● “Illegal Drug Use during Past Six Month” ● “Severe Drug Use Problem”

²⁹⁶ Marie VanNostrand and Kenneth J. Rose “The Virginia Pretrial Risk Assessment Instrument” (Report, Luminosity Inc., 2009), 3.

²⁹⁷ Latessa et al., “Creation and Validation of the Ohio Risk Assessment System Final Report,” *University of Cincinnati* (July 2009): 49, http://www.ocjs.ohio.gov/ORAS_FinalReport.pdf.

<p>Federal Pretrial Risk Assessment (PTRA)²⁹⁸</p>	<ul style="list-style-type: none"> ● “Number of felony convictions ● Prior failure to appear ● Pending felonies or misdemeanors ● Current offense type ● Offense class ● Age at interview ● Highest education ● Employment status ● Residence ● Current Drug Problems ● Citizenship status ● Foreign ties”
<p>Arnold Foundation Public Safety Assessment (PSA)²⁹⁹</p>	<ul style="list-style-type: none"> ● “Age at current arrest ● Current violent offense <ul style="list-style-type: none"> ○ Current violent offense & 20 years old or younger ● Pending charge at the time of the offense ● Prior misdemeanor conviction ● Prior felony conviction <ul style="list-style-type: none"> ○ Prior conviction (misdemeanor or felony) ● Prior violent convictions ● Prior failure to appear in the past 2 years ● Prior failure to appear older than two years ● Prior sentence to incarceration”

²⁹⁸ “Federal Pretrial Risk Assessment User’s Manual and Scoring Guide” (March 2010), 1

<https://university.pretrial.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=cafafb20-a824-136a-fb2c-36785168616f&forceDialog=0>.

²⁹⁹ “Public Safety Assessment: Risk Factors and Formula” (Laura and John Arnold Foundation), 2. <http://www.arnoldfoundation.org/wp-content/uploads/PSA-Risk-Factors-and-Formula.pdf>.

<p>Correctional Offender Manager Profiling for Alternative Sanctions (COMPAS)³⁰⁰</p>	<ul style="list-style-type: none"> ● “Criminal Involvement” <ul style="list-style-type: none"> ○ Criminal involvement ○ History of non-compliance ○ History of violence ○ Current violence ● Relationships/Lifestyle <ul style="list-style-type: none"> ○ Criminal associations/peers ○ Criminal opportunity ○ Leisure and recreation ○ Substance abuse ● Personality/Attitudes <ul style="list-style-type: none"> ○ Criminal personality ○ Criminal thinking self-report ○ Anger ○ Cognitive behavioral ● Family <ul style="list-style-type: none"> ○ Socialization failure ● Social exclusion <ul style="list-style-type: none"> ○ Vocational/education ○ Residential instability ○ Social adjustment problems”³⁰¹
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³⁰⁰ “Practitioners Guide to COMPAS” (Report, Northpointe, 2012), http://www.northpointeinc.com/files/technical_documents/FieldGuide2_081412.pdf.

³⁰¹ “Practitioners Guide to COMPAS” (Report, Northpointe, 2012), http://www.northpointeinc.com/files/technical_documents/FieldGuide2_081412.pdf.

Appendix B: Predictive Accuracy Table of Studies

Title	Author(s)	Year	Publisher	Sample Size	Location	Type
Creating and Validation of the Ohio Risk Assessment System	Edward Latessa Paula Smith, Richard Lemke, Matthew Makarios, Christopher Lowenkamp	2009	University of Cincinnati School of Criminal Justice Center for Criminal Justice Research	1,837	Ohio	Validation study, correlational
New data: Pretrial risk assessment tool works to reduce crime, increase court appearances	Laura and John Arnold Foundation	2016	Laura and John Arnold Foundation	N/A	Lucas County, Ohio	Correlational
Pretrial Risk Assessment in the Federal Court	Marie VanNostrand	2009	Luminosity, Inc.	565,178	94 federal judicial districts, including at least one district in each	Validation study, correlational

Questioning the Practice of Pretrial Detention: Some Empirical Evidence from Philadelphia	John S. Goldkamp	1983	The Journal of Criminal Law & Criminology.	n=463, control group (n=462, experimental group)	Philadelphia, Pennsylvania	comparative, experimental, causal
Risk-Based Pretrial Release Recommendation and Supervision Guidelines	Mona J.E. Danner, Marie VanNostrand, Lisa M. Spruance,	2015	Luminosity, Inc.	14,382	Virginia	Validation study, correlational
Santa Clara Report. Bail & Release Work Group: Consensus Report on Optimal Pretrial Justice	Santa Clara County Bail & Release Work Group	2016	Santa Clara County	N/A	Santa Clara County, California	Report

Appendix C: Race Neutrality Table of Studies

Title	Author(s)	Year	Publisher	Sample Size	Location	Type
A Market Test for Race Discrimination in Bail Setting	Ian Ayres and Joel Waldfogel;	1994	Yale Law School	1,366	New Haven, Connecticut	Correlational
Bias in Criminal Risk Scores is Mathematically Inevitable, Researchers Say	Julia Angwin, Jeff Larson	2016	ProPublica	N/A	N/A	Correlational
'Give Us Free': Addressing Racial Disparities in Bail Determinations	Cynthia E. Jones;	2013	American University Washington College of Law	N/A	Various	Meta-analysis, correlational
Machine Bias	Julia Angwin, Jeff Larson, Surya Mattu and Lauren Kirchner	2016	ProPublica	11,700	Broward County, Florida	Correlational
Pretrial Release of Felony Defendants in State Courts	Thomas H. Cohen & Brian Reaves	2007	DOJ Bureau of Justice Statistics	~40,000	"40 of the nation's 75 most populous counties" (2, n. 3)	Correlational

Race and Gender Neutral Pretrial Risk Assessment, Release Recommendations, and Supervision: VPRAI and PRAXIS revised	Marie Van Nostrand, Mona J.E. Danner, & Lisa M. Spruance.	2016	Luminosity, Inc.	14,209	Virginia	Validation Study
Testing for Racial Discrimination in Bail Setting Using Nonparametric Estimation of a Parametric Mode	Shawn D. Bushway and Jonah B. Gelbach	2011	University of Pennsylvania Law School	N/A	Five counties	Causal

Appendix D: Effectiveness Table of Studies

Title	Author(s)	Year	Publisher	Sample Size	Location	Type
'Give Us Free': Addressing Racial Disparities in Bail Determinations	Cynthia E. Jones	2013	American University Washington College of Law	Various	Saint Louis County, Minnesota	Correlational
Alternatives to Pretrial Detention: Southern District of Iowa	Marie VanNostrand	2010	Luminosity, Inc.	3,521	Southern District of Iowa	Comparative
Pretrial Release of Felony Defendants in State Courts	Thomas H. Cohen & Brian Reaves	2007	Department of Justice, Bureau of Justice Statistics	40,000	Sample of 40 of the nation's 75 most populous counties	Correlational
Report on Impact of House Bill 463: Outcomes, Challenges and Recommendations	Tara Boh Klute, Mark Heyerly	2012	Pretrial Justice Institute	Statewide (not specified)	Kentucky	Correlational
Restoring Accountability in Pretrial Release: the Philadelphia Pretrial Release Supervision Experiments	John S. Goldkamp and Michael D. White	2006	Journal of Experimental Criminology	845	Philadelphia, Pennsylvania	Causal

Risk-Based Pretrial Release Recommendation and Supervision Guidelines	Marie VanNostrand, Lisa Spruance, and Mona Danner	2015	Luminosity, Inc.	14,382	Virginia	Correlational
The Jefferson County Bail Project: Impact Study Found Better Cost Effectiveness For Unsecured Recognizance Bonds Over Cash and Security Bonds	Claire M.B. Brooker, Michael R. Jones, Timothy Schnacke	2014	Pretrial Justice Institute	536	Jefferson County, Colorado	Correlational
Unsecured Bonds: The As Effective and Most Efficient Pretrial Release Option	Michael R. Jones	2013	Pretrial Justice Institute	~1,900	10 Colorado counties (where 80 percent of the state's population lives)	Correlational
Vera Institute of Justice: Manhattan Bail Project	Scott Kohler	1962	Duke University	~3,505	New York	Causal

Appendix E: Campaign Donation Data for Current State Assemblymembers and Senators, Since 2006

Between 2006 and 2018, eight senators accepted \$23,800 in campaign donations: five Democrats and three Republicans. The most donations were received by Kevin de Leon, who is currently the Senate President Pro Tempore, at \$9,700.

Assemblymember Name	Donations from Bail Agencies and Agents	Total Donations from All Sources	Percent of Total Donations that Come from Bail Agencies and Agents
Kevin de Leon	\$9,700	\$8,576,594.43	0%
Jim Nielsen	\$5,500	\$3,068,266.27	0%
Jeff Stone	\$3,900	\$1,926,770.27	0%
Cathleen Galgiani	\$3,000	\$10,204,201.98	0%
Mike McGuire	\$725	\$618,258.59	0%
Ed Hernandez	\$375	\$5,117,148.02	0%
Janet Nguyen	\$350	\$4,408,738.11	0%
Jim Beall	\$250	\$4,085,806.18	0%

Between 2006 and 2016, 13 Assemblymembers received campaign donations from bail agencies and agents. They received \$15,950 in campaign donations. Donations were received by nine Democrats and four Republicans. The Speaker of the Assembly, Anthony Rendon, has received the most donations at \$3,125.

Senator Name	Donations from Bail Agencies and Agents	Total Donations from All Sources	Percent of Total Donations that Come from Bail Agencies and Agents
Anthony Rendon	\$3,125	\$4,659,999.39	0%
Jim Cooper	\$2,500	\$2,044,436.74	0%
Fletcher Gonzalez	\$2,500	\$1,278,298.77	0%
Joaquin Arambula	\$2,000	\$1,820,201.39	0%
Jordan Cunningham	\$1,225	\$1,267,550.51	0%
Anna Caballero	\$1,000	\$4,852,268.32	0%
Ian Calderon	\$1,000	\$3,000,277.44	0%
Marie Waldron	\$1,000	\$1,614,725.67	0%
Kevin Mullin	\$500	\$2,151,522.47	0%
William Brough	\$350	\$708,172.98	0%
Steven Choi	\$300	\$888,668.14	0%
Kevin McCarty	\$250	\$1453154.03	0%
Rudy Salas, Jr.	\$200	\$4,741,372.09	0%

Appendix F: Interview Questions for Political Feasibility Criterion

Interview Questions for Justin Rausa on February 13, 2017:

1. What are some of the challenges with abolishing the commercial bail system?
2. What kind of support do you have inside and outside of the legislature? Where does the support come from?
3. Are you worried about opposition from legislators who have received donations from the bail industry?
4. What are you doing to gain public support for this legislation?
5. Why has this reform not happened in California before now? Why do you think now is a good time?
6. Can you talk about what political conditions lead to bail reform in other states?
7. Do you expect pushback because of the research that shows risk assessment tools contain racial bias?
8. What kind of effect does the current federal administration and political climate have on the passage of the bill?
9. What do you think is more politically feasible: keeping commercial surety bail or adopting risk assessment?
10. What do you think is more politically feasible: release on own recognizance, supervision matrix, or unsecured bonds, or a combination of these?

Interview Questions for Margaret Dooley-Sammuli on February 23, 2017:

1. What are some of the challenges with abolishing the commercial bail system? Do you think it will be possible to totally abolish bail with the introduction of this legislation? (If yes/no: why?)
2. What kind of institutional support does the ACLU have on this issue? Where does the support come from? (other organizations, non-profits etc.)
3. Are you worried about opposition from the bail industry? What, in particular, are you worried about?
4. What are other barriers to bail reform that you think the campaign will face?
5. How big of a barrier to full bail reform (elimination of money bail) does the California Constitution pose?
6. What impact do you think the lawsuits in Sacramento and San Francisco will have on the bail reform campaign, if any?
7. What are you doing to gain public support for this legislation?

8. Why has this reform not happened in California before now?
9. Why do you think now is a good time for reform? Can you talk about what political conditions led to bail reform in other states?
10. Another person that we interviewed mentioned that there have been a lot of successes on criminal justice reform legislation, and that these successes have created momentum of support of bail reform. However, we saw an LA Times article about the killing of the police officer in Whittier and how they are blaming the killing on criminal justice reform and are asking Jeff Sessions to look into the criminal justice reform in California. Do you think this will have an impact on bail reform in California?
11. Do you expect pushback because of the research that shows risk assessment tools contain racial bias?
12. What do you think is more politically feasible: keeping the commercial surety bail or adopting risk assessment tools?
13. What do you think is more politically feasible: release on own recognizance, supervision matrix, or unsecured bonds, or a combination of these?
14. Do you think that this will end up being a two-year bill?

Appendix G: Interview Questions for Bail Agents

Introduction questions:

1. How did you get into this type of work?
2. How long have you been working at your current position?
3. What is your official title?

Understanding the system:

1. Walk me through your day today.
 - a. Is this a typical day?
2. How do you get business?
3. Do you go to court? What do you do at court?
4. Do you work with attorneys? How do you work with them?
5. How do you decide who to bail out?
6. Describe the ideal defendant for bailing out.
7. Describe a defendant that you would not bail out.
8. How do you make decisions about co-signers?
9. How do you monitor the defendants? How do you ensure that they will return to court?
10. What happens if they don't appear at court?
11. How often do you worry about flight-risk being an issue for defendants? Are they mostly compliant?

Understanding the agents' self-image:

1. When you see depictions of bail agents in popular culture, what is your reaction?
2. What qualities do you possess that make you good at your job?
3. How do you incorporate ethics into your position? (For example, man in Riverside bailed out and murdered his partner.)
4. I've heard bail describe their work as a service. What services do you provide for families of defendants? What about defendants? For society as a whole?
5. What are some challenges you run into trying to do your job?
6. What are some information or tools you wish you had to make your job easier?