RE: COMMENTS OF COLUMBIA LAW SCHOOL RESEARCHERS ON PROPOSED CALIFORNIA JUDICIAL COUNCIL RULES 4.10 AND 4.40

INTRODUCTION

The undersigned faculty and students at Columbia Law School are scholars and researchers of pretrial practices, including criminal procedure; pretrial detention; and the history, sociology, and reform of pretrial bail. We write with concern about the incomplete guidance offered by proposed Rules 4.10 and 4.40. We ground our concerns in the latest scholarly research available in hopes that the Council will refine its guidance or else delay the implementation of these Rules until more specific and meaningful constraints on the use of risk assessments is promulgated by the Council in the future.

A number of the student authors of these comments are current or future residents of California and will begin their legal careers in the world created by S.B. 10 and the Judicial Council’s Rules. The undersigned faculty urge the Council’s solicitude for the views of these young practitioners and scholars who will shortly be participants in the reformed practices worked out by the Council.

STATEMENT OF POSITION

We are opposed to proposed Rules 4.10 and 4.40. While the Rules contain a number of laudable provisions, their often unspecific requirements are largely unenforceable as written. Although a reformed pretrial justice system that maximizes the number of defendants released pretrial while minimizing costs and risks to the public could be achieved under the Rules, a draconian system that
punitive and unnecessarily detains the vast majority of defendants pretrial is equally possible under the Rules as formulated. That is, the undefined terms and unclear guidance of the Rules allow for many possibilities, as S.B. 10 itself does. Yet the purpose and value of the Council’s rulemaking should be to implement S.B. 10 in ways that honor constitutional principles of due process, equal protection, and the presumption of innocence, and that constrain the use of risk assessments and preventive detention to incarcerate the same populations at the same rates as the unequal and indefensible secured money bail system abolished by S.B. 10.

We reiterate at the outset that a number of proposed provisions are laudable. Rule 4.10(b)(5)(6), requiring that courts consider “whether any scientific research has raised questions that the particular instrument unfairly classifies offenders based on race, ethnicity, gender, or income level,” demands that local courts be knowledgeable about the tools they use and whether those tools “unfairly classif[y] offenders based on race, ethnicity, gender, or income level.” Of course, not all such classifications will be an overt metric of the tool, but may be endemic to the use of criminal history or arrest records. That makes Rule 4.40(d)(6)’s requirement that courts consider “the extent to which” detaining “medium risk” defendants “may increase the disparity in detention rates of ethnic or racial minorities, or other inappropriate demographic such as income level or gender, within the local population” particularly important and valuable. In this comment, we offer some of the most recent and relevant literature that can aid the courts in this task.

Rule 4.40(a)(2)’s statement of purpose, requiring that each local Rule authorize release for as many arrested persons as possible while reasonably assuring public safety and appearance in court states the appropriate legal standard, although crucial details about what is “possible” and “reasonable” are missing. Rule 4.40(d)(4) properly rejects status-based presumptions of detentions, though the Rule should add immigration status as an enumerated forbidden exclusion.

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Rule 4.40(b)(3)(D) is commendable insofar as it requires pretrial assessment agencies to consider “[t]he impact of detention on the arrested person’s family responsibilities and community ties, employment, and participation in education or rehabilitation services.” Pretrial detention has devastating effects on not only an arrestee,2 but also their families and their community on a broader scale.3 A myriad of studies have demonstrated the negative impacts on children of incarcerated parents, including a rising rate of homelessness,4 development of negative social behaviors in school in an attempt to cope with the instability of having an incarcerated parent,5 inferior health outcomes,6 and the risk of being incarcerated themselves.7 It is essential that any decision to detain takes into consideration the direct and collateral consequences of pretrial incarceration to take a full accounting of the social costs of pretrial incarceration.8


Rule 4.10(c)(2)’s requirement that decision makers weigh only the risk of re-offending pretrial and not "the long-term risk of reoffense," and Rule 4.40(c)(6)’s prohibition on "rehabilitative objectives" offer important and useful guidance to Pretrial Assessment Services and local courts to disregard irrelevant information and objectives at the pretrial release stage.

Rule 4.10(c)(3) cautions local courts from giving "additional undue weight" in its release determinations to factors already evaluated by the chosen risk assessment tool. This is a valuable protection against double-counting or arbitrarily inflating an estimated risk, but it stands in apparent contradiction with Rule 4.10(b)(1), which lists additional factors for consideration that nearly every risk assessment tool already includes in its metrics. The apparent conflict is resolvable only by reference to the vague phrase "undue weight," a phrase that gives local courts little guidance on how they should double-count risk factors—as the Rule requires—without giving them "undue" consideration—as the Rule also requires.

In the comments that follow, we seek to respond to the questions raised by the Council in its invitation and to urge the Council to improve on the laudable provisions above by making them clearer and more directly enforceable.

**COMMENTS**

I. **RULE 4.10(b)(6) SHOULD FORBID THE USE OF PRETRIAL ASSESSMENT INFORMATION IN SUBSEQUENT PROCEEDINGS AND RELATED MATTERS**

Information obtained during pretrial assessment processes should not be used in subsequent proceedings, especially proceedings for establishing guilt or imposing punishment. Risk assessment tools are designed for the specific purpose of informing pretrial release and supervisory conditions, so the Rules should restrict their use to reduce their influence on judges in future decisions unrelated to pretrial release. A clear rule establishing confidentiality in pretrial assessments is best equipped to respect defendants’ privilege against self-incrimination and to effectuate the goals of Pretrial Assessment Services.
A. Pretrial Assessment Services’ Goals Are Best Served Where Defendants’ Confidentiality Is Respected.

The Fifth Amendment protects individuals’ right to silence and ability to avoid self-incrimination in the context of criminal prosecution and, more specifically, in custodial police interrogation.\(^9\) The inherently coercive and stressful environment of pretrial service interviews is directly akin to custodial interrogation; the protections offered in constitutional law for criminal suspects questioned by the police thus provide a useful guideline for pretrial confidentiality.\(^10\) As in interrogations, defendants interviewed by pretrial service agencies have their “freedom of action” seriously curtailed.\(^11\) Defendants questioned pretrial are similarly pressed to share personal information in a high-stakes environment, with their liberty on the line. Given the sensitivity of the information shared by pretrial detainees and the potential involuntariness of disclosures made under pressure and possible fatigue, it is imperative that the use of disclosed information is carefully limited to serve the specific goals of pretrial service agencies, and never used against the defendant in a subsequent proceeding.

Beyond a threat to the constitutional protections against self-incrimination, the ability for pretrial services to do its job effectively will be compromised without a guarantee of confidentiality for interviewees. Where there is a risk that information collected will be used against defendants in court, interviewees will be incentivized to remain silent or even to lie. In turn, pretrial services will be unable


\(^10\) Cf. Miranda, 384 U.S. at 444 (“[T]he prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination.”).

\(^11\) Id. (“By custodial interrogation, we mean questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way.”).
to determine an effective pretrial strategy or provide a proper recommendation to the court regarding pretrial release.

B. California Should Follow the Lead of the Federal Court System and Multiple States in Guaranteeing the Confidentiality of Pretrial Assessment Information.

California would not be alone in providing for confidentiality in pretrial service interviews. Pursuant to 18 U.S.C. § 3153(c), information collected by federal pretrial service agencies for the purpose of a bail determination is generally confidential. Federal law provides for a handful of carefully limited exceptions where pretrial service information may be shared with law enforcement or other qualified individuals, but that information is never “admissible on the issue of guilt in a criminal judicial proceeding unless such proceeding is a prosecution for a crime committed in the course of obtaining pretrial release or a prosecution for failure to appear for the criminal judicial proceeding with respect to which pretrial services were provided.”

Multiple other states have adopted laws similar to the federal statute. In New York, information from pretrial release services investigations is confidential, and disclosure to certain sources is strictly limited. The accused is informed of how the information might be used before deciding whether to participate.

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12 18 U.S.C. § 3153(c)(1) (2012) (“[I]nformation obtained in the course of performing pretrial services functions in relation to a particular accused shall be used only for the purposes of a bail determination and shall otherwise be confidential.”).

13 Id. § 3153(c)(2)–(3).


15 Id.
Virginia follows a similar policy, keeping the risk assessment confidential so it is only revealed to the court and the attorneys and cannot be used as evidence in trial.¹⁶

C. Specific Recommendations for the Use of Information Obtained in Pretrial Assessments.

The following limitations to the use or disclosure of information gathered in pretrial assessment interviews should apply:

- Disclosure to prosecutors or government attorneys should be categorically prohibited
- Disclosure for research purposes should be permitted but moderated by anonymized conditions of disclosure
- Disclosure for sentencing should be strictly prohibited
- Disclosure to law enforcement should be strictly prohibited
- Disclosure to jail officials should be strictly prohibited
- Disclosure for impeachment purposes should be strictly prohibited

D. Suggested Changes to Rule 4.10(b).

Below is proposed language to supplement Rule 4.10 regarding release of information obtained by pretrial services:

4.10(b)(7) Information obtained in the course of performing pretrial services functions in relation to a particular accused shall be used only for the purposes of bail determination and shall otherwise be confidential. In no case shall the risk assessment score or information provided to determine that score be used or made available in subsequent proceedings against the accused. The court may release aggregated data to qualified persons for purposes of research related to the administration of criminal justice, provided the data are transmitted in aggregated form and individually identifying information has been anonymized. In no case shall such information identifying specific individuals be disclosed to any probation department, jail official, or other member of law enforcement. Such information shall not be used to impeach the defendant.

II. ARRESTS THAT DID NOT RESULT IN THE FILING OF CRIMINAL CHARGES SHOULD BE EXCLUDED FROM CRIMINAL HISTORY REFERENCED IN RULE 4.40(B)(3)(B)

A. Consideration of an Uncharged Arrest Undermines the Presumption of Innocence and is Unduly Prejudicial to Defendants.

Consideration of uncharged arrests as part of a defendant’s criminal record violates that principle that defendants are presumed innocent until proven guilty, a “bedrock[,] axiomatic and elementary principle” that “lies at the foundation of the administration of our criminal law.” As an initial matter, innocent Californians do not have the right to a copy of an arrest report detailing the circumstances of their arrest. That defense attorneys can access a copy of arrest reports does little to mitigate the harm to indigent individuals arrested and then released without the filing of formal charges. Because defense attorneys for indigent people are appointed at arraignment—a proceeding that will not occur if one is never formally charged with a crime—an arrested person who is indigent and cannot retain a private attorney may never even know the details of their arrest. Because the inclusion of arrest absent charges in criminal history reverses the presumption of

17 E.g., Betterman v. Montana, 136 S. Ct. 1609, 1614 (2016) (quoting Reed v. Ross, 468 U.S. 1, 4 (1984)). See also Taylor v. Kentucky, 436 U.S. 478, 485–86 (1978) (“While use of the particular phrase “presumption of innocence”—or any other form of words—may not be constitutionally mandated, the Due Process Clause of the Fourteenth Amendment must be held to safeguard ‘against dilution of the principle that guilt is to be established by probative evidence and beyond a reasonable doubt.’” (quoting Estelle v. Williams, 425 U.S. 501, 503 (1976))); id. (“[Maintaining] the presumption of innocence . . . represents one means of protecting the accused's constitutional right to be judged solely on the basis of proof adduced at trial.”).

innocence and is unfairly prejudicial to criminal defendants, its inclusion should be prohibited by Rule 4.40(b)(3)(B).

B. Including Arrests that Did Not Result in the Filing of Charges Contravenes the Stated Purpose of Rule 4.40.

Rule 4.40(a)(2) requires that the “local rule must authorize release for as many arrested persons as possible, while reasonably assuring public safety and appearance in court as required.” Because the fact of arrest without criminal charges does not work to assure public safety or appearance in court, the inclusion of that information within a criminal history is irrelevant. Uncharged arrests provide little if any information about the nature of the alleged crime or the strength of the state’s evidence (indeed, if anything, uncharged arrests show the weakness of the evidence of guilt). A person arrested but not charged had no court dates at which they needed to appear during that limited interaction with the justice system. Therefore, the arrest has little inherent value in predicting the likelihood of failure to appear in court.

C. Inclusion of Arrests that Did Not Result in the Filing of Charges Exacerbates Racial and Socioeconomic Disparity in the Criminal Justice System.

Rule 4.40(d)(6) requires that, when presuming “medium risk” defendants eligible for preventive detention, “the court must consider the extent to which the additional [presumption] may increase the disparity in detention rates of ethnic or racial minorities, or other inappropriate demographic information such as income level or gender, within the local population.” This clause, and similar language throughout the proposed Rules, acknowledges and encourages mitigation of oppressive outcomes in the pretrial bail system.

The consideration of arrest history where no formal charges were filed is likely to increase or at least reinforce disparity in detention rates of minority populations. Uncharged arrests offer a poor proxy for risk, but a strong proxy for race and socioeconomic status. Numerous studies have found that the racial disparity in arrests persists even after controlling for a variety of legally and socially
relevant factors such as demeanor, offense severity, prior arrest record, overall criminality, and neighborhood and family structure. Additionally, minority and low-income individuals have a statistically higher chance of interaction with and arrest by police due in part to living in neighborhoods that are heavily policed. Because racial minorities are disproportionately arrested absent legally relevant factors, the inclusion of arrest with no charges in criminal history makes it more likely that racial minorities will be disparately considered eligible for detention by Pretrial Assessment Services.

Disparity in arrest rates, if considered as a factor in pretrial risk assessment, threatens to reinforce a “feedback loop” that punishes low-income communities of color on a broader scale, damaging “social networks and family functioning, decreas[ing] high school graduation and employment rates, increas[ing] risk for involvement in violence and violent victimization, and worsen[ing] mental health outcomes and long-term life opportunities.” In turn, these types of negative

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19 See, e.g., Tammy Rinehart Kochel, David B. Wilson & Stephen D. Mastrofski, Effect of Suspect Race on Officers’ Arrest Decisions, 49 Criminology 473, 473–512 (2011) (conducting a meta-analysis of data collected at the encounter or suspect level, and finding that black people have an increased likelihood of being arrested as compared to whites even after controlling for meaningfully differentiating legal factors); see also David S. Kirk, The Neighborhood Context of Racial and Ethnic Disparities in Arrest, 45 Demography 55, 55–77 (2008) (conducting a multilevel, longitudinal study of Chicago’s youth, revealing substantial differences in arrest rates between black youths and other racial groups even after factoring in differentiating social context).

20 See, e.g., Vera Inst. of Justice, supra note 2.

21 Ensign et al., supra note 1.

outcomes make future contact with the criminal justice system more likely, introducing a destructive cycle of contact.

Under these circumstances, the inclusion of arrest without the filing of charges in criminal history perpetuates the marginalization of minority communities. Rule 4.40(b)(3)(B) should exclude arrests that did not result in the filing of charges from criminal history for the purposes of pretrial risk assessment.

III. RISK OF NON-APPEARANCE MUST BE DISAGGREGATED FROM RISK TO PUBLIC SAFETY IN PRETRIAL RISK ASSESSMENT TOOLS

Perhaps of most significant concern about the proposed Rules is the Council’s repeated references to “low,” “medium,” and “high” risk categories, as if there were a single spectrum of risk, paired with the continual requirement that courts evaluate two distinct kinds of risk: “reasonably assur[ing] public safety or the appearance of the person as required.” The distinct risks of nonappearance or of pretrial offense should be separately analyzed both at the risk assessment stage and throughout the pretrial process. It is especially important that the Council disaggregate these risks at the outset of its rulemaking and that it require local jurisdictions to do so as well. Further, the Council should caution against conflating risk of nonappearance (a minor and often easily remedied form of pretrial failure) with risk of flight (a very rare occurrence for most charge categories today), or conflating risk of re-offense pretrial (which might include technical failures to adhere to the strict letter of monitoring conditions, like weekly check-ins) from risk of dangerous or violent offense.

Only risk assessment tools that disaggregate the risk of non-appearance from the risk that the defendant will commit new violent crimes while awaiting trial should be approved for use. Risk assessment tools that provide only one “pretrial failure” score do not acknowledge an important distinction between risk of non-

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23 Rule 4.40(b)(4) (emphasis added).

appearance and risk to public safety, two very different measurements that are informed by different inputs and require different mitigation techniques. The policy concerns that must be considered when evaluating the strength of various risk assessment tools are “what statistical information [the risk assessment tool] provides, whether that information represents an improvement over the status quo, and whether it can justifiably guide pre-trial decision-making.”

Any tool that does not give two distinct scores for two distinct risks does not give courts sufficient information to identify the least restrictive nonmonetary conditions necessary for defendants’ release.

A. Failing to Account for the Differences Between Non-Appearance and Public Safety Risks Threatens Overestimation of Risk and Over-Incarceration.

If, as S.B. 10 and the Council require, courts must evaluate and guard against both the risk of a defendant’s nonappearance and the risk the defendant may commit of a new offense pretrial, a single risk score or designation (e.g., “high”) is uninformative unless the decision maker knows what the particular risk is. A person at high risk for nonappearance may be a low risk of reoffending pretrial because the causes of nonappearance are generally distinct and uncorrelated with failure scores). Out of the tools Professor Mayson compares, the PSA and the COMPAS are currently the only risk assessment tools that separate the two risks.

See, e.g., Lauryn P. Gouldin, Disentangling Flight Risk from Dangerousness, 2016 BYU L. Rev. 837, 842 (“One key problem with most of the risk assessment tools employed in the federal system and around the country, however, is that they combine flight risk and dangerousness into a single ‘risk of pretrial failure’ score.”); Shima Baradaran & Frank L. McIntyre, Predicting Violence, 90 Tex. L. Rev. 497, 547 (2012) (“The things one can predict about future violent-crime risk are uncorrelated with the things one can predict about flight risk.”).

criminality. Under the proposed Rules, Pretrial Assessment Services and courts are likely to overestimate a defendant’s risk by looking at an aggregated score.\(^\text{27}\) Overestimation may lead to over-detention of defendants or the unnecessary imposition of counterproductive pretrial monitoring measures.

We should note that even among tools that disaggregate risks, overestimation is a danger when risk assessment tools rely on criminal history data in jurisdictions that are undergoing major criminal justice reforms. In many jurisdictions, bail reform has begun to mitigate defendants’ risk of failing to appear or reoffending.\(^\text{28}\) Implementing low-cost and low-tech interventions like court date reminder programs through live-callers, postcards, or text messages have reduced failure to appear rates sizably.\(^\text{29}\) One study has even suggested that reducing pretrial detention, which these mitigation techniques are designed to do, may decrease the overall level of rearrests.\(^\text{30}\) As new risk assessment tools have been validated or revalidated, studies have shown that defendants rated in the four highest risk

\(^{27}\) For a salient discussion of overestimation and its consequences in the context of human decision making, see Gouldin, supra note 25, at 886.


\(^{29}\) E.g., Timothy R. Schnacke et al., Increasing Court-Appearance Rates and Other Benefits of Live-Caller Telephone Court-Date Reminders: The Jefferson County, Colorado, FTA Pilot Project and Resulting Court Date Notification Program, 48 Ct. Rev. 86 (2012); Alan Tomkins et al., An Experiment in the Law: Studying a Technique to Reduce Failure to Appear in Court, 48 Ct. Rev. 96 (2012); Brice Cooke, et al., Using Behavioral Science to Improve Criminal Justice Outcomes Preventing Failures to Appear in Court, Univ. of Chi. Crime Lab 16 (2018), http://urbanlabs.uchicago.edu/attachments/store/9c86b123e3b00a5da58318f438a6e787dd01d66d0efad54d66aa232a6473/142-954_NYCSummonsPaper_Final_Mar2018.pdf.

\(^{30}\) Paul Heaton et al., The Downstream Consequences of Misdemeanor Pretrial Detention, 69 Stan. L. Rev. 711 (2017).
categories for failure to appear exceeded expectations upon release. The same was true for the two highest risk categories for new criminal activity.

If these risks are already being overestimated, then combining the two risks by giving each defendant only one risk score can exaggerate the effect. Especially when presented in qualitative terms (i.e. “low risk,” “medium risk”) rather than quantitative, a defendant could be given a low risk score in both categories and still be assessed as medium risk when the two scores are combined. These overestimations are of tremendous importance because the way a defendant’s level of risk is framed and communicated to a decision maker affects how the decision maker perceives the defendant and the ultimate treatment of the defendant. Overestimation can create a vicious feedback loop by overburdening defendants with unnecessarily onerous pretrial monitoring requirements. Defendants who are over-supervised have increased opportunities to fall out of compliance with the terms of their release and accordingly, their chances of success can worsen, a cycle that makes the risk overestimation a self-fulfilling prophecy. As a result, imposing counterproductive conditions of release on defendants on the basis of risk overestimation could undermine the reform that S.B. 10 aims to achieve.


32 Id.


B. Aggregated Risk Scores Increase the Difficulty of Tailoring Assistance.

The American Bar Association’s codified standards on pretrial release call for courts to use the least restrictive means available to reasonably mitigate non-appearance and public safety risks while protecting the integrity of the judicial system.³⁵ Least restrictive conditions are those that are targeted toward a specific risk posed by an individual defendant.³⁶

The use of a single, or aggregated, risk score complicates courts’ ability to tailor conditions to an individual defendant’s actual risk because many release conditions are effective in mitigating one risk or the other, but not both.³⁷ For example, if a defendant poses a high risk of failure to appear, travel restrictions could be imposed. But those same conditions would not be effective or tailored to a defendant with a low risk of failure to appear but higher risk of new violent criminal activity, whose rate of offense might be lowered by requirements that she attend a drug treatment program, stay away from an identifiable victim or community, or refrain from carrying weapons.

Disaggregated risk measures are also vital to assess the tools’ performance, to adjust the tools to improve their accuracy, and to give judges feedback on whether the conditions they are imposing on defendants are working as intended. “Data on the risk scores and subsequent outcomes, whether for all defendants or for a representative sample of them, is necessary in order to understand the relationship between scores and true levels of risk.”³⁸ It is imperative that new data be collected

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³⁶ See Stevenson & Mayson, supra note 26, at 46 (“The central principle that unites best practices in the pretrial arena is that any pretrial restraint on liberty should be tailored to the specific risk a defendant presents, and should be the least restrictive means available to reasonably reduce the risk.”).

³⁷ See Gouldin, supra note 25.

³⁸ Koepke & Robinson, supra note 28, at 51.
on which defendants are failing to appear for their court dates and reoffending, what their conditions of release were, and what their risk scores were that induced the specific conditions of release. This data should then be used to calibrate the risk assessment tools, which in turn will give Pretrial Assessment Services and the courts scores built on more accurate data that are both jurisdiction-specific and up-to-date.

Disaggregation will allow courts and the legislature to measure the effectiveness of mitigation techniques. A court that relies heavily on electronic monitoring as a condition of pretrial release may conclude that the condition is ineffective in general if a higher-than-expected number of defendants placed on electronic monitoring experience “pretrial failure,” when in reality the condition could be working for reducing criminal activity but not for assuring court appearances. As a result, a judge might stop using a tool that is very effective for one risk but not the other simply for lack of or misattribution of data.

C. Disaggregating Risk in Rules 4.10 and 4.40.

At a minimum, any chosen risk assessment tool should disaggregate a defendant’s risk of non-appearance and the risk of threatening public safety. An even better tool will make further appropriate distinctions in the kinds of risk Pretrial Assessment Services and the courts should be informing themselves about.

i. Flight Versus Non-Appearance.

Throughout Rule 4.10 and Rule 4.40, a defendant’s return to court is one of the major intended purposes of pretrial risk assessment and the justification for specific release conditions. That requirement is in keeping with the long history and

tradition of bail as a means to guard against the “flight” of a defendant pretrial. But the risk that a defendant will fail to appear for a court date is different from the risk that a defendant will flee. The Council should take care that courts using risk assessment scores not conflate the two.

When a defendant misses a court appearance it is typically for a reason other than avoidance of prosecution. Often defendants do not realize that failing to appear is a violation of the law that can lead to an arrest warrant, or the defendant might fear that not going to work or providing child care will have greater consequences than not going to court. Misperceiving a risk of failure to appear as a flight risk is the same kind of overestimation described above and often entails over-supervision such as the imposition of ankle monitoring when text message reminders or travel vouchers would have been much more effective mitigation measure.


Rule 4.10(a)(2)(A) refers to the use of pretrial risk assessment information for the purpose of “increas[ing]” public safety. However, most risk assessment tools measure only the risk of rearrest, which is not an indicator of “dangerousness” as much as it is a predictor of future contact with the criminal justice system. In fact, most pretrial arrests appear from the available data to be for technical violations, not for new or violent crimes. While technical violations are not desirable, imposing additional release conditions to prevent them could result in a


41 See generally Gouldin, supra note 25.


43 See Schnacke, supra note 299.

44 See Koepke & Robinson, supra note 28, at 52; supra, section II.C.

45 Koepke & Robinson, supra note 28, at 53.
net loss to the community if the additional conditions are more costly than the benefit of decreasing the risk of a technical violation.\footnote{46}

Further, if increasing public safety is to be addressed through mitigating the risk of a defendant committing a new violent crime, then any chosen risk assessment tool needs to have separate scores for a defendant’s risk of committing crime and risk of committing a violent crime while on release.\footnote{47} Only looking at risk of rearrest would be counterproductive to addressing violent crime risk because “people at highest risk for any arrest are not at highest risk of arrest for violent crimes in particular, and vice versa.”\footnote{48}

IV. RULES 4.10 AND 4.40 REQUIRE ADDITIONAL SPECIFICITY TO LIMIT THE ALREADY BROAD DISCRETION OF LOCAL COURTS.

Rules 4.10 and 4.40 should more explicitly establish the proper use of pretrial risk assessment information and the review and release standards for persons assessed as medium risk. As currently written, these Rules largely repeat the general language of S.B. 10. They could benefit from examples or instructions, which would more effectively guide local implementation. Otherwise, these Rules risk giving local courts unfettered discretion to counteract the legislative purpose of maintaining a presumption of release, or worse, of contravening constitutional principles of due process and equal protection.\footnote{49}

A. General Comments on Rules 4.10 and 4.40.

\footnote{46} For an economic model for evaluating bail systems, see generally Yang, \textit{supra} note 8.

\footnote{47} The PSA and COMPAS are the only risk assessment tools that assess risk of rearrest for violent crime specifically. Mayson, \textit{supra} note 24.

\footnote{48} Stevenson & Mayson, \textit{supra} note 26, at 38.

\footnote{49} S.B. 10, Legislative Counsel’s Digest 92 (“The bill would create a presumption that the court will release the defendant on his or her own recognizance at arraignment with the least restrictive nonmonetary conditions that will reasonably assure public safety and the defendant’s return to court.”).
i. Neither Rule Specifies How Courts “Must Consider” Various Factors.

Both Rules 4.10 and 4.40 repeatedly use the phrase “the court must consider” or “must be familiar with” without specifying how courts are expected to demonstrate their familiarity with or due consideration of their risk assessment tools and procedures. In particular, courts are told to weigh the risk assessment score but also consider public safety, the victim’s safety and rights, the defendant’s rights and individual needs, and what release resources are locally available. They are instructed to consider the risk score in the context of other information, while remembering the limitations of the tool. In sum, the proposed Rules urge courts to consider the risk assessment score but to still use “sound independent judgement.”

These requirements never explain how courts are supposed to consider these factors. They are told to weigh many (often conflicting) considerations about the defendant and situation as a whole but, at the same time, instructed that they “must not give additional weight” to factors included in the risk assessment tool used, without further explanation.

ii. Neither Rule Ensures Courts Properly Consider Everything They Are Required to.

Given the ambiguity of how to apply Rules 4.10 and 4.40, assessing whether courts are properly considering what they are instructed to will be extremely difficult. Though courts are required to make an annual review of the local rule,\(^\text{50}\) many of the Rule’s “must consider” requirements are untethered to the annual reporting requirement.

One way to ensure courts fully consider all pertinent factors is to require courts to draft preliminary reports explaining what they plan to implement and why. S.B. 10 allows local courts to choose their own methodology, so a preliminary report would ensure these courts can articulate their understanding of what the Council’s Rules require them to consider. A preliminary report would ensure that courts demonstrate their reasoning about how their chosen risk assessment accounts

\(^{50}\) 4.40(e)(2).
for public safety, victims’ safety and rights, defendants’ rights and individual needs, and locally available resources. Further, and more importantly, explaining why the court decided on a certain risk assessment would prove that local courts have scrutinized the limitations and biases in their chosen risk assessments. Requiring a preliminary report would therefore serve two important purposes: it would help train judges to think through the Rules’ requirements, and it would create a public record to put future annual reports in context and help to hold the courts accountable.


Below is proposed language to supplement rule 4.40(e) regarding a preliminary report, prior to the current 4.40(e)(2):

Courts must prepare a preliminary report to explain their choice of a risk assessment tool. This report must articulate the expected impact of the local rules on public safety and the due process rights of arrested persons. The court also must describe how it has become aware of and plans to counteract possible biases of the assessment process.

B. Specific Comments on Rule 4.10.

Rule 4.10 does not restrict discretion to weigh risk assessment scores, define the other factors courts must consider in pretrial detention determinations, define remedies for inappropriate uses of risk assessments, or provide clear guidance on how to enforce its enumerated procedural safeguards. It leaves local courts with overbroad discretion.

Rule 4.10(b)(1) requires that courts “weigh” information from pretrial services and give “significant weight” to the risk assessment score, but does not clarify how determinative such information should be. What one locality decides is “significant” might not be the same as another, which may lead to intolerable disparities across the state.
The next subsection appears to establish that the risk score is not determinative, but is rather a “relevant factor”\(^{51}\) in assessing pretrial release,\(^ {52}\) release conditions,\(^ {53}\) responses to violations of release,\(^ {54}\) and whether a person presumptively ineligible for pretrial release has overcome that presumption.\(^ {55}\) But merely stating that risk score is not determinative is insufficient. The vagueness of this critical language gives local courts overbroad discretion to rely entirely on risk assessment scores with only a superficial scan of other factors.\(^ {56}\)

The lack of clarity in Rule 4.10 thus poses a grave risk of institutionalizing the worst features of California’s soon-to-be-abolished money bail regime. Sections of the Penal Code now repealed by S.B. 10 directed judges to make bail determinations by considering both bail schedules and additional factors that would counsel a departure from prescheduled bail amounts.\(^ {57}\) But studies overwhelmingly indicate that county bail schedules were the predominant factor in bail-setting

\(^{51}\) Rule 4.10(b)(3).

\(^{52}\) Rule 4.10(b)(3)(A).

\(^{53}\) Rule 4.10(b)(3)(B).

\(^{54}\) Id.

\(^{55}\) Rule 4.10(b)(3)(C).

\(^{56}\) Rule 4.10(c)(1).

decisions, and that bail hearings were extremely short and release determinations were rarely if ever individualized.\textsuperscript{58}

By replacing bail schedules with risk assessments without guidance on how to weigh the score appropriately, the new rules risk replicating an old problem. The purpose of using these other factors in addition to the risk assessment score is to obtain an individualized result. Rule 4.10 must specify both how local rules should be structured to prevent local courts from treating risk assessments as the newest manifestation of bail schedules. The Council must add an enforcement mechanism, or, at the very least, require more extensive public reporting so that judges may be held accountable for how they exercise their discretion.

One option is to guide courts that if the risk assessment score as calibrated by the local jurisdiction suggests detention, Pretrial Assessment Services and the courts \textit{must} look to the other factors for mitigation—even mandating a chronological order by which courts must consider the factors will help prevent risk assessment scores from becoming the determinate factor in the analysis. Turning this vague balancing standard into a required two-step process will not only help ensure that courts and Pretrial Assessment Services do not simply skimp on the other factors, but also aid in enforcement and transparency. Pretrial Assessment Services and the courts should have to lay out in clear, transparent terms the factors other than the risk assessment score that they used in their analysis.

\textsuperscript{58} See, e.g., \textit{Punishing Poverty}, supra note 57, at 171–73; Human Rights Watch, “Not in It for Justice”: How California’s Pretrial Detention and Bail System Unfairly Punishes Poor People 26, 31 (2017), https://www.hrw.org/report/2017/04/11/not-it-justice/how-californias-pretrial-detention-and-bail-system-unfairly (“Hearings to decide pretrial release status and to set bail amounts in California are generally extremely fast and often involve minimal argument. Judges have imprecise guidelines to direct their discretion, and almost no meaningful oversight.”); \textit{id.} at 5 (“[Judges] rely on arbitrarily determined bail schedules that set amounts to coincide with the level of the charge. While judges have discretion to depart from them, they tend to treat the schedules as mechanical formulas to apply in most cases.”).
The other factors that courts and Pretrial Assessment Services must consider are the safety of the public;\(^{59}\) the safety and rights of the victim;\(^{60}\) the rights of the defendant;\(^{61}\) the specific characteristics, interest, or needs of the defendant;\(^{62}\) and the particular conditions of release and availability of local resources that will maximize the efficiency and effectiveness of pretrial release.\(^{63}\) More detail is required here as well. Instead of saying that courts and Pretrial Assessment Services must consider the rights of the defendant, the Rule should lay out, for instance, the due process rights that a defendant possesses, including their state-protected interest in pretrial liberty, and their rights to adequate and timely hearings. Public safety also requires clarification. Public safety seems, in the context of the Rule, to be referring to the risk of harm that releasing a defendant poses to the public. That would seem to contradict Rule 4.10(c)(3)’s caution against relying on factors that a risk assessment tool already incorporates and weighs.\(^{64}\) Although the localities have yet to choose their risk assessment tools, the risk being measured by them according to section 1320.7(h) of S.B. 10 is the likelihood that a person will not appear in court as required or the likelihood that a person will commit a new crime if they are released before adjudication.\(^{65}\) The likelihood that a person will commit a new crime inevitably includes consideration of public safety.

Another option is to define public safety in a broader and more holistic way where the harm of pretrial incarceration is also considered a public safety issue, and the restrictions, violence, and trauma imposed on defendants, their families, and

\(^{59}\) Rule 4.10(b)(1)(A).

\(^{60}\) Rule 4.10(b)(1)(B).

\(^{61}\) Rule 4.10(b)(1)(C).

\(^{62}\) Rule 4.10(b)(1)(D).

\(^{63}\) Rule 4.10(b)(1)(E).

\(^{64}\) Rule 4.10(c)(3).

\(^{65}\) S.B. 10, § 1320.7(h).
their communities are also accounted for in what makes a public safe. In addition to social costs elaborated above, pretrial detention physically rips defendants from their communities and their families, and cages them in an oft violent environment. Under a holistic view of public safety, these are all harms that place persons in vulnerable situations and perpetuate violence and instability in a community.

Rule 4.10(b)(5), which requires the court to consider limitations of risk assessment tools, is too unspecific. While it is important to recognize the limitations of risk assessment tools as well as the particular limitations of the ones chosen for use, the section does not say what to do when a limitation becomes apparent. The Rule fails to prohibit the use of risk assessment tools that lack transparency or produce biased outcomes. Instead, it seems to say that judges should just be aware these limitations exist when they evaluate a risk score. This Rule should provide more guidance on what exactly a judge should do when a limitation in the risk assessment becomes apparent. If, for example, a particular risk assessment is found by scientific research to unfairly classify offenders based on race—a limitation noted in 4.10(b)(5)(C)—its continued use should be impermissible.

This Rule also does not address the validation of risk assessments. It is important that the either the Council or the local courts provide for proper testing

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67 See Yang, supra note 8.

68 Rule 4.10(b)(5).

69 Rule 4.10(b)(5)(C).
of algorithms to detect patterns of problematic classifications.\textsuperscript{70} Machine learning algorithms often work on a feedback loop so if they are not continually retrained, they deviate toward the assumed correctness of their initial determination and away from both reality and fairness.\textsuperscript{71} Validating a risk assessment cannot be a procedure done once—it must be repeated frequently to prevent corrupted results. The Rule should include a requirement that not only should there be a periodic monitoring for limitations, but also that if one is discovered, the risk assessment must be revalidated.

Lastly, section 4.10(b)(2) lays out the improper uses of pretrial risk assessment information. The Rule states that a court must be familiar with the factors included in the particular risk assessment tool; however, there is a need for greater transparency about these algorithms. The general public should also be able to view the inputs to the risk assessment. The Rule should specify where those will be posted along with a report of the assessment’s validity. The Rule should mandate that the following information also be released to the public: how the algorithm in use was developed; what assumptions were made in crafting it; and how frequently the tool is assessed and re-validated.

\section*{C. Specific Comments on Rule 4.40.}

Rule 4.40 problematically gives local courts discretion to create new categories of “medium risk” persons who are excluded from pre-arraignment release without defining “medium risk” or specifying how local jurisdictions will even distinguish “medium” from “high” or “low” risk. It is virtually impossible to judge the wisdom of this Rule without knowing more about these risk categories or how they will be constructed. The legislative intent to encourage pretrial release is


apparent, but Rule 4.40 does not ensure that local courts meet it. Once risk categories are defined, the Council may wish to consider piloting a quota system to ensure that its expectations for high rates of pretrial release are clear and concrete and actually being carried out (for example, “Each local rule must provide for release of at least 90 percent of arrested persons deemed to be medium risk”). The judicial council should review this percentage annually and increase the percentage of persons who must be released as data on pretrial success rates and cost savings validate the pilot levels.

Local rules should mandate that Pretrial Assessment Services include written reasons for the decision to detain in investigation reports to be served on the court and counsel. Given that the legislature’s intent is to strongly encourage pretrial release, a suggestion would be to only specify reasons for the decision to detain. While the report should still include all the factual information for the court, the requirement that Pretrial Assessment Services justify only detainment would better maintain the presumption towards release alluded to by S.B. 10.\textsuperscript{73}

The review requirements set out factors Pretrial Assessment Services must consider when determining whether to release or detain pending arraignment. Some considerations such as “the impact of detention on the arrested person’s family responsibilities and community ties, employment, and participation in education or rehabilitation services”\textsuperscript{74} are well fleshed out, telling courts exactly what must be in their local rule. Others are not, leaving the door open for a broad range of discretion.

In particular “past conduct,”\textsuperscript{75} and the “record concerning appearance at court” factor\textsuperscript{76} should also include reasons for past failed appearances, if any. This

\textsuperscript{72} Rule 4.40(a)(2).

\textsuperscript{73} See S.B. 10, Legislative Counsel’s Digest at 92.

\textsuperscript{74} Rule 4.40(b)(3)(D).

\textsuperscript{75} Rule 4.40(b)(3)(B).

\textsuperscript{76} Id.
rule should define mechanisms by which accused individuals can provide information to Pretrial Assessment Services because S.B. 10 does not. If individuals cannot reach Pretrial Assessment Services and pass on favorable information, the overall investigation and assessment will not be thorough. For instance, possible reasons for nonappearance include being unaware of or forgetting the date of the court appearance, illness, unforeseen personal emergencies, childcare issues, employment conflict, lack of transportation, inability to navigate the process, or confusion.\footnote{See Lauryn P. Gouldin, \textit{Defining Flight Risk}, 85 U. Chi. 677, 729–731 (2018).} Some of these reflect what could be structural problems of the court (possibly an ineffective notice system or unnecessary complexity), others are rational, realistic, and harmless reasons people do not make it to their date,\footnote{Id. at 729.} and still others disproportionately affect low-income people.\footnote{Caitlin Hill, Rethinking the Concept of “Failure to Appear,” ACLU Ohio (2017), https://www.acluohio.org/archives/blog-posts/rethinking-the-concept-of-failure-to-appear (“A person might miss a court date because she had to get her children to school, or her car broke down, or she missed the bus. Perhaps they have an hourly job with an inflexible work schedule. These types of tough situations result in defendants not showing up for court, and are also situations that low-income people experience more regularly.”).} Having a procedure specified for individuals to give these details (and other favorable information) to Pretrial Assessment Services will lead to an individualized approach to determining release or detention.

Next, the Council’s list of nonmonetary conditions that a local rule must identify to facilitate success of pretrial release\footnote{Rule 4.40(c)(5).} would be more useful if it contained more concrete guidance about which conditions are typically the least restrictive. For instance, even a simple rule that weekly in-person reporting should not be imposed on a person unless Pretrial Assessment Services can articulate a clear and convincing reason why monthly phone check-ins are inadequate would clearly
communicate the Rule’s requirement for least restrictive conditions and provide
decision makers a concrete example of how to apply the Council’s Rules.

Similarly, in addition to stating the correct legal standard of imposing the
least restrictive condition reasonably available, the Rules should make clear that
GPS monitoring and home detention are serious impositions on a person’s liberty
and unless there is an articulable reason why that extreme intrusion is necessary,
they should not be used. More detailed information on the deprivation of liberty
that accompanies these conditions—rather than the vague lists substantially
repeating S.B. 10—should be given to the localities so they can appropriately gauge
the social costs of their release conditions.81

As Professor Yang demonstrates in her important study of the social costs
of pretrial detention systems, courts should take account not just of the level of
risk—that is, the chance of social harm—but also the magnitude of the potential
harm. Some restrictions on liberty might have a high personal cost that outweighs
the small benefit of the restrictions.82 For instance, the decline in total social welfare
from an individual missing her misdemeanor hearing may not justify the high
personal cost83 that would result from her detainment pretrial or from an extreme
restriction like house arrest. Even a high risk of nonappearance in such a case ought
to be weighed against the relatively small magnitude of harm. The Council should
more specifically require Pretrial Assessment Services to include in writing why
particular conditions, instead of lesser ones, are recommended or imposed, and to
show that the release conditions are tailored to the individual person as required

81 See Yang, supra note 8, at 1438–39.
82 Id. at 1424 (finding that detained defendants are substantially less likely
to be employed in the formal labor market and less likely to have household income
for up to four years after the bail hearing).
83 See id. (“In particular, the negative collateral consequences of pre-trail
detention on formal sector attachment are the largest for defendants who had the
strongest ties to the labor market prior to arrest and for defendants charged with
misdemeanors . . . .”).
under Rule 4.40(c)(2)\textsuperscript{84} and are the least restrictive ones necessary, taking account of both the \textit{risk} of harm and the \textit{magnitude} of the potential harm.\textsuperscript{85}

In sum, the language in both Rule 4.10 and 4.40 needs more specificity. More examples should be provided to impose clearer regulations on lower courts as they come up with their rules. The vagueness of the Rules in general, along with the pronounced lack of enforcement mechanisms, gives local courts too broad a range of discretion, and will inevitably lead to major disparities between jurisdictions and overall ineffectiveness of the proposed measures.

V. THE COUNCIL SHOULD CONSIDER MODIFYING THE REPORTING MECHANISMS IN RULE 4.40(e)(2)

The mandated annual reporting to the Judicial Council required by Rule 4.40(e)(2) is an important element for monitoring enforcement of S.B. 10. We propose that the Council consider two slight modifications to the Rule designed to make these reports more effective. The Council should consider lessening the burden of reporting for jurisdictions that are meeting or exceeding the legislative goal of maximizing the release of defendants with reasonable conditions pretrial, and the Council should require by Rule that the annual reports (and preliminary reports, were our suggestions above adopted) be made publicly available, including by easy-to-access online portals.

One potential concern is that courts may view their reporting duty as excessively burdensome, disincentivizing them from producing comprehensive reports. A potential safeguard and incentive system might require the full report as described in the current Rule every other year with merely a statistical report of pretrial detention (how many people were arrested; how many classified as low, medium, and high risk; how many were then detained, etc.) annually or semi-annually. If, however, based on the statistics, a county is experiencing unusually high rates of incarceration compared to similarly situated counties, the rules should

\textsuperscript{84} Rule 4.40(c)(2).

\textsuperscript{85} Rule 4.40(c)(6).
require a more frequent full report on the design of the local rule, the use and expectations of the locally chosen risk assessment tool, an explanation for disproportionate rates of incarceration, and an explanation of the steps the county is taking to remedy any problems the report turns up. This, in combination with the suggested preliminary report as described earlier, will allow for greater accountability and a closer monitoring of the local courts.

Furthermore, these reports should be made available to the public. Especially where the system is relying increasingly on technology, transparency is critical. The Council should impose a publicity requirement for these reports, and specify where the reports will be found and when they will be made public.

CONCLUSION

The proposed Rules show the Council’s commendable aim to guide local jurisdictions towards a knowledgeable implementation of risk assessment tools with due regard for the potential limits and biases of such tools. If these laudable goals are not to become a dead letter, we urge the Council to take further steps to clarify its requirements; provide specific, detailed examples for pretrial decision makers; disaggregate the potential risks being guarded against at the outset; require courts to take account of high social costs of pretrial incarceration; and give teeth to its admonitions by requiring courts to articulate the reasoning behind their systems upfront and make all reports publicly available and accessible online. To the two questions posed by the Council, we answer that information gathered in the risk assessment process should not be used in subsequent proceedings, and uncharged arrests should not be considered relevant to a defendant’s criminal history.

We thank the Council for their invitation to comment and for their careful consideration of our remarks. If you have any additional questions, please contact Professor Kellen Funk at krf2138@columbia.edu.
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