

Mental Health America of California Supports Proposition 25 California's Pretrial System Needs to Strive Towards Equity Executive Summary

Introduction

A fair and just pretrial release and detention system recognizes the presumption of innocence, facilitates due process, and serves to advance public safety for all. This is the fundamental premise underlying Proposition 25 on California's Ballot in 2020 as it seeks approval to eliminate the monetary bail system which unfairly discriminates against people with mental illness and exacerbates socioeconomic and racial bias. Instead it would establish a risk-based system for pretrial release and detention.

The Pretrial Phase: Release or Detain?

The pretrial phase begins with arrest and covers the period from when a person is cited and released or booked into jail, to the period when he or she is charged in a criminal complaint through to dismissal, a plea or trial. During this phase, an arrestee may be released pending the outcome of their plea or trial, or held in custody in the county jail (pretrial detention). Law enforcement officers, pretrial service officers, and judges have some discretion and can make decisions to release or detain arrested individuals. If a person is detained, the court has broad discretion in setting bail amounts for California lacks a statewide bail amount schedule.

Why Change Our Current System?

California's existing pretrial release and detention system bases a person's liberty on an out-of-date monetary bail system that relies on financial status rather than risk to public safety. It disproportionately affects those with mental illness and substance use disorders. It also exacerbates socioeconomic and racial disparities.

- A disproportionately high number of arrestees have trauma, existing mental health needs, and/or substance use disorder needs. These individuals, many charged with misdemeanors and non-violent crimes, often stay in jail for longer periods of time, and receive limited health care treatment.
- People of color are disproportionately represented among the pretrial population, and have a lower pretrial release rate when compared with whites (after statistically adjusting for differences in offense characteristics and booking status).
- Bail agents charge a 10 percent nonrefundable fee on the bail amount, even if the defendant appears at court dates and/or is acquitted, or their charges are dropped. This significant financial burden can have long standing negative consequences even when the individual is found not guilty.
- Time spent in jail awaiting trial, even for a short duration, has serious deleterious effects. In the short-term, employment is jeopardized and often lost, family

relationships are disrupted including the custody of children, housing may be lost, education is disrupted, needed medications are likely not accessible. Many low-income defendants who cannot pay bail are pushed to plead guilty for low-level offenses that result in fines and/or less than a year in jail.

- Pretrial detention also has an adverse impact on the adjudication of a case.
 - Defendants in pretrial detention face a greater likelihood of incarceration and receive longer prison sentences than pretrial released defendants with similar changes and a similar criminal history.
 - Low-risk defendants who are detained for the entire pretrial period are more than 5 times more likely to be sentenced to jail and almost 4 time more likely to be sentenced to prison when compared to similar defendants who are released at some point before trial or case disposition.

What Will Proposition 25 Achieve?

First, Proposition 25 will eliminate monetary bail. A defendant's financial resources will no longer determine pretrial release or detention. Instead, the Proposition establishes statewide Pretrial Assessment Services (PAS). A defendant can be detained pretrial if there is strong evidence that no conditions of release can reasonably assure public safety and the defendant's return to court. This determination would be based on risk assessment rather than the financial resources of the individual. Proposition 25 provides a strong, transparent and accountable framework. Most defendants with misdemeanor charges would be booked and released. These defendants would be released on their own recognizance, or supervised own recognizance, with the least restrictive nonmonetary conditions that will reasonably assure public safety and the defendant's return to court. They would not be unjustly detained, or cornered into a monetary bail system.

Pretrial detention would be more accurately and reliably utilized for defendants to which it applies—a risk to public safety and/or strong likelihood to not return to court. Proposition 25 offers a more informed and transparent process for making these determinations. It also provides for the prevention detention hearing in which new information can be aired to determine if release, in lieu of detention, can be accomplished.

Recommendation

Mental Health America of California recommends Support of Proposition 25 to achieve greater equity in our justice system for people with mental illness, low income individuals and persons of color.

More detailed information is provided in the following paper.

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Introduction

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Proposition 25 is a referendum on Senate Bill 10, Statutes of 2018. This legislation emerged from long-standing debates on pretrial release and detention, and recommendations from the Pretrial Detention Reform Workgroup, convened by the Supreme Court of California in 2016.¹ Though signed into law and to become effective as of October 1, 2019, the law was sidelined after a challenge by the bail industry. Therefore, the outcome of the November 2020 election will decide its fate.

The Pretrial Phase: Release or Detain?

The pretrial phase begins with arrest and covers the period from when a person is cited and released or booked into jail, to the period when he or she is charged in a criminal complaint through to dismissal, a plea or trial. During this phase, an arrestee may be released pending the outcome of their plea or trial, or held in custody in the county jail (pretrial detention).

Law enforcement officers, pretrial service officers, and judges have certain discretion and can make decisions to release or detain arrested individuals. There are three types of pretrial release from custody under California law:²

- Release on one's own recognizance in which the arrestee vows to appear for court hearings and meet any specified conditions ordered by the court;
- Release on bail, which requires a monetary transaction and may include specified conditions ordered by the court; and
- Supervised release, in which the arrestee is released under supervision of a pretrial services program and vows to meet any specified conditions ordered by the court.

Pretrial release may be obtained at several stages of the legal process, including at arrest (cite and release), jail booking, arraignment, and into pretrial detention. These pretrial phase

¹ Judicial Council of California, Pretrial Detention Reform Workgroup, Pretrial Detention Reform: Recommendations to the Chief Justice, October 2017. Available at: <https://www.courts.ca.gov/documents/PDRReport-20171023.pdf>

² See page 28, *ibid.*

decisions should be based primarily on whether the arrestee is a threat to public safety, and secondarily, on whether they will appear in court to face their charges.³

If an arrestee remains in custody, the court must make a decision regarding release at arraignment, which is the person's first appearance in court. California law requires that arraignment occur no more than 48 hours after arrest, excluding Sunday's and holidays. At arraignment, and for duration of pretrial detention, the court may set or adjust the bail amount within legal limits, or release bail-eligible individuals on their own recognizance (non-financial). If the judge does not grant release, the arrestee is returned to custody and retains the right to post monetary bail. If the arrestee does not bail out before arraignment, the judge sets the bail amount in a court order.

The court has broad discretion in setting bail amounts for California lacks a statewide bail amount schedule⁴. As such, judges create bail amount schedules in each of California's 58 counties which has resulted in widely varying bail amounts for the same crimes. For example, the bail amount for assault with a fire arm is \$50,000 in San Diego County, and \$75,000 in Alpine County in 2020, a staggering difference of \$25,000.

Pretrial detention often occurs for one of the following reasons.⁵

- A court believes the arrestee poses an unmanageable risk to public safety, or is otherwise a flight risk;
- The arrestee does not have funds available to post the bail set by the court;
- The arrestee is ineligible for release based on the charged offense⁶; and
- A separate hold has been placed on the arrestee due to an unrelated charge.

Pretrial detention is prevalent in California. Based upon available data, only about half of misdemeanor arrests and roughly one-third of lower-level felony arrests obtain pretrial release within a few days of arrest.⁷ As of March 2020, approximately *two-thirds* (66 percent) of California's average daily jail population, or about 47,000 individuals, are pretrial detainees (non-sentenced), including individuals who are ineligible for release.⁸ Further, people of color are

³ Public Policy Institute of California, *Reforming Pretrial Justice in California*, August, 2020.

⁴ A bail schedule is a list of criminal charges and aggravating circumstances that are associated with a bail amount. See California Penal Code, Section 1269b(f). Also see, UCLA, Luskin School of Public Affairs, *Bail Reform in California*, May 2017, page 24.

⁵ Judicial Council of California, *Pretrial Detention Reform Workgroup, Pretrial Detention Reform: Recommendations to the Chief Justice*, October 2017. See page 24.

⁶ The California Constitution in article 1, section 12, provides that all defendants are eligible for bail except for those listed.

⁷ Public Policy Institute of California, *Pretrial Release in California*, May 2017. Analysis is based upon available data that examined 11 counties from 2011 to 2015.

⁸ Board of State Community Corrections, *Jail Population Trends, Sentenced and Non-Sentenced Column*. Reflects data as of March, 2020. Available at <https://public.tableau.com/profile/kstevens#!/vizhome/ACJROctober2013>

disproportionately represented among the pretrial population, and have a lower pretrial release rate when compared with whites (after statistically adjusting for differences in offense characteristics and booking status).⁹ Clearly the overuse of pretrial detention diminishes the presumption of innocence which is a core tenant of the American legal system.

What is Broken?

California's existing pretrial release and detention system bases a person's liberty on an out-of-date monetary bail system that relies on financial status rather than risk to public safety, and exacerbates socioeconomic disparities and racial bias.¹⁰ This key finding of the Pretrial Detention Reform Workgroup is illustrative of the need to make change now.

Extensive research and peer-reviewed studies have chronicled the negative attributes of the money bail system, as well as the severe consequences of pretrial detention.¹¹ Foremost within this discussion is the core aspect that defendants should be released under the least restrictive conditions to sufficiently assure public safety and their court appearance.¹² However, it is clearly evident this is not occurring.

States, including California, have increased reliance on the use of commercial surety bail bonds while reducing the use of personal recognizance releases.¹³ California's large urban counties rely on pretrial detention to a considerably larger extent than large urban counties elsewhere in the United States.¹⁴ Though exact data is not available, research indicates that many thousands of individuals being detained are otherwise eligible for release, including many low-risk defendants.¹⁵

California's bail amount schedules are among the highest in the nation. Based on an analysis, the median bail amount in California (\$50,000) is more than five times the median amount in the country (\$10,000).¹⁶ Further, several studies have shown that people of color are assigned greater bail levels than whites accused of similar offenses.¹⁷

⁹ Public Policy Institute of California, *Pretrial Release in California*, May 2017.

¹⁰ This is a key conclusion of the Pretrial Detention Reform Workgroup. See executive summary.

¹¹ See for example: (1) Williams, Marian, *The Effects of Pretrial Detention on Imprisonment Decisions*, *Criminal Justice Review*, 2003 28 (2), pages 299-316; (2) Sacks, Meghan and Alissa Ackerman, *Pretrial detention and guilty pleas—if they cannot afford bail they must be guilty*, *Criminal Justice Studies*, 2012 25(3), pages 265-278; (3) UCLA, *Luskin School of Public Affairs, Bail Reform in California*, May 2017; (4) Public Policy Institute of California, *Reforming Pretrial Justice in California*, August 2020; (5) *Color of Change, Selling Off Our Freedom*, May 2017; and (6) Jones, Cynthia, *Give Us Free: Addressing Racial Disparities in Bail Determinations*, 2013.

¹² American Bar Association, *Standards for Criminal Justice—Pretrial Release*, 2007. See Part I, General Principles, Standard 10-1.2.

¹³ Judicial Council of California, *Pretrial Detention Reform Workgroup, Pretrial Detention Reform: Recommendations to the Chief Justice*, October 2017.

¹⁴ Public Policy Institute of California, *Pretrial Detention and Jail Capacity in California*, July 2015.

¹⁵ Public Policy Institute of California, *Pretrial Release in California*, May 2017.

¹⁶ Public Policy Institute of California, *Pretrial Detention and Jail Capacity in California*, July 2015.

¹⁷ See for example: (1) Bushway, Shawn D., and Jonah B. Gelbach, *Testing for Racial Discrimination in Bail Setting Using Nonparametric Estimation of a Parametric Model*, August 2011; and (2) Sacks, Meghan, Vincenzo

The vast majority of defendants in California who are released on bail use commercial bail bonds to secure their release. Commercial bail bonds are issued and underwritten by licensed bail agents who serve as representatives of licensed surety insurance companies (sureties). Bail agents are not required to take all inquiries, and often base their selection of clients on financial status, as well as their own internal guidelines.

These internal guidelines can often rely on racial stereotypes and biases in determining who may be dangerous or a potential flight risk.¹⁸ For example, research studies have consistently identified that Black defendants receive significantly harsher bail amounts than those imposed on other defendants. The problem is pervasive.¹⁹

Bail agents charge a defendant a non-refundable fee, usually 10 percent of the value of the bond. These non-refundable fees have increased considerably over the last two decades, as the average bail amount has increased.²⁰ For example, a \$75,000 bond as required in Alpine County for possible assault with a fire arm, would likely require a non-refundable fee of \$7,500 for the defendant. Some bail bond agencies use a credit method, whereby the defendant pays a portion of the non-refundable fee, and then pays regular installments—plus interest—until this fee is paid. Further, some bail agents may also require collateral property to secure the arrangement.

The financial demands to acquire release for future court proceedings for defendants eligible for release, is often a significant hardship and adds to impoverishment. The bail agents and bail bond agencies use financial contracts and terms to their advantage in leveraging payment from pretrial detainees.

On the other hand, release on monetary bail can cause public safety concerns for it allows, with certain limitations, potentially high-risk defendant's a way to be achieve pretrial release if they have the financial means. According to a recent study, among those who were released pretrial, release on monetary bail was secured by:²¹

- 86 percent of those booked on sexual offenses;
- 76.3 percent of those booked on serious offenses;
- 68.3 percent of those booked on domestic violence offenses; and

A. Sainato and Alissa R. Ackerman, Sentenced to Pretrial Detention: A Study of Bail Decisions and Outcomes, *American Journal on Criminal Justice*, volume 40, 661, August 2014.

¹⁸ Jones, Cynthia, Give Us Free: Addressing Racial Disparities in Bail Determinations, 2013. See page 943.

¹⁹ For example, see: (1) *Ibid*, see page 939, and (2) Arnold, David, Will Dobbie, and Crystal S. Yang, Racial Bias in Bail Decisions, May 2018.

²⁰ Judicial Council of California, Pretrial Detention Reform Workgroup, Pretrial Detention Reform: Recommendations to the Chief Justice, October 2017.

²¹ Public Policy Institute of California, Pretrial Release in California, May 2017. This study examined 11 California counties from 201 to 2015.

- 68.1 percent of those booked on violent offenses.

No statewide data measure the effectiveness of bail bond agencies' services.²² Public data on court appearances and failure-to-appear numbers on defendants they insure is not required to be report by bail agents. According to the California Department of Insurance (CDI), who licenses bail agents, there are about 3,200 licensed bail agents, about 155 bail agencies, and 17 sureties operating in California.²³ Many bail agents have appointments with multiple sureties.

Bail agents working for 13 of the 17 sureties collected more than \$308.2 million in non-refundable fees collected from defendants, based on data from the CDI.²⁴ Further, this data also reflects that sureties received more than \$87.2 million from bail agents and agencies during this same sample period. The national bail bond industry is a \$2 billion industry, with California generating about 25 percent of this amount. The for-profit bail industry, a global anomaly used only in the United States and the Philippines, financially profits with minimal transparency.²⁵

Pretrial detention is not only prevalent in California, it usually permanently damages lives, particularly individuals with lower-incomes. First, based on a 2015 analysis, most people unable to pay bail fall within the poorest third of society, and 80 percent fall within the bottom half of society with respect to poverty.²⁶ Further, it was determined that the typical Black man, Black woman, and Hispanic woman detained for failure to pay bail were living below the poverty line before incarceration. Second, a disproportionately high number of arrestees have trauma, existing mental health needs, and/or substance use disorder needs. These individuals, many charged with misdemeanors and non-violent crimes, often stay in jail for longer periods of time, and receive limited health care treatment.²⁷

Time spent in jail awaiting trial, even for a short duration such as less than two-days, has serious deleterious effects.²⁸ In the short-term, employment is jeopardized and often lost, family relationships are disrupted, including affecting the custody of children, housing may be lost, education is disrupted, needed medications are likely not accessible, and the physical and health risks of being in a county jail are all at the forefront, just to name a few of the disruptions and

²² Ibid, see page 36.

²³ California Department of Insurance, An Exploration of California's Bail System, January 31, 2017.

²⁴ Judicial Council of California, Pretrial Detention Reform Workgroup, Pretrial Detention Reform: Recommendations to the Chief Justice, October 2017. See pages 36 to 37.

²⁵ See for example: (1) Color of Change, Selling Off Our Freedom: How Insurance Corporations Have Taken Over Our Bail System, May 2017; (2) Prison Policy Initiative, Detaining the Poor, May 2016; and (3) Judicial Council of California, Pretrial Detention Reform Workgroup, Pretrial Detention Reform: Recommendations to the Chief Justice, October 2017.

²⁶ Prison Policy Initiative, Detaining the Poor, May 2016. See page 2.

²⁷ Vera Institute of Justice, Incarceration's Front Door: The Misuse of Jails in American, July 29, 2015; and also Vera Institute of Justice, Los Angeles County Jail Overcrowding Reduction Project, 2011.

²⁸ See for example: (1) Holsinger, Alexander and Kristi Holsinger, Analyzing Bond Supervision Survey Data: The Effects of Pretrial Detention on Self-Reported Outcomes, Federal Probation, volume 82, number 2, September 2018; (2) Jones, Cynthia, Give Us Free: Addressing Racial Disparities in Bail Determinations, 2013; and (3) Arnold Foundation, Investigating the impact of Pretrial Detention on Sentencing Outcomes, November 2013.

difficulties. A particularly heinous outcome is that many low-income defendants who cannot pay bail are pushed to plead guilty for low-level offenses that result in fines and/or less than a year in jail.

Pretrial detention also has an adverse impact on the adjudication of a case. The following references highlight this aspect²⁹:

- 78 percent of pretrial detained defendants are eventually convicted, but just 60 percent of pretrial released defendants are eventually convicted;
- Defendants in pretrial detention are more likely to plead guilty, and tend to receive worse plea offers from prosecutors than released defendants;
- Defendants in pretrial detention face a greater likelihood of incarceration and receive longer prison sentences than pretrial released defendants with similar charges and a similar criminal history; and
- Low-risk defendants who are detained for the entire pretrial period are 5.41 times more likely to be sentenced to jail and 3.76 times more likely to be sentenced to prison when compared to low-risk defendants who are released at some point before trial or case disposition.³⁰

Research and extensive studies have shown the biased and unjust consequences of this existing system. Pretrial detainees are subject to punishment by being detained, even though they are supposed to be presumed innocent until full due process and legal outcomes are completed.

The existing pretrial release and detention process lacks transparency and consistency. Those who make pretrial release and detention decisions can prioritize information differently, rely on internal judgements, and rarely need to reflect on or explain their decisions. Pretrial detention inherently discriminates against lower-income individuals who cannot pay bail. Reliance on a monetary bail system compromises the entire pretrial process.

Key Changes through Proposition 25—Use of Pretrial Assessment Services

First, Proposition 25 will eliminate monetary bail. A defendant's financial resources will no longer determine pretrial release or detention.

Instead, the Proposition establishes statewide Pretrial Assessment Services (PAS). Every trial court (one in 58 counties) would have a PAS division to determine which defendants receive pretrial release or detention. Though most counties have components of pretrial assessment services now, approaches vary and are not consistent. Proposition 25 would ensure consistency of approach, as well as program services.

²⁹ Jones, Cynthia, Give Us Free: Addressing Racial Disparities in Bail Determinations, 2013;

³⁰ Arnold Foundation, Investigating the Impact of Pretrial Detention on Sentencing Outcomes, November 2013.

As designed, substantially fewer defendants would experience pretrial detention. For most misdemeanor charges, arrestees would generally be booked and released without being jailed.³¹ This release would occur prior to arraignment and without court review. These defendants would be released on their own recognizance, or supervised own recognizance, with the least restrictive nonmonetary conditions that will reasonably assure public safety and the defendant's return to court.

Being released from custody provides the defendant with the ability to better prepare for their defense, and to continue with their personal lives at home and work. Further, the financial weight of monetary bail is not hoisted upon their shoulders in order to obtain release.

Pretrial detention will primarily apply to defendants charged regarding four specified serious misdemeanors, and for those arrested for felonies.³² The PAS pre-arraignment review process focuses on these defendants. A defendant can be detained pretrial if there is strong evidence that no conditions of release can reasonably assure public safety and the defendant's return to court.

The pre-arraignment review must be conducted within 24-hours of booking and includes the following³³:

- Determine risk levels of defendant —low, medium or high;
- Assemble additional information related to the defendant's risk;
- Prepare pretrial release or detention recommendation based on the assessed combined risk level and analysis; and
- Offer specified conditions for pretrial release where relevant.

PAS recommendations are based on the following six factors regarding the defendant:

- Risk level/score according to a risk assessment tool (low, medium, or high);
- Criminal charge;
- Criminal history;
- Any missed court appearances within the last three years;

³¹ There are certain specified circumstances in which an arrestee is not eligible for release prior to proceeding through PAS.

³² There are four serious misdemeanors in which arrestees will be required to proceed through PAS. These are: (1) Corporal injury on a spouse or cohabitant; (2) Domestic battery; (3) Stalking; and (4) Violation of protective order.

³³ There are some defendants who are not entitled to prearrangement reviews. This includes defendants who meet certain specified circumstances as contained in California's Penal Code, such as high risk assessment by PAS and other aspects that may impose significant harm or significant risk to public safety.

- Any supplemental information regarding risk to public safety; and
- Potential risk of failing to appear at court appearances.

Judges use information in the PAS report and PAS recommendation, along with their discretion, to release or detain individuals who are screened under PAS. With respect to defendants who are not released, they may be able to offer evidence for release at a subsequent preventive detention hearing. The preventive detention hearing is like a replacement for a bail hearing. It occurs in front of a judge at arraignment, or within three days of the arraignment (intended to facilitate due process).

At a preventive detention hearing the defendant has the right to attorney representation, and victims are afforded a reasonable opportunity to be heard (in person or in writing) as well. For the court to detain a defendant, it has to find clear evidence that there is no reasonable avenue to assure public safety and that the defendant will make their court appearances. If the defendant is released, the court informs them of the conditions for their release and the legal penalties if they are violated (such as an arrest warrant).

It should be noted that a preventive detention hearing can be reopened by the court if new information, such as new evidence or facts, or material changes in circumstance, has surfaced. This assists in ensuring that defendants receive equitable due process.³⁴

As noted above, one of the tools used within PAS pre-arraignment review is a pretrial risk assessment instrument. The use of these has been in operation for decades and changes in them have evolved over the years. Today there are as many as 60 pretrial risk assessment instruments in use throughout the United States. Different instruments have been used with success in different jurisdictions. Research has generally identified common factors as useful indicators of danger to community and predictors of court appearances, including the following³⁵:

- Current Charges;
- Outstanding warrants at time of arrest;
- Pending charges at time of arrest;
- Active community supervision at time of arrest;
- History of criminal convictions;
- History of failure to appear;
- History of violence;

³⁴ For a more detailed step-by-step flow chart of the pre-arraignment and arraignment stages, please go to: <https://www.courts.ca.gov/pretrial.htm>

³⁵ Center for Court Innovation, Demystifying Risk Assessment: Key Principles and Controversies, 2017.

- Residence stability over time;
- Employment stability;
- Community ties; and
- History of substance abuse.

Currently, there are six pretrial risk assessment instruments in use in 49 counties throughout California, with the Virginia Pretrial Risk Assessment Instrument and the Ohio Risk Assessment System being the two most widely used (17 counties use each of these tools).³⁶ A growing body of research indicates that pretrial risk assessment instruments produce more accurate estimates of risk for future crime, when compared with professional judgement alone.³⁷

Proposition 25 would mandate the use of PAS, including the use of pretrial risk assessment instruments. There are several operational aspects that are important to note. First, the outcomes from the pretrial risk assessment instrument are important, but are not the sole determining factor at pre-arraignment review, at arraignment, or in a preventive detention hearing. The judge utilizes their judgement, along with the instrument and other supplemental information brought forward, including that of the defense.

Second, Senate Bill 36, Statutes of 2019, requires each PAS entity to validate their pretrial risk assessment instrument by January 1, 2021, and on a regular basis thereafter, but no less than once every three years. As part of the validation process, specific information, along with the validation studies must be made publicly available. Among other things, this public information is to include the scoring and weighting of the variables used within the tool, how each variable is scored for assessment, and tabulated outcomes regarding the validation studies.³⁸

Further, the Judicial Council of California³⁹ is required to maintain a list of PAS entities who have, or have not, satisfied the validation requirement, and to provide annual reporting data related to outcomes and potential biases within the instrument and processes used. All of this information is to be public.

As the policymaking body of the California Courts, the Judicial Council of California typically adopts “rules of the court” to provide structure, guidance, and consistency on the administration of California’s courts. As noted within the Judicial Council of California, Pretrial Detention Reform Workgroup recommendations, the Judicial Council should establish mandatory

³⁶ Judicial Council of California, Pretrial Detention Reform Workgroup, Pretrial Detention Reform: Recommendations to the Chief Justice, October 2017. See Appendix G.

³⁷ Center for Court Innovation, Demystifying Risk Assessment: Key Principles and Controversies, 2017.

³⁸ See SB 36, Statutes of 2019.

³⁹ The Judiciary Council of California is the policymaking body of the California Courts. Under the leadership of the Chief Justice of the California Supreme Court and in accordance with the California Constitution, the council is responsible for ensuring the consistent, independent, impartial, and accessible administration of justice within the State.

guidelines for administering pretrial risk assessment instruments, ongoing training for the judicial branch, and providing overall supervision services. It is highly anticipated that these actions will be taken if Proposition 25 is approved by voters.

It is imperative to have a quality assurance process in place to ensure that the pretrial risk assessment instruments are thoroughly validated, being scored properly, and that clear policies and procedures are used and monitored in their operation. Training of all involved, including judges, is also critical.

Racial inequity in the use of pretrial risk assessment instruments is of paramount concern.⁴⁰ For example, ProPublica found in one pretrial risk assessment instrument—COMPAS- racial-bias.⁴¹ A key reason was the difference in the frequency with which blacks and whites were charged with new crimes (since past criminal history is a component of the instrument). Racial injustice, particularly within the criminal justice system, is institutional and needs to vastly be changed. Disparity often begins at arrest and permeates through the criminal justice system. Many aspects within this system need to be changed, and diligence on making changes needs to be done with transparency, monitoring, and openness to reassess effectiveness. Proposition 25 offers changes to move forward in the endeavor to seek and obtain justice.

The pretrial risk assessment instrument presents opportunities for substantially increased transparency and consistency in the pretrial release and detention system. Analyzing information across California, making it public, requiring regular validation of instruments and reporting by the Judiciary Council of California make it possible to evaluate if detention decision are accurate and equitable.

Thoughts and Considerations

California's current system with its reliance on monetary bail is not working, and many analyzes articulate this fact, including the following summary points:

- Rates of pretrial release are low compared to the national average, yet rates of pretrial misconduct are generally greater;⁴²
- Approximately *two-thirds* (66 percent) of California's average daily jail population, or about 47,000 individuals, are pretrial detainees (non-sentenced), including individuals who are ineligible for release.⁴³

⁴⁰ See for example: (1) Public Policy Institute of California, Pretrial Release in California, December 2019; (2) Public Policy Institute of California, Reforming Pretrial Justice in California, August 2020; and (3) Center for Court Innovation, Demystifying Risk Assessment, 2017..

⁴¹ Angwin, Julia, Jeff Larson, Surya Maitu, and Lauren Kirchner, Machine Bias, ProPublica, May 23, 2016.

⁴² Public Policy Institute of California, Pretrial Release in California, May 2017.

⁴³ Board of State Community Corrections, Jail Population Trends, Sentenced and Non-Sentenced Column. Reflects data as of March, 2020. Available at

<https://public.tableau.com/profile/kstevens#!/vizhome/ACJROctober2013>

- People of color are disproportionately represented among the pretrial population, and have a lower pretrial release rate when compared with whites (after statistically adjusting for differences in offense characteristics and booking status).⁴⁴
- Low-income people and people of color suffer significant consequences associated with being detained pretrial, often because they cannot afford bail. A disproportionately high number of arrestees have trauma, existing mental health needs, and/or substance use disorder needs. These individuals, many charged with misdemeanors and non-violent crimes, often stay in jail for longer periods of time, and receive limited health care treatment
- Bail agents charge a 10 percent nonrefundable fee on the bail amount, even if the defendant appears at court dates and/or is acquitted, or their charges are dropped. Yet, bail agents acquire release for nearly half of the most dangerous defendants with little to no meaningful supervision.⁴⁵
- No statewide data measure the effectiveness of bail bond agencies' services.⁴⁶ Public data on court appearances and failure-to-appear numbers on defendants they insure is not required to be report by bail agents.⁴⁷

By eliminating monetary bail in California, and establishing the PAS framework, along with validated pretrial risk assessment, Proposition 25 provides a strong, transparent and accountable framework. Most defendants with misdemeanor charges would be booked and released. This release would occur prior to arraignment and without court review. These defendants would be released on their own recognizance, or supervised own recognizance, with the least restrictive nonmonetary conditions that will reasonably assure public safety and the defendant's return to court. They would not be unjustly detained, or cornered into a monetary bail system.

Pretrial detention would be more accurately and reliably utilized for defendants to which it applies—a risk to public safety and/or strong likelihood to not return to court. Proposition 25 offers a more informed and transparent process for making these determinations. It also provides for the prevention detention hearing in which new information can be aired to determine if release, in lieu of detention, can be accomplished.

Proposition 25 can also serve as a focal point from which to build additional criminal justice reforms and even linkages with other county-focused services. For example, released defendants can be directed, where appropriate, to social services, Medi-Cal enrollment and services, and county behavioral health services, including mental health assistance and

⁴⁴ Public Policy Institute of California, Pretrial Release in California, May 2017.

⁴⁵ Arnold Foundation, Developing a national Model for Pretrial Risk Assessment, Research Summary, November 2013.

⁴⁶ Ibid, see page 36.

⁴⁷ Vera Institute of Justice, Incarceration's Front Door: The Misuse of Jails in American, July 29, 2015; and also Vera Institute of Justice, Los Angeles County Jail Overcrowding Reduction Project, 2011.

substance use disorder services. County jail diversion programs could be more extensively and effectively offered, where appropriate, for people to obtain renewed opportunities for positive change.

Proposition 25 can serve as a significant furtherance towards reforming California's justice system.