

## ***CALIFORNIA BAIL REFORM – VOTERS DECIDE PROPOSITION 25 & SB 10 CONTROVERSY***

California Senate Bill 10 (SB 10: Hertzberg – Pretrial release, or detention: pretrial services) was signed into law in 2018 by Governor Brown. SB 10 changed California’s money-based custody release system for defendants awaiting trial by eliminating cash bail or bail bonds with the presumption the defendant will be released under the least restrictive non-monetary conditions on their own recognizance. (See Figure 1)

Proposition 25 (Referendum on Law that Replaced Money Bail with System Based on Public Safety and Flight Risk) qualified for the November 3rd, 2020 ballot by voter signatures and stands to repeal SB 10’s efforts to replace the State’s cash bail system with pretrial risk assessments.

*A “yes” vote on Proposition 25 will allow SB 10 to go into effect, replacing the existing cash bail system with pretrial risk assessments. A “no” vote on Proposition 25 will repeal SB 10 in favor of*

*For information on registering to vote in California, including same-day registration, or to check to see if you are registered, please visit [registertovote.ca.gov](https://registertovote.ca.gov).*

*To find your polling place, please visit <https://rb.gy/i3hedj>.*

### **WHAT ARE YOU VOTING ON? Key Components of SB 10 and Prop 25**

If Proposition 25 passes and SB 10 becomes law, **cash bail and bail bonds will effectively be eliminated as detainees will be released under the least restrictive non-monetary conditions.** Pre-trial custody will be determined along the following lines:

- 1. All misdemeanor detainees released within 12 hours**, unless domestic violence, stalking, or other serious factors in play;
- Pretrial assessment agency conducts risk assessment for felony detainees;
- 3. Low risk felony detainees released on their own recognizance** within 24 hours, except in cases of domestic violence, multiple DUIs, or other serious factors;
- 4. Medium risk felony detainees released with the least restrictive supervision conditions** (e.g. check-in’s with pretrial supervision officers, GPS monitoring, drug testing, etc.) to ensure public safety and return to court;
- 5. High risk felony detainees held until court arraignment before judge (usually 48 hours) and released following arraignment unless prosecution makes a motion based on concerns** for violence, serious bodily injury, retaliation against a witness, etc. upon release or belief there is “substantial reason” that defendant will not return to court if released;
- If defendant fails to appear on their own recognizance or violates conditions of their pretrial supervision, the court may issue an arrest/bench warrant.

Figure 1



*the current procedure, which affords historical statutory judge oversight of the cash bail system for pretrial detainees.*

**HISTORY of the U.S. and CALIFORNIA PRE-TRIAL CASH BAIL SYSTEM**

In 1872, the U.S. Supreme Court cited English common law as the root explanation of the responsibilities of cash bail and sureties with a defendant charged with crime.<sup>1</sup> When presented with a defendant awaiting trial, a judge is granted the discretion to release them on their own recognizance, detain them until their trial without bail, or grant them release pending their ability to post bail with the agreement their funds will be returned once their trial is complete. This system is intended to encourage defendants to return to court.

If a defendant is unable to afford their bail, they may work with a commercial bail bonds firm and pay a portion of their bail, plus a premium to the firm for guaranteeing the remainder of their payment to the court in the event they do not attend their trial.

The United States’ use of cash bail and sureties as a way of ensuring a defendant will return for their trial is enshrined in the 8th Amendment of the U.S.

**SAMPLE BAIL SCHEDULES\***

Offense	Riverside County	San Bernardino County
Injury of a spouse, cohabitant	\$50,000 (+\$25,000 for priors)	\$50,000 (+\$50,000 for priors)
Firearm possession by prohibited person (e.g. felon)	\$10,000	\$50,000
Felony DUI	\$50,000	\$100,000

\* Bail is set on a case-by-case basis at the discretion of the presiding judge. These figures are examples of bail schedules for felony offenses in Riverside<sup>2</sup> and San Bernardino<sup>3</sup> counties and do not include enhancements and other considerations for multiple strikes, multiple counts, and other circumstances that can increase the guidelines that help inform judges’ decisions when determining bail.

Figure 2

Constitution, which prohibits bail that is excessive. While “bail schedules” (see Figure 2) provide general guidelines for the price bail that should be set based on the alleged crime committed, judges have broad discretion to decide the amount – including what constitutes “excessive” or denying bail entirely because they believe it will not aid in ensuring the accused will attend their court appearance. Judicial discretion in making bail decisions was later expanded to include

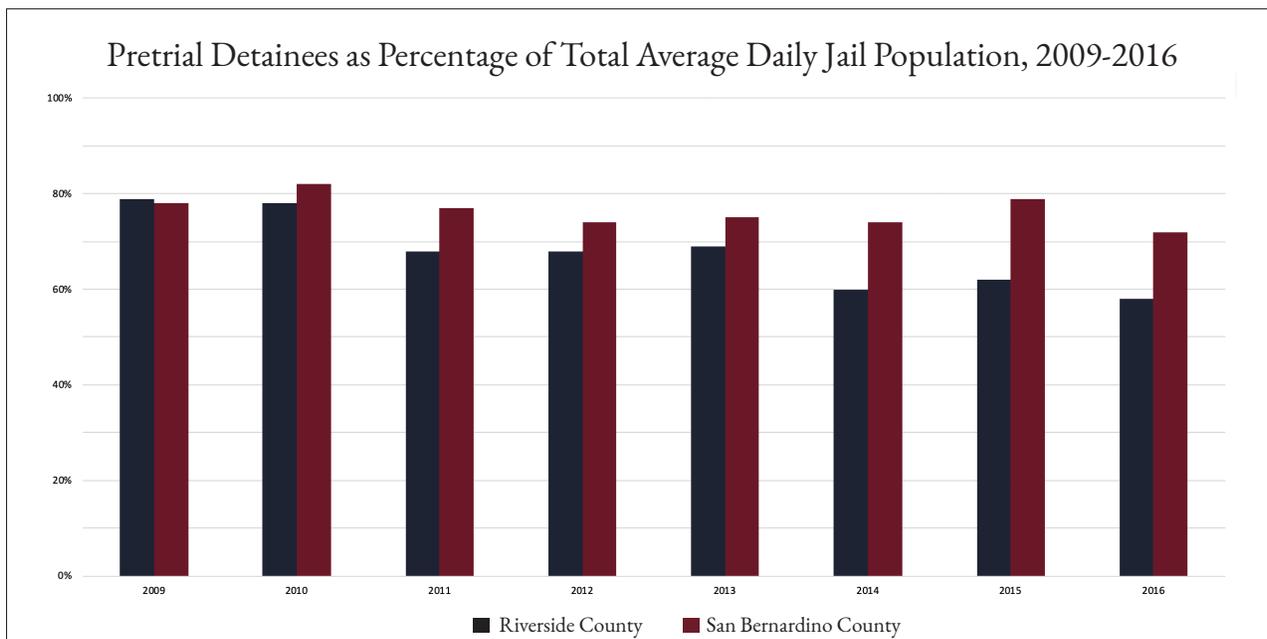


Figure 3 - Source: California Sentencing Institute

determinations of public safety.

Federal bail law remained unchanged until the middle of the 20th century with the Federal Bail Reform Act of 1966, which provided alternatives to traditional cash bail including release on recognizance with nonfinancial conditions, among other reforms. In 1984, this legislation was amended to add additional criterion for determining eligibility for pre-trial release, including the consideration of whether the defendant was dangerous to any specific person or the community at-large. Three years later, the United States Supreme Court upheld the legitimacy of this provision in *U.S. v. Salerno* (1987), noting perceived dangerousness is a “constitutional-ly valid purpose to limit pretrial freedom”.<sup>4</sup>

Though judges are empowered to use their discretion in applying these criteria and determining the defendant’s pretrial fate, federal and state bail laws generally require judges use the least restrictive conditions of release when considering the crime charged and personal factors.

These federal statutory bail criteria are used by most states, including California, and are included in the professional standards of many national organizations, including the American Bar Association, the National District Attorneys Association, and the National Association of Pretrial Services Agencies.

***The ROAD to CASH BAIL REFORM IN CA***  
Prop. 25 follows California’s 2011 enactment of AB 109 (Public Safety Realignment Act of 2011). This was a direct result of the U.S. Supreme Court *Brown v. Plata* decision holding the lack of medical and mental health care due to over prison overcrowding resulted in a 8th Amendment violation. At the time, the design capacity of the prisons was 85,000 inmates with approximately 156,000 inmates. Instead of releasing state inmates, AB 109 was passed realigning 46,000 state inmates to the 58

### PRETRIAL DETENTIONS in CALIFORNIA, 2011-2015

A study of 11 counties from 2011 to 2015 by the Public Policy Institute of California<sup>18</sup> provide a snapshot of pretrial detentions in California under the existing cash bail system. Notably:

1. 41.5% of detainees released pretrial
2. 50% of detainees booked on misdemeanors and 29.8% of detainees booked on felonies released pretrial
3. Bail is predominant for more serious offenses
4. Bail is more likely to be assessed for those with active warrants, holds, or supervision violations at booking.
5. 38% of Latinos and 33.7% of African Americans are granted pretrial release, compared with 48.9% of white and 54.6% of Asians. The comparison drops to less than 2% when accounting for differences in offense characteristics, booking state, and the month and county of booking. Additional research is needed to unpack demographic variation.

counties.<sup>5</sup> Transferring correctional responsibility of non-violent, non-sexual, non-serious offenders to the counties caused significant local jail overcrowding for sentenced inmates normally housed in state prison. A judge’s decision to detain a defendant without bail prior to trial only adds to the jail’s population, further exacerbating this issue (see Figure 3).

Moreover, other states have re-examined their bail practices in recent years. In March 2015, the Civil Rights Division of the U.S. Department of Justice found Ferguson, Missouri set revenue targets for criminal justice fines and fees – including those collected through their cash bail system. These fees were found to disproportionately impact racial minorities and poor citizens.

Under the leadership of the California Chief Justice, bail reform via court rules were changed. For

example, California Rule of Courts Rule 4.105 was implemented in June 2015, and prohibits the use of bail for traffic infractions except in extraordinary cases.

Following this change, a series of court cases were argued across the state that challenged the existing use of cash bail. Notably, California Supreme Court Chief Justice Cantil-Sakauye addressed the California State Legislature in March 2016, stating: “We must examine our bail system. In its current form, is it fair to all? Does it penalize poverty? Does it adequately serve its purpose?”<sup>6</sup>

With this momentum, Chief Justice Cantil-Sakauye, Governor Jerry Brown, Senator Hertzberg (D-Van Nuys), and Assemblymember Bonta (D-Oakland) issued a joint statement to reform California’s bail system to, “prioritize public safety and cost-efficiency.” Subsequently, SB 10, the California Money Bail Reform Act of 2017, was introduced. SB 10 prescribes pre-trial release be based on an algorithm assessment of risk to public safety and probability of missing a court date. Under this system, a defendant would not be detained because they were unable to pay cash bail.

### ***PERSPECTIVES on PROP 25***

If Proposition 25 is passed by voters, California will join New Jersey and Alaska to become the third state to do away with cash bail in favor of a risk assessment-based approach. Arguments for and against the referenda are presented below, alongside relevant empirical research where available.

**FOR:** Supporters of Prop 25 argue that too many pretrial detainees remain jailed solely because they cannot afford to post bail. Indeed, nearly 75% of those detained in America’s jails are awaiting trial, with their guilt yet to be proven.<sup>7</sup> Proposition 25 removes pretrial detention determinations based on wealth or poverty in favor of using risk-based

algorithm. They further argue that Proposition 25 removes socioeconomic barriers to release and the need for bail bondsman and bail schedules.

This argument is supported by data from the Bureau of Justice Statistics, which shows most of those who are unable to post bail fall within the poorest third of the population.<sup>8</sup> Moreover, of those unable to make bail, those who are black or Hispanic women (on average) live below the federal poverty line.<sup>9</sup>

**AGAINST:** Those who oppose Prop 25 highlight that algorithms are less reliable for individual-level analysis than group-level analysis and often perpetuate existing biases. Algorithms are built using existing data, so biases in the current system – along socioeconomic, racial, offense, or other lines – have the potential to be perpetuated. Indeed, civil rights organizations, like the American Civil Liberties Union, have argued against the use algorithm based risk assessments without additional reform to combat historical inequalities.

There is mixed evidence to support this argument.<sup>10</sup> Studies show prior convictions increase an individual’s score when using the most common risk assessments and because minority-group members are more likely to have prior convictions than whites, their scores are on average higher.<sup>11</sup> That said, the counterargument is that a minority defendant and white defendant both deemed to be medium risk using an algorithm risk assessment would be provided similar pretrial release conditions by a judge because their scores are the same.<sup>12</sup>

**FOR:** Supporters of Prop 25 note that those who cannot afford bail may be more likely to accept plea bargains to ensure their timely release, rather than fight their charges – even if they are innocent.

A study conducted in Philadelphia found that pretrial detention increased the likelihood of being convicted by 13%, which was largely explained by

defendants who accepted plea deals while detained and who would have otherwise been found innocent.<sup>13</sup> Supporters argue Prop 25 would remove this incentive and promote accurate convictions.

**AGAINST:** Those who oppose Prop 25 often argue the use of risk assessments to inform pretrial release is hollow reform and note that 49 of California’s 58 counties already incorporate a risk assessment tool when making pretrial detention decisions. They further contend that while there could be value in using an assessment tool, removing cash bail and releasing most defendants on their own recognizance takes away the incentive for defendants to appear for their day in court.

A recent study of a pretrial assessment and release supervision (PARS) program in Orange County, similar to what is proposed in SB 10, found there was not a significant increase in pretrial release rates. However, defendants who were released and provided supervision prior to their trial were significantly more likely to appear for their trial than those granted traditional cash bail release.<sup>14</sup> Together, these findings are mixed in suggesting Prop 25 may be a hollow reform if it does not lead to greater pretrial release, but also that defendants will be more likely to appear in court under Prop 25’s model.

**FOR:** Supporters of Prop 25 argue that pretrial detention unreasonably deprives defendants of the ability to earn an income while they are detained, which is doubly problematic for those who are not able to post bail due to preexisting financial hardship.<sup>15</sup>

In addition to a logical appeal, there is evidence to suggest that resource deprivation – including loss of income – can encourage future criminal behavior. Theoretically, it follows that detaining defendants due to their inability to afford bail might actually increase future criminality.<sup>16</sup>

**AGAINST:** Opponents of Prop 25 note the cost of SB 10 to the state. In addition to losing funds tied to cash bail that are forfeited when defendants fail to appear, there is also a cost associated with creating and maintaining a new “pretrial assessment services” agency that will contract with courts to conduct valid risk assessments. The cost to the state is estimated to be in the mid-hundred millions, with the potential for savings in the high tens of millions for counties.<sup>17</sup> While there is not a tax increase written into Prop 25, it is possible it could contribute to an increase if it contributes to budget deficit.

### ***WHAT TO DO on NOVEMBER 3rd?***

The information and arguments presented here capture the broad debate surrounding Proposition 25 and what evidence-based research tells us about the referendum’s potential promise and shortfalls. As a non-partisan center dedicated to producing empirical research to inform practice, we take no position on Proposition 25, but encourage additional research by voters on this and all issues on the ballot every election. Much as the Presley Center is dedicated to evidence-based practice, we are able to practice evidence-based voting by searching out information from a variety of sources and vetting our findings with a critical eye. ■

## CITATIONS

1. Taylor v. Tainter (1873).
2. Uniform Bail and Penalty Schedule County of Riverside. (n.d.). <https://www.riverside.courts.ca.gov/FormsFiling/StateBailSchedule/uniformbail.pdf?rev=09-15-2020-10:54:08pm>
3. Uniform Bail and Penalty Schedule County of San Bernardino. (n.d.). <https://www.sb-court.org/sites/default/files/Divisions/Criminal/Felony-Misdemeanor-Bail-Schedule.pdf>
4. U.S. v. Salerno (1897).
5. Brown v. Plata (2011).
6. State of the Judiciary March 2016. (n.d.). <https://www.courts.ca.gov/34477.htm>
7. Pretrial Detention. *Prison Policy Initiative*. [https://www.prisonpolicy.org/research/pretrial\\_detention/](https://www.prisonpolicy.org/research/pretrial_detention/)
8. Detaining the Poor: How money bail perpetuates an endless cycle of poverty and jail time. (n.d.). Prison Policy Initiative. <https://www.prisonpolicy.org/reports/incomejails.html>
9. Detaining the Poor: How money bail perpetuates an endless cycle of poverty and jail time. (n.d.). *Prison Policy Initiative*. <https://www.prisonpolicy.org/reports/incomejails.html>
10. Lowden, R. F. (2018). Risk Assessment Algorithms: The answer to an inequitable bail system? *North Carolina Journal of Law & Technology*, 19(4), 221-251.; Eckhouse, L., Lum, K., Conti-Cook, C., & Ciccolini, J. (2019). Layers of Bias: A unified approach for understanding problems with risk assessment. *Criminal Justice and Behavior*, 46(2), 185-209.; etc.
11. Julia Angwin, J. L. (2016, May 23). Machine Bias. <https://www.propublica.org/article/machine-bias-risk-assessments-in-criminal-sentencing>
12. Sam Corbett-Davies, E. P. (2019, April 18). A computer program used for bail and sentencing decisions was labeled biased against blacks. It's actually not that clear. <https://www.washingtonpost.com/news/monkey-cage/wp/2016/10/17/can-an-algorithm-be-racist-our-analysis-is-more-cautious-than-propublicas/>
13. Stevenson, M. T. (2018). Distortion of Justice: How the inability to pay bail affects case outcomes. *The Journal of Law, Economics, and Organization*, 34(4), 511-542.
14. Barno, M., Martinez, N. D., & Williams, K. R. (2020). Exploring Alternatives to Cash Bail: An evaluation of Orange County's pretrial assessment and release supervision (PARS) program. *American Journal of Criminal Justice*, 45(3), 363-378.
15. Detaining the Poor: How money bail perpetuates an endless cycle of poverty and jail time. (n.d.). *Prison Policy Initiative*. <https://www.prisonpolicy.org/reports/incomejails.html>
16. Hsieh, C., & Pugh, M. D. (1993). Poverty, Income Inequality, and Violent Crime: A meta-analysis of recent aggregate data studies. *Criminal Justice Review*, 18(2), 182-202.
17. Prop 25 Analysis: Official Voter Information Guide: California Secretary of State. (n.d.). <https://voterguide.sos.ca.gov/propositions/25/analysis.htm>
18. Harris, H. M., Goss, J., & Gumbs, A. (2019, December). Pretrial Risk Assessment in California. <https://www.ppic.org/wp-content/uploads/pretrial-risk-assessment-in-california.pdf>

## ON THE BALLOT, NOVEMBER 3rd Criminal Justice Reform

### **Proposition 17 – Voting Rights Restoration for Persons on Parole**

A 'yes' vote is in favor of a constitutional amendment to allow people on parole for felony convictions to vote.

A 'no' vote opposes this amendment and continues to prohibit people who are on parole for felony convictions from voting.

### **Proposition 20 – Criminal Sentencing, Parole, and DNA Collection**

A 'yes' vote supports adding crimes to the list of violent felonies for which early parole is restricted, categorizes certain types of theft and fraud as chargeable as felonies or misdemeanors, and requires DNA collection for some misdemeanors

A 'no' vote opposes adding crimes to the list of violent felonies with restricted early parole, categorizing certain types of theft and fraud, and collecting DNA for some misdemeanors

### **Proposition 25 – Replace Cash bail with Risk Assessments**

A 'yes' vote upholds contested legislation (SB 10) to replace cash bail with risk assessments for detained defendants awaiting trial.

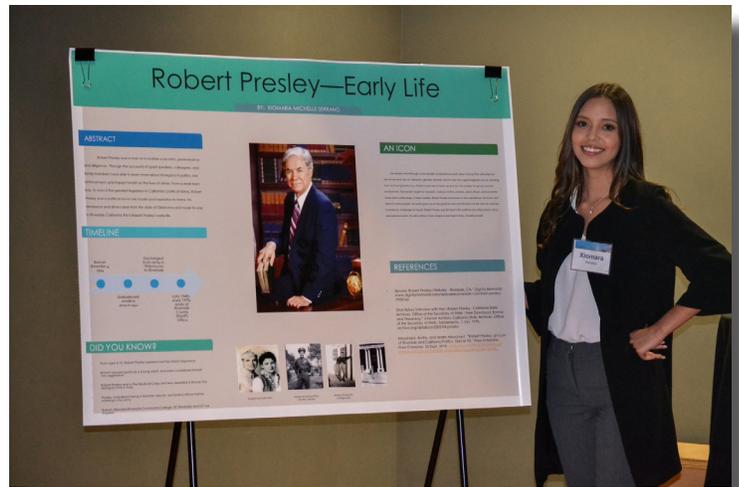
A 'no' vote repeals SB 10 and keeps the use of cash bail in place.



Help Train the Next Generation of

# CRIMINAL JUSTICE POLICY LEADERS & CHANGE MAKERS

The Presley Center is proud to support UCR students who are justice-impacted or passionate about a career in the criminal justice system by providing scholarships, paid internships, research fellowships, and other professional and educational development opportunities. We are committed to helping prepare UCR students – many of whom are first generation students and members of historically disenfranchised groups – for a seat at the table and ensure research is represented in future justice policy.



Visit [bit.ly/presley-scholarship-fund](https://bit.ly/presley-scholarship-fund)  
to learn more about your  
tax-deductible donation to the  
Robert Presley Scholarship Fund today!

**ROBERT PRESLEY CENTER  
OF CRIME AND JUSTICE STUDIES**

University of California, Riverside  
School of Public Policy  
Interdisciplinary North 4022  
900 University Avenue  
Riverside, CA 92521