

Bill Analysis 2018 Regular Session**SPONSOR:** Representative Monica Youngblood**SHORT TITLE:** Pretrial Risk Assessments for Bail

SYNOPSIS OF BILL: Establishes statewide standards for pretrial risk assessment instruments (RAI) used in pretrial hearings on release and detention. Requires RAI to be consistent with evidence-based standards and to be regularly reviewed to 1) predict risk of failure to appear and risk to public safety; 2) include testing for disparate impact and predictive bias across race, gender, and ethnicity; and 3) minimize disparate results.

STRENGTHS: A pretrial system that engages in the limited use of a risk assessment tool may pass constitutional muster and improve public safety outcomes. However, there are significant concerns that jurisdictions and reformers are embracing RAIs without careful scrutiny and in the absence of empirical evidence of reliability.

From an ethical and accuracy perspective, the use of RAIs in pretrial decision-making has the potential to amplify and perpetuate existing social inequalities. Most—if not all—RAIs ascribe higher degrees of risk to individuals with criminal histories (e.g., prior convictions, prior jail time), as well as those with mental health concerns and challenges regarding substance abuse. While acknowledging that it may be difficult to find data points that are not contaminated by racial bias, the data points relied upon in many existing RAI instruments—including age at first arrest or prior justice system involvement— represent particularly strong proxies for race. Due to well-documented and unwarranted disparities in all stages of the criminal justice system, people of color are much more likely to have criminal histories.¹

Though some jurisdictions have the infrastructure and resources necessary to collect comprehensive criminal justice data, many do not. According to the Bureau of Justice Statistics in 2010 it was not yet possible to assess the efficacy of a given pretrial intervention as compared to potential alternatives² and little has changed. Primarily due to cost, resource, and technology barriers³ many jurisdictions do not collect data on a range of risk-assessing factors. Absent thorough and methodologically-sound data collection and analysis regarding race, ethnicity, income, and age, it is impossible to assess and address disparities in a given jurisdiction.

ADDITIONAL INFO: The nonprofit Arnold Foundation's Public Safety Assessment (PSA) tool, which is now being used in Bernalillo County, is meant to help judges in their decisions by providing them with a risk score that is calculated by considering factors like: the offense the defendant is charged with, any prior convictions, the defendant's age, and previous failures to appear in court. The PSA does not factor in race, gender, education, or socioeconomic standing, in an effort to make bail determinations more objective and fair. The PSA was implemented during the summer of 2017 for felony cases in Bernalillo County. The Second Judicial District is working with the University of New Mexico's Institute of Social Research on a preliminary assessment of outcomes, including whether defendants while on pretrial release failed to appear in court or were arrested on a new criminal charge.

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Evidence based decisions in release and detention hearings will make communities safer. By limiting certain factors that tend to be markers of race or poverty, this bill will require RAIs to focus on factors actually related to public safety.	Some opponents of bail reform have been particularly critical about the use of the Arnold Foundation’s RAI in Bernalillo County, claiming it’s creating a “catch and release” system because too many defendants receive scores low enough for release on recognizance. However, judges are not required to follow the RAI’s suggestion; ultimately, the decision to release or hold a defendant is theirs alone.	According to the Fiscal Impact Report, this bill would put tremendous responsibility on the NM Sentencing Commission to validate RAIs. The nonprofit Arnold Foundation currently provides its RAI to Bernalillo County free of charge. In the Second Judicial District, the courts, LOPD, and DAs have invested significant time and training into the Arnold Foundation RAI.	Most jurisdictions do not collect or have the ability to analyze the risk assessment factors necessary to make evidence-based decisions. This bill would require all RAIs in the state to be guided by current research and evidence-based best practices. The Arnold Foundation RAI was created using a database of over 1.5 million cases drawn from more than 300 jurisdictions across the United States and is in use in about 40 jurisdictions across the country. ⁴	B

1 The Sentencing Project, Report of the Sentencing Project to the United Nations Human Rights Committee Regarding Racial Disparities in the United States Criminal Justice System (Aug. 2013), retrieved at: <http://sentencingproject.org/wp-content/uploads/2015/12/Race-and-Justice-Shadow-Report-ICCPR.pdf>.

2 Bureau of Justice Statistics, Data Risk Advisory: State Court Processing Statistics Data Limitations (March 2010), retrieved at https://www.bjs.gov/content/pub/pdf/scpsdl_da.pdf.

3 Cynthia A. Mamalian, State of the Science of Pretrial Risk Assessment (2011) at 26. (“Pretrial programs tend to have underdeveloped information systems and limited financial resources.”)

4 Laura and John Arnold Foundation, Public Safety Assessment. Reviewed at: <http://www.arnoldfoundation.org/initiative/criminal-justice/crime-prevention/public-safety-assessment/>