

# NOTE

## INCARCERATION OR E-CARCERATION: CALIFORNIA'S SB 10 BAIL REFORM AND THE POTENTIAL PITFALLS FOR PRETRIAL DETAINEES

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## INTRODUCTION

On April 23, 2017, Kenneth Humphrey followed an elderly man into his home and demanded money—he left with seven dollars and a bottle of cologne.<sup>1</sup> A few days later, Humphrey was arrested and a court ordered that he be held on \$350,000 bail.<sup>2</sup> However, Humphrey’s robbery netted him a total of *five* dollars—he did not have enough money to post \$350,000 bail.<sup>3</sup> He was an elderly African American man with a criminal record and a history of drug addiction.<sup>4</sup> While these traits disadvantaged him in the eyes of the criminal justice system, Humphrey also had one trait that would ultimately determine his sentence: he was *poor*.

When Humphrey’s case eventually came before the California Court of Appeal, the court declared California’s money-bail system unconstitutional for penalizing the poor.<sup>5</sup> The widely publicized nature of the case prompted the California legislature to react. On August 28, 2018, the legislature signed the California Money Bail Reform Act of 2017 (also known as “SB 10”) into law.<sup>6</sup> As the first piece of legislation to completely abolish monetary bail,<sup>7</sup> California’s SB 10 is an unprecedented step forward in the struggle for bail reform, eliminating a bail system that puts an unfair “tax on poor people in California.”<sup>8</sup> However, progressive movements for change often result in fierce counter-movements, and California’s bail reform movement will be no different.<sup>9</sup>

This Note addresses the arguments that will likely be raised against SB 10 and provides a response to these challenges. Part I discusses the historical background of monetary bail, the bail reform movement in both the federal and state

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<sup>1</sup> *In re Humphrey*, 228 Cal. Rptr. 3d 513, 518 (Cal. Ct. App. 2018).

<sup>2</sup> *Id.* at 519, 522.

<sup>3</sup> *Id.* at 522.

<sup>4</sup> *See id.* at 520.

<sup>5</sup> *Id.* at 530.

<sup>6</sup> Thomas Fuller, *California Is the First State to Scrap Cash Bail*, N.Y. TIMES (Aug. 28, 2018), <https://www.nytimes.com/2018/08/28/us/california-cash-bail.html> [https://perma.cc/88GA-WEN2].

<sup>7</sup> *Id.*

<sup>8</sup> In 1979, the Governor of California declared in his State of the State Address that it was necessary for the Legislature to reform the bail system, which he said constituted an unfair “tax on poor people in California. Thousands and thousands of people languish in the jails of this state even though they have been convicted of no crime. Their only crime is that they cannot make the bail that our present law requires.” Governor Edmund G. Brown Jr., State of the State Address (Jan. 16, 1979). However, the Legislature did not respond. *See In re Humphrey*, 228 Cal. Rptr. 3d at 516.

<sup>9</sup> *See Fuller, supra* note 6.

forums, and the beginning of the current bail reform movement in California. Part II addresses the main legal and policy challenges against SB 10, showing how the greatest threats to SB 10 come from policy challenges, rather than legal challenges. Part III looks at the big picture, discussing the pitfalls of pre-trial incarceration and the possibility that SB 10 could create a regime of e-carceration.

## I

### BAIL BACKGROUND

#### A. Monetary Bail and Its Effects

Two brothers and a lawyer walk into a bar.

In 1896, the two McDonough brothers realized they could earn quite a profit by posting bail money as a favor to a lawyer who frequented their father's saloon in San Francisco.<sup>10</sup> They began charging a fee for this service and their side business became a huge success, albeit a notorious one.<sup>11</sup> In fact, the McDonough brothers' business was so successful that it earned the nickname of "Old Lady of Kearny Street" who "furnished bail by the gross to bookmakers and prostitutes, kept a taxi waiting at the door to whisk them out of jail and back to work."<sup>12</sup> The brothers inadvertently created America's first bail bonding business, and thus the commercial money bail industry was born.

What started as a lucky venture soon spread across the United States, producing a domino-like effect that transformed the criminal justice system.<sup>13</sup> At first, commercial money bail simply allowed more defendants to obtain release from jail—it was a needed service for poor, friendless defendants who ordinarily would not have been able to make bail at all.<sup>14</sup> However, because bondsmen were making it more difficult to keep the accused behind bars before trial, judges began setting higher

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<sup>10</sup> See SHIMA BARADARAN BAUGHMAN, *THE BAIL BOOK: A COMPREHENSIVE LOOK AT BAIL IN AMERICA'S CRIMINAL JUSTICE SYSTEM* 165 (2018). Peter and Thomas McDonough posted bail money as a favor to lawyers who frequented their father's bar and when the lawyers' clients appeared in court, the brothers got their money back. Shane Bauer, *Inside the Wild, Shadowy, and Highly Lucrative Bail Industry*, MOTHER JONES (May/June 2014), [www.motherjones.com/politics/2014/06/bail-bond-prison-industry](http://www.motherjones.com/politics/2014/06/bail-bond-prison-industry) [<https://perma.cc/LQ6S-2DCC>].

<sup>11</sup> Bauer, *supra* note 10.

<sup>12</sup> Credit: *The Old Lady Moves On*, TIME (Aug. 18, 1941), [content.time.com/time/magazine/article/0,9171,802159,00.html](http://content.time.com/time/magazine/article/0,9171,802159,00.html) [<https://perma.cc/P8W9-6JE2>].

<sup>13</sup> See BAUGHMAN, *supra* note 10, at 165.

<sup>14</sup> *Id.*

and higher bail amounts.<sup>15</sup> Eventually, even defendants who could not afford the small bail amounts were given high bail amounts.<sup>16</sup> By the 1940s, bail amounts nationwide were high enough that many defendants had no choice but to pay a bondsman or wait in jail until trial.<sup>17</sup>

The commercial bail industry, and the bail system that became money-based rather than risk-based, became a gateway to a wider systemic issue: the cobweb criminal justice system in America. The web easily entraps and ensnares individuals who are poor, minorities, or otherwise marginalized in an endless cycle of crime and punishment. Individuals locked up for even a few days can lose their jobs, homes, or custody of their children, leading them into a cycle of crime in order to survive.<sup>18</sup> The monetary bail system only exacerbates this cycle, and it has innumerable negative effects on both individual rights and society as a whole.

The monetary bail system discriminates on the basis of wealth and turns justice into a “pay-for-play affair” where wealthy individuals can pay to go free, while indigent defendants are taken from their families and communities.<sup>19</sup> Further, “detention, rather than other variables, causally affects [trial] outcomes.”<sup>20</sup> For instance, defendants who are detained pre-trial are significantly disadvantaged in court—detained defendants are 25% more likely to be convicted and 43% more likely to receive jail sentences.<sup>21</sup> Mass incarceration rates are also affected by the bail system in that “[t]he political pressures of the criminal justice system reward judges for conservatism in making release and punishment decisions,”<sup>22</sup> resulting in a trend of overincarceration of pretrial detainees.

Ultimately, in fewer than fifty years, the bail system changed from one that was risk-based to one that was wealth-based without any legislative or policy motivation.<sup>23</sup> In the wake of this change, a cascade of negative consequences followed. The key to a successful reform of the bail system is in

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<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *See id.*

<sup>18</sup> *See* Thea L. Sebastian & Alec Karakatsanis, *Challenging Money Bail in the Courts*, 57 *JUDGES' J.* 23, 23 (2018).

<sup>19</sup> *Id.* at 24.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> Esmond Harmsworth, *Bail and Detention: An Assessment and Critique of the Federal and Massachusetts Systems*, 22 *NEW ENG. J. ON CRIM. & CIV. CONFINEMENT* 213, 220 (1996).

<sup>23</sup> *See* BAUGHMAN, *supra* note 10, at 167.

figuring out how to change the system back to the way it once was.

## B. Bail Reform in America

### 1. Federal Reforms

Congress's initial attempt to reform the federal bail system resulted in the Bail Reform Act of 1966 (1966 Act). The 1966 Act provided defendants with a statutory right to obtain release on bail.<sup>24</sup> Congress clearly stated that its purpose of the legislation was, "to assure that all persons, regardless of their financial status, shall not needlessly be detained pending their appearance to answer charges, to testify, or pending appeal, when detention serves neither the ends of justice nor the public interest."<sup>25</sup> Pretrial bail was not to be used as a means of protecting society against the "possible commission of additional crimes by the accused."<sup>26</sup>

The 1970s and 1980s saw a rise in crime rates and a rise in tough-on-crime legislation.<sup>27</sup> This attitude toward crime had a profound impact on attitudes toward bail, ultimately motivating Congress to pass the Bail Reform Act of 1984 (1984 Act).<sup>28</sup> In passing the 1984 Act, Congress noted its purpose was to address "the alarming problem of crimes committed by persons on release."<sup>29</sup> The 1984 Act essentially revised the 1966 Act to allow courts to impose conditions of release to ensure community safety.<sup>30</sup> Specifically, the 1984 Act provided that, "the judicial officer [must] release the [defendant] on his own recognizance, or upon execution of an unsecured appearance bond . . . , unless the judicial officer determines that such release will not reasonably assure the appearance of the person as required or *will endanger the safety of any other person or the community*."<sup>31</sup>

The 1984 Act expanded the list of factors a judicial officer could consider in determining whether bail should be set in a

<sup>24</sup> Bail Reform Act of 1966, Pub. L. No. 89-465, § 3146, 80 Stat. 214 (amended 1984).

<sup>25</sup> H.R. REP. NO. 89-1541 (1966), *reprinted in* 1966 U.S.C.C.A.N. 2293, 2295.

<sup>26</sup> *Id.*; *see* BAUGHMAN, *supra* note 10, at 166.

<sup>27</sup> James A. Allen, "Making Bail": *Limiting the Use of Bail Schedules and Defining the Elusive Meaning of "Excessive" Bail*, 25 J.L. & POL'Y 637, 653-55 (2017).

<sup>28</sup> Bail Reform Act of 1984, Pub. L. No. 98-473, § 202 (codified as 18 U.S.C. §§ 3141-3150 (1988)); *see* Allen, *supra* note 27, at 685.

<sup>29</sup> S. REP. NO. 98-225, at 3 (1984), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3185.

<sup>30</sup> *See id.*

<sup>31</sup> *Id.* at 3195 (emphasis added).

particular case to include “the nature and seriousness of the danger to any person or the community that would be posed by the person’s release.”<sup>32</sup> By allowing the court to consider a defendant’s potential for dangerousness, the 1984 Act added a rebuttable presumption of preventative detention if a defendant had committed certain offenses like violent crimes or serious drug crimes.<sup>33</sup> The 1984 Act permitted courts to deny bail to defendants as a preventative measure,<sup>34</sup> and this arguably contributed to the growing use of monetary bail in America.<sup>35</sup>

The 1984 Act came under scrutiny in *United States v. Salerno*.<sup>36</sup> The *Salerno* Court upheld the constitutionality of the 1984 Act,<sup>37</sup> and the Court emphasized that preventative detention must be “regulatory, not penal” and must not constitute “impermissible punishment before trial.”<sup>38</sup> Further, the Court ruled that although the liberty interest of a presumptively innocent arrestee rises to the level of a fundamental constitutional right, preventative detention can be consistent with constitutional guarantees as long as there are robust procedural safeguards.<sup>39</sup> These procedural safeguards must protect “the due process rights of the defendant and result[] in a finding that no less restrictive condition or combination of conditions can adequately assure the arrestee’s appearance in court and/or protect public safety, thereby demonstrating a compelling state

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<sup>32</sup> BAUGHMAN, *supra* note 10, at 166; see also Floralynn Einesman, *How Long is Too Long? When Pretrial Detention Violates Due Process*, 60 TENN. L. REV. 1, 1 (1992) (noting that the Bail Reform Act authorized courts to consider a defendant’s flight risk and danger to community in setting bail).

<sup>33</sup> 18 U.S.C. § 3142(b) (2012); see Keith Eric Hansen, *When Worlds Collide: The Constitutional Politics of United States v. Salerno*, 14 AM. J. CRIM. L. 155, 158 (1987).

<sup>34</sup> Ann M. Overbeck, *Detention for the Dangerous: The Bail Reform Act of 1984*, 55 U. CIN. L. REV. 153, 169 (1986); see Allen, *supra* note 27, at 685.

<sup>35</sup> See BAUGHMAN, *supra* note 10, at 166.

<sup>36</sup> *United States v. Salerno*, 481 U.S. 739, 741 (1987); see Allen, *supra* note 27, at 685.

<sup>37</sup> *Salerno*, 481 U.S. at 739; see *In re Humphrey*, 228 Cal. Rptr. 3d 513, 530 (Cal. Ct. App. 2018).

<sup>38</sup> *Salerno*, 481 U.S. at 746; see *Bell v. Wolfish*, 441 U.S. 520, 535–39 (1979) (“In evaluating the constitutionality of conditions or restrictions of pretrial detention that implicate only the protection against deprivation of liberty without due process of law, we think that the proper inquiry is whether those conditions amount to punishment of the detainee. . . . [I]f a particular condition or restriction of pretrial detention is reasonably related to a legitimate governmental objective, it does not, without more, amount to ‘punishment.’”).

<sup>39</sup> *Salerno*, 481 U.S. at 750–51.

interest warranting abridgment of an arrestee's liberty prior to trial."<sup>40</sup>

In giving judges more factors to consider in the bail determination process, the 1984 Act sought to provide more reasons to grant pretrial release. Paradoxically, the additional factors enunciated in *Salerno* were not employed by the courts to effectuate *more* instances of pretrial release. Rather, they were employed as bases of new, legitimate reasons for ordering pretrial preventative detention.<sup>41</sup>

## 2. State Reforms

In recent years, the administration of bail in the criminal justice system has caused nationwide concern.<sup>42</sup> Indeed, “[i]n 2017, state lawmakers in 46 states and the District of Columbia enacted 182 new pretrial laws—almost a 50 percent increase compared to 2015 and 2016.”<sup>43</sup> Many of the pretrial policy enactments that these state legislators passed dealt with the use or development of risk assessments in determinations of bail and release conditions.<sup>44</sup> States also “modified who is eligible for release after arrest” and “amended pretrial release provisions by limiting the use of financial conditions in release decisions.”<sup>45</sup>

The recent trend in bail reform follows in the footsteps of successful bail reform efforts such as those in Kentucky and Washington, D.C., where legislation mandated that the bail system rely on risk assessments rather than money bail.<sup>46</sup> In-

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<sup>40</sup> *Humphrey*, 228 Cal. Rptr. 3d at 526; *see also Salerno*, 481 U.S. at 747 (“The Bail Reform Act carefully limits the circumstances under which detention may be sought to the most serious of crimes.”).

<sup>41</sup> *See* BAUGHMAN, *supra* note 10, at 186.

<sup>42</sup> PRETRIAL DETENTION REFORM WORKGROUP, PRETRIAL DETENTION REFORM: RECOMMENDATIONS TO THE CHIEF JUSTICE 13 (2017); *see, e.g.*, John S. Goldkamp, *Judicial Responsibility for Pretrial Release Decisionmaking and the Information Role of Pretrial Services*, 57 FED. PROBATION 28, 30 (1993) (discussing how “serious questions about the fairness and effectiveness of pretrial release” still remain even decades after bail reform went into effect); TIMOTHY SCHNACKE, U.S. DEP’T OF JUSTICE, FUNDAMENTALS OF BAIL: A RESOURCE GUIDE FOR PRETRIAL PRACTITIONERS AND A FRAMEWORK FOR AMERICAN PRETRIAL REFORM 7 (2014) (discussing how recent pretrial reform initiatives have increased the visibility of the need for bail reform).

<sup>43</sup> NAT’L CONFERENCE OF STATE LEGISLATURES, TRENDS IN PRETRIAL RELEASE: STATE LEGISLATION UPDATE (2018), [http://www.ncsl.org/portals/1/ImageLibrary/WebImages/Criminal%20Justice/pretrialEnactments\\_2017web\\_v02.pdf](http://www.ncsl.org/portals/1/ImageLibrary/WebImages/Criminal%20Justice/pretrialEnactments_2017web_v02.pdf) [https://perma.cc/NK3Q-DBJ8].

<sup>44</sup> *See id.*

<sup>45</sup> *Id.*

<sup>46</sup> *See Frequently Asked Questions: Pretrial Detention Reform*, CALIFORNIA COURTS: THE JUDICIAL BRANCH OF CALIFORNIA (Nov. 6, 2017), <https://newsroom.courts.ca.gov/news/frequently-asked-questions-pretrial-detention-reform>

deed, Washington, D.C., has operated an effective and successful pretrial system with almost no money bail for decades.<sup>47</sup> In other states, such as New Mexico, legal action<sup>48</sup> led to new bail reform efforts.<sup>49</sup>

In 2017, New Jersey's Criminal Justice Reform Act (CJRA)<sup>50</sup> instituted "pretrial service agencies to conduct risk assessments, encourage nonmonetary release, and allow detention without bail for defendants deemed too dangerous or flight risks."<sup>51</sup> The legislation also provided for pretrial monitoring as a release option.<sup>52</sup> Since the CJRA's implementation, judicial officers have almost eliminated the use of monetary bail.<sup>53</sup>

In February 2018, one year after the implementation of the CJRA, the New Jersey Judiciary issued a report to the Governor and the legislature summarizing the results of the CJRA and the successes and challenges the CJRA confronted since

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[<https://perma.cc/9355-34TT>]. In Washington, D.C., defendants are not incarcerated pretrial if they cannot afford bail and they are not generally allowed to pay for release. See D.C. CODE § 23-1321(c)(3) (2016). Kentucky, Washington, D.C., and other jurisdictions with robust pretrial programs that do not rely on financial guarantees also have low failure to appear rates. *Frequently Asked Questions: Pretrial Detention Reform, supra*.

<sup>47</sup> Having almost entirely eliminated money bail, D.C. releases 94% of defendants pretrial. See Harvard Law Review Ass'n, *Bail Reform and Risk Assessment: The Cautionary Tale of Federal Sentencing*, 131 HARV. L. REV. 1125, 1130 (2018). Further, 90% of defendants released pretrial make their court appointments, and 98% are not rearrested for a violent crime pretrial. *Id.* These appearance and public-safety rates both surpass the national average. *Id.*

<sup>48</sup> *State v. Brown*, 338 P.3d 1276 (N.M. 2014).

<sup>49</sup> The New Mexico Supreme Court created a task force to revamp the state's bail scheme, and this task force later proposed a bail "amendment to the New Mexico Constitution prohibiting bail above what defendants can afford and expanding the power of judges to hold defendants without bail for dangerousness and risk of flight." Kenechukwu Okocha, *Nationwide Trend: Rethinking the Money Bail System*, 90 WIS. LAW. 30, 34 (2017); see N.M. CONST. art II, § 13. An initiative to revise the state's constitutional provision addressing bail passed with 87% of the vote. S.J. Res. 1, 52d Leg., 2d Sess. (N.M. 2016), [www.sos.state.nm.us/uploads/files/CA1-SJM1-2016.pdf](http://www.sos.state.nm.us/uploads/files/CA1-SJM1-2016.pdf) [<https://perma.cc/W6KE-9UY7>]. The initiative provides for preventative detention on grounds of dangerousness or flight risk under limited circumstances and prohibits detaining a defendant solely due to financial inability to post a money or property bond. *Id.*

<sup>50</sup> 2014 N.J. Sess. Law Serv. Ch. 31 (West).

<sup>51</sup> See Okocha, *supra* note 49, at 34.

<sup>52</sup> PRETRIAL DETENTION REFORM WORKGROUP, *supra* note 42, at 17.

<sup>53</sup> See Lisa W. Foderaro, *New Jersey Alters Its Bail System and Opens Legal Landscape*, N.Y. TIMES (Feb. 6, 2017), <https://www.nytimes.com/2017/02/06/nyregion/new-jersey-bail-system.html> [<https://perma.cc/A84U-JWBK>]; New Jersey Courts Criminal Justice Reform Information Center, N.J. COURTS, [www.judiciary.state.nj.us/courts/criminal/reform.html](http://www.judiciary.state.nj.us/courts/criminal/reform.html) [<https://perma.cc/RDD8-MRPA>] (last visited July 30, 2019).



its implementation.<sup>54</sup> According to preliminary statistics, the pretrial jail population experienced a significant decrease, declining from 8,894 pretrial detainees in 2015 to only 5,743 in 2018.<sup>55</sup> Indeed, in 2017 alone, the pretrial jail population decreased 20%.<sup>56</sup> Counting the time between 2015 and 2017, New Jersey's pretrial detainee population has decreased by a total of 35%.<sup>57</sup>

### C. California's Senate Bill No. 10

In California, approximately two-thirds of the jail population—nearly 48,000 people—are unsentenced.<sup>58</sup> Further, California's average bail is \$50,000, more than five times the national average.<sup>59</sup> These high bail amounts place an inordinate burden on the poor, given that 47% of Americans lack even \$400 for emergency expenses.<sup>60</sup> Further, the bail system affects California taxpayers, who spend millions of dollars each day on housing the detainees awaiting trial.<sup>61</sup>

For decades, criminal justice reform advocates unsuccessfully struggled to change the blackhole that was California's bail system.<sup>62</sup> However, in 2017, the bail reform movement gained a new momentum. In *In re Humphrey*, the California Court of Appeals held that the Fourteenth Amendment requires courts to consider a defendant's ability to pay, nonmonetary alternatives to money bail, and less restrictive conditions of release before ordering pretrial detention.<sup>63</sup> The court stated that because the trial court set bail at an amount that was impossible for Humphrey to pay, despite having found him suitable for release on bail, the trial court's order constituted a

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<sup>54</sup> GLENN A. GRANT, 2017 REPORT TO THE GOVERNOR AND THE LEGISLATURE 1 (2017), <https://www.njcourts.gov/courts/assets/criminal/2017cjrrannual.pdf> [<https://perma.cc/8HMY-TAMV>].

<sup>55</sup> *Id.* at 19.

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> The Board of State and Community Corrections' annual Jail Profile Survey includes both people who are eligible for release but have not (or cannot) post money bail, and people who are not eligible for release. *SB 10: Pretrial Release and Detention*, CALIFORNIA COURTS: THE JUDICIAL BRANCH OF CALIFORNIA, <https://www.courts.ca.gov/pretrial.htm> [<https://perma.cc/S9PZ-QD38>] (last visited July 30, 2019) (under "What percentage of the people held in California jails are unsentenced?" in "Frequently Asked Questions").

<sup>59</sup> Kyle Harrison, *SB 10: Punishment Before Conviction? Alleviating Economic Injustice in California with Bail Reform*, 49 U. PAC. L. REV. 533, 535 (2018).

<sup>60</sup> *Id.* at 537–38.

<sup>61</sup> *Id.* at 535.

<sup>62</sup> *See id.* at 539.

<sup>63</sup> *In re Humphrey*, 228 Cal. Rptr. 3d 513, 517 (Cal. Ct. App. 2018).

“*sub rosa* detention order lacking the due process protections constitutionally required.”<sup>64</sup>

The *Humphrey* court also referenced the Pretrial Detention Reform Workgroup’s report,<sup>65</sup> which concluded that, “California’s current pretrial release and detention system unnecessarily compromises victim and public safety because it bases a person’s liberty on financial resources rather than the likelihood of future criminal behavior and exacerbates socioeconomic disparities and racial bias.”<sup>66</sup> The substance of the report consists of ten recommendations designed to establish and facilitate implementation of

a risk-based pretrial assessment and supervision system that (1) gathers individualized information so that courts can make release determinations based on whether a defendant poses a threat to public safety and is likely to return to court—without regard for the defendant’s financial situation; and (2) provides judges with release options that are effective, varied, and fair alternatives to monetary bail.<sup>67</sup>

Ultimately, the *Humphrey* opinion and the Pretrial Detention Reform Workgroup’s report became the blueprint for a new wave of bail reform, and with the passage of SB 10, California became the first state to completely abolish its cash bail system.<sup>68</sup>

## II

### LEGAL AND POLICY CHALLENGES TO SB 10

Notwithstanding SB 10’s laudatory goal to reform a discriminatory system of bail, the legislation has produced staunch critics, even from some unanticipated sources.<sup>69</sup> Chief among the SB 10 critics, and not unexpectedly, is the bail bond industry. The bail bond industry is worth \$2 billion,<sup>70</sup> and facing the existential threat that SB 10 poses, bail bonds-

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<sup>64</sup> *Id.* at 517 (emphasis in original).

<sup>65</sup> *Id.* at 516; see PRETRIAL DETENTION REFORM WORKGROUP, *supra* note 42.

<sup>66</sup> PRETRIAL DETENTION REFORM WORKGROUP, *supra* note 42, at 1.

<sup>67</sup> *Id.* at 2.

<sup>68</sup> Fuller, *supra* note 6.

<sup>69</sup> See Lorelei Laird, *ABA Weighs in on California Supreme Court Case Affecting State’s New Bail Reform Law*, AM. BAR ASS’N J. (Oct. 10, 2018), [http://www.abajournal.com/news/article/bail\\_reformers\\_critical\\_of\\_california\\_bail\\_reform\\_law](http://www.abajournal.com/news/article/bail_reformers_critical_of_california_bail_reform_law) [<https://perma.cc/GCJ2-KJSK>] (noting that critics include the bail industry, public defenders, prosecutors, and criminal justice reformers).

<sup>70</sup> Jazmine Ulloa, *California’s Historic Overhaul of Cash Bail Is Now on Hold, Pending a 2020 Referendum*, L.A. TIMES (Jan. 16, 2019) <https://www.latimes.com/politics/la-pol-ca-bail-overhaul-referendum-20190116-story.html> [<https://perma.cc/L7EX-3Z5J>].

men have declared that “[e]very single weapon in [their] arsenal will be fired” in order to block the law.<sup>71</sup>

### A. Legal Challenges to SB 10

Senate Bill 10 opponents challenge the law’s inclusion of preventative detention on the grounds that it violates the constitutional right to bail.<sup>72</sup> Although the U.S. Constitution does not explicitly provide for a constitutional right to bail, case law leaves some room for argument regarding this ambiguity. However, a majority of state constitutions provide a right guaranteeing bail.<sup>73</sup>

#### 1. *Due Process*

The Fifth and Fourteenth Amendments to the U.S. Constitution guarantee that “[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law.”<sup>74</sup> Relying on the Fifth and Fourteenth Amendments, critics argue that pretrial detention deprives a person of their liberty and therefore violates the constitutional right to bail.<sup>75</sup> However, in order to find that the right to bail is fundamental to due process, the Court must first find that the right is “deeply rooted in this Nation’s history and tradition” and “fundamental to *our* concept of constitutionally ordered liberty.”<sup>76</sup> In this context, the Supreme Court declined to decide whether the right to bail satisfies this standard,<sup>77</sup> leaving the issue open for determina-

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<sup>71</sup> Laird, *supra* note 69.

<sup>72</sup> See Fuller, *supra* note 6.

<sup>73</sup> As of 2009, forty-one state constitutions guaranteed the right to bail. Ariana Linder Mayer, *What the Right Hand Gives: Prohibitive Interpretations of the State Constitutional Right to Bail*, 78 *FORDHAM L. REV.* 267, 283–84 (2009). However, courts differ in their interpretations about whether state provisions protecting the right to bail are absolute or conditional. See *id.* at 274, 276 (“[S]everal state constitutions only prohibit excessive bail without guaranteeing any right to bail. A majority of states, however, have adopted stronger protections than those secured by federal law, by guaranteeing a constitutional right to bail in noncapital cases.” (footnote omitted)).

<sup>74</sup> U.S. CONST. amend. XIV, § 1; see U.S. CONST. amend. V.

<sup>75</sup> See *California: Assembly Passes Senate Bill 10 “Bail Reform,” the Unconstitutional “Crappy Bill,”* AM. BAIL COALITION (Aug. 20, 2018), <http://www.americanbailcoalition.org/in-the-news/california-assembly-passes-senate-bill-10-bail-reform-the-unconstitutional-crappy-bill/> [<https://perma.cc/5P5L-EDB8>] (“Californians have a ‘right to bail’ and that’s something no Assembly vote can change.”).

<sup>76</sup> *Washington v. Glucksberg*, 521 U.S. 702, 721, 727 (1997) (emphasis added).

<sup>77</sup> *United States v. Salerno*, 481 U.S. 739, 752–53 (1987); *Stack v. Boyle*, 342 U.S. 1, 4 (1951) (stating that unless the right to bail is preserved, “the presumption of innocence, secured only after centuries of struggle, would lose its mean-

tion in the future.<sup>78</sup> This ambiguity poses a potential problem for SB 10: does a bail reform law abolishing monetary bail infringe on a constitutional right to bail?

The Third Circuit Court of Appeals dealt with a due process challenge to a piece of bail reform legislation.<sup>79</sup> *Holland v. Rosen* is a putative class action brought by a bail bond company and a defendant subject to the pretrial release conditions of home detention and electronic monitoring after being charged with aggravated assault.<sup>80</sup> The plaintiffs contended that the CJRA violated the Fourth, Eighth, and Fourteenth Amendments by failing to allow defendants to provide cash bail as an alternative to nonmonetary release conditions.<sup>81</sup> The *Holland* court rejected Holland's procedural due process argument under the Fourteenth Amendment. In response to this challenge, the court noted that the CJRA includes (1) all of the "extensive safeguards" of the federal Bail Reform Act, which the Supreme Court held were more than constitutionally sufficient in *Salerno*, and (2) "the additional protection of extensive discovery" prior to the pretrial detention hearing, which the federal process did not provide.<sup>82</sup> The *Holland* court also rejected the substantive due process challenge, holding that Holland did not adequately show that the rights to cash bail and corporate surety bond were deeply rooted in the nation's history and tradition.<sup>83</sup> In its opinion, the court explained that the original meaning of "bail" encompassed only a personal surety bail system,<sup>84</sup> and that

cash bail and corporate surety bond are not protected by substantive due process because they are neither sufficiently rooted historically nor implicit in the concept of ordered liberty. Hence the [CJRA's] subordination of monetary bail to non-monetary conditions of release need only be rationally related to a legitimate State interest. And it is—New Jersey's interests in ensuring defendants appear in court, do not en-

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ing"); *Carlson v. Landon*, 342 U.S. 524, 544–46 (1952) (holding that the Eighth Amendment does not guarantee a right to bail in all arrests).

<sup>78</sup> The criminal justice system extols the principle that individuals are presumed innocent until proven guilty. See *Coffin v. United States*, 156 U.S. 432, 459 (1895). While the Supreme Court has avoided the question of whether there is a fundamental right to bail, it has held that bail is not guaranteed in all arrests, suggesting that there is no fundamental right to bail. See *Carlson*, 342 U.S. at 544–46.

<sup>79</sup> *Holland v. Rosen*, 895 F.3d 272 (3d Cir. 2018).

<sup>80</sup> *Id.* at 284.

<sup>81</sup> *Id.* at 278.

<sup>82</sup> *Id.* at 298–99.

<sup>83</sup> *Id.* at 295–96.

<sup>84</sup> *Id.* at 289.

danger the safety of any person or the community, or obstruct their criminal process, are no doubt legitimate.<sup>85</sup>

The Third Circuit's clear ruling rejecting the idea that bail is a fundamental right dashes any hopes bail advocates may have about invalidating bail reform legislation by way of substantive due process. Furthermore, on October 29, 2018, the Supreme Court denied certiorari, guaranteeing that the Third Circuit's ruling would be the last word on the case.<sup>86</sup> In light of this denial, it appears unlikely that the Supreme Court will ever choose to make a definitive ruling on the issue. Further, the Supreme Court's denial of certiorari and the Third Circuit's rejection of Holland's due process challenges show that a due process challenge to SB 10 is not likely to be raised, nor is it likely to be successful.

## 2. Eighth Amendment "Excessive Bail" Clause

The Eighth Amendment provides "[e]xcessive bail shall not be required."<sup>87</sup> Opponents to SB 10 will likely argue that the Excessive Bail Clause provides a constitutional right to bail. However, there is a rigorous debate as to whether the Excessive Bail Clause incorporates a "right to bail" inherent in its proscription of excessive bail.<sup>88</sup> Further, even assuming the Eighth Amendment does provide a right to bail, no court has yet determined whether that right extends to *monetary* bail to be considered in line with nonmonetary release conditions.<sup>89</sup> As such, given these ambiguities, an Eighth Amendment challenge to SB 10 is not likely to be successful.

In determining whether the Eighth Amendment provides a right to bail, a court first has to determine the definition of "excessive" bail; however, the Supreme Court has yet to define "excessiveness."<sup>90</sup> The Supreme Court jurisprudence regard-

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<sup>85</sup> *Id.* at 296.

<sup>86</sup> *Holland v. Rosen*, 139 S. Ct. 440 (2018).

<sup>87</sup> U.S. CONST. amend. VIII.

<sup>88</sup> The majority of courts facing Eighth Amendment challenges to preventative detention have concluded that the Excessive Bail Clause does not grant an absolute right to bail. Overbeck, *supra* note 34, at 192. However, a few courts have held that the Eighth Amendment guarantees a right to bail. Kevin F. Arthur, *Preventive Detention: Liberty in the Balance*, 46 MD. L. REV. 378, 394 (1987); *see, e.g.*, *Escandar v. Ferguson*, 441 F. Supp. 53, 58 (S.D. Fla. 1977) (discussing how denying pretrial release implicates a defendant's fundamental rights); *Trimble v. Stone*, 187 F. Supp. 483, 484–85 (D.D.C. 1960) ("The right to bail pending trial is absolute, except in capital cases . . .").

<sup>89</sup> *Holland*, 895 F.3d at 288.

<sup>90</sup> Samuel R. Wiseman, *Pretrial Detention and the Right to be Monitored*, 123 YALE L. J. 1344, 1349 (2014).

ing the Excessive Bail Clause is sparse and consists chiefly of two cases: *Stack v. Boyle*<sup>91</sup> and *Carlson v. Landon*.<sup>92</sup> In *Stack*, the Court rejected an excessive bail amount set for the purpose of preventing defendants from receiving bail.<sup>93</sup> Although the Court defended the historic meaning of bail in *Stack*, it took an opposite view in *Carlson v. Landon*, holding that the Eighth Amendment does not guarantee a right to bail in all cases.<sup>94</sup> Left with these conflicting rulings, the Eighth Amendment has not been a fruitful constitutional provision with which to challenge bail.<sup>95</sup>

Further, the weakness of an Eighth Amendment argument to a bail reform law can be seen in *Holland v. Rosen*, which involved an Eighth Amendment challenge to New Jersey's CJRA.<sup>96</sup> Holland argued that the Eighth Amendment's prohibition against excessive bail implicitly encompassed a right to monetary bail.<sup>97</sup> The Third Circuit, in rejecting this argument, noted that (1) the concepts of cash bail or corporate security bonds did not exist when the Eighth Amendment was enacted,<sup>98</sup> and (2) the modern understanding of "bail" developed in the twentieth century would include not only monetary bail, but also nonmonetary conditions imposed under the CJRA that "enable[] accused persons 'to stay out of jail until a trial has found them guilty.'"<sup>99</sup> To pass muster under the Eighth Amendment, nonmonetary conditions, like monetary bail, must not be "excessive in light of the perceived evil."<sup>100</sup> Noting that (1) the CJRA expressly required trial judges in New Jersey to impose the least restrictive conditions possible to achieve its goals, and (2) only "8.3% of eligible defendants" were subjected to "level 3+ home detention and electronic monitoring," the Third Circuit found no indication that the nonmonetary conditions imposed on Holland or other eligible defendants were "excessive."<sup>101</sup>

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91 342 U.S. 1, 4 (1951).

92 342 U.S. 524, 544-46 (1952).

93 *Stack*, 342 U.S. at 7.

94 *Carlson*, 342 U.S. at 544-46.

95 See Wiseman, *supra* note 90, at 1349.

96 *Holland v. Rosen*, 895 F.3d 272, 278 (3d Cir. 2018).

97 *Id.* at 285.

98 *Id.* at 290.

99 *Id.*

100 *Id.* at 291 (quoting *United States v. Salerno*, 481 U.S. 739, 754 (1987)).

101 *Id.* at 291-92.

### 3. *State Constitutional Right to Bail*

The California Constitution contains two sections pertaining to bail: Article I, sections 12 and 28(f)(3).<sup>102</sup> These two sections govern pretrial release on bail and personal recognizance release.<sup>103</sup> Few cases have addressed these constitutional provisions, and as a result, no definitive judicial interpretation exists regarding the differences between these two provisions.<sup>104</sup> However, it is clear that the state constitution prohibits excessive bail.<sup>105</sup>

Section 12 of the California Constitution states that “[a] person shall be released on bail by sufficient sureties,” with few offenses as exceptions.<sup>106</sup> Section 12 “was intended to abrogate the common law rule that bail was a matter of judicial discretion by conferring an absolute right to bail except in a narrow class of cases.”<sup>107</sup> This provision

establishes a person’s right to obtain release on bail from pretrial custody, identifies certain categories of crime in which such bail is unavailable, prohibits the imposition of excessive bail as to other crimes, sets forth the factors a court shall take into consideration in fixing the amount of the required bail, and recognizes that a person ‘may be released on his or her own recognizance in the court’s discretion.’<sup>108</sup>

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<sup>102</sup> CAL. CONST. art. I, §§ 12, 28(f)(3).

<sup>103</sup> California constitutional and statutory rights to bail are broader than federal rights. See CAL. PENAL CODE § 1271 (West 1872); see also *In re Underwood*, 508 P.2d 721, 725 (1973) (“[I]t is clear that the Constitution of California prohibits the denial of bail solely because of petitioner’s dangerous propensities.”).

<sup>104</sup> PRETRIAL DETENTION REFORM WORKGROUP, *supra* note 42, at 20.

<sup>105</sup> CAL. CONST. art. I, §§ 12, 28(f)(3). Bail is not considered excessive merely because the defendant cannot post it. *Galen v. Cty. of Los Angeles*, 477 F.3d 652, 661 (9th Cir. 2007); *Ex parte Burnette*, 95 P.2d 684, 684–85 (Cal. Ct. App. 1939). However, bail may not be set in an amount which is functionally no bail in a case where bail is mandated. *Galen*, 477 F.3d at 661. The amount of bail may not be set solely to ensure the defendant’s incarceration for improper reasons. See *Wagenmann v. Adams*, 829 F.2d 196, 213 (1st Cir. 1987).

<sup>106</sup> CAL. CONST. art. I, § 12. The offenses excluded from receiving bail are capital crimes and felony offenses involving acts of violence or sexual assault, both where the facts are evident or the presumption of guilt is great. *Id.* Another exception is any felony offense where the defendant has threatened another with great bodily harm and there is a substantial likelihood that the threat would be carried out if the person were released. *Id.*

<sup>107</sup> *In re Humphrey*, 228 Cal. Rptr. 3d 513, 523 (Cal. Ct. App. 2018) (citations omitted).

<sup>108</sup> *Id.* (quoting *In re York*, 892 P.2d 804, 807 (1995)). Section 12 provides in full:

- “A person shall be released on bail by sufficient sureties, except for:
- (a) Capital crimes when the facts are evident or the presumption great;
  - (b) Felony offenses involving acts of violence on another person, or felony sexual assault offenses on another person, when

Section 28 establishes and ensures enforcement of certain rights for victims of criminal acts,<sup>109</sup> one of which is the right “[t]o have the safety of the victim and the victim’s family considered in fixing the amount of bail and release conditions for the defendant.”<sup>110</sup> With respect to that victim’s right, Section 28(f)(3), entitled “Public Safety Bail,” provides that “[i]n setting, reducing or denying bail, . . . [p]ublic safety and the safety of the victim shall be the primary considerations.”<sup>111</sup>

These sections of the California Constitution may pose the greatest legal threat to SB 10’s survival. Notably, as SB 10 eliminates cash bail, the law may be challenged on the grounds that it violates the California Constitution’s guarantee to an “absolute right to bail except in a narrow class of cases.”<sup>112</sup> Indeed, members of the bail industry have already suggested this by claiming that SB 10 infringes on the state constitution’s positive right to bail.<sup>113</sup> The best way to dodge such a challenge is by amending the state constitution. One state did just that in order to protect its bail reform law—New Jersey amended its constitution as a necessary addition to its enactment of the CJRA.<sup>114</sup> New Jersey voters ultimately passed a constitutional amendment permitting the detention of high-

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the facts are evident or the presumption great and the court finds based upon clear and convincing evidence that there is a substantial likelihood the person’s release would result in great bodily harm to others; or

- (c) Felony offenses when the facts are evident or the presumption great and the court finds based on clear and convincing evidence that the person has threatened another with great bodily harm and that there is a substantial likelihood that the person would carry out the threat if released.

Excessive bail may not be required. In fixing the amount of bail, the court shall take into consideration the seriousness of the offense charged, the previous criminal record of the defendant, and the probability of his or her appearing at the trial or hearing of the case. A person may be released on his or her own recognizance in the court’s discretion.”

CAL. CONST. art. I, § 12.

<sup>109</sup> CAL. CONST. art. I, § 28(b).

<sup>110</sup> *Id.* § 28(b)(3).

<sup>111</sup> *Id.* § 28(f)(3).

<sup>112</sup> *Humphrey*, 228 Cal. Rptr. at 523 (citations omitted).

<sup>113</sup> Blanca Garcia, *Bail Industry Fights SB 10*, SANTA BARBARA INDEPENDENT (Oct. 11, 2018), <https://www.independent.com/news/2018/oct/11/bail-industry-fights-sb-10/> [<https://perma.cc/VY5X-N49E>].

<sup>114</sup> Prior to the CJRA’s implementation, the New Jersey Constitution mandated the right to bail for *all* defendants, creating a paradoxical system where the state’s wealth-based bail system and the state constitution’s right to bail were in direct conflict. THE JOINT COMMITTEE ON CRIMINAL JUSTICE, REPORT OF THE JOINT COMMITTEE ON CRIMINAL JUSTICE 2 (2014).



risk defendants before trial.<sup>115</sup> In a similar vein, the biggest step in support of SB 10 would be to follow New Jersey's example and enact an amendment to the California Constitution to bring its bail provision in line with that of the Federal Constitution.<sup>116</sup>

## B. Policy Challenges to SB 10

While legal challenges to the validity of SB 10 may not pose a danger to the law's survival, policy challenges headed by the media and driven by the bail bondsman lobby pose a much bigger threat. Further, despite SB 10's passage, California voters will weigh in on the future of SB 10.<sup>117</sup> A coalition called Californians Against the Reckless Bail Scheme<sup>118</sup> attained enough signatures to qualify for a referendum for the November 2020 ballot.<sup>119</sup> As such, SB 10 is placed on hold until 2020, giving the bail industry and other opponents more than a year to stop SB 10 for good.<sup>120</sup> The bail industry is not the only opponent to SB 10—other critics include public defenders,<sup>121</sup>

<sup>115</sup> S. Con. Res. 128, 216th Leg. (N.J. 2014), [www.njleg.state.nj.us/2014/Bills/SCR/128\\_I1.htm](http://www.njleg.state.nj.us/2014/Bills/SCR/128_I1.htm) [<https://perma.cc/F49Y-TJJ3>]. The amendment was passed in November 2014, three months after the passage of the CJRA. See *New Jersey Pretrial Detention Amendment, Public Question No. 1 (2014)*, BALLOTPEdia, [https://ballotpedia.org/New\\_Jersey\\_Pretrial\\_Detention\\_Amendment,\\_Public\\_Question\\_No.\\_1\\_\(2014\)#cite\\_note-text-2](https://ballotpedia.org/New_Jersey_Pretrial_Detention_Amendment,_Public_Question_No._1_(2014)#cite_note-text-2) [<https://perma.cc/3J2V-AB59>] (last visited Sept. 13, 2019).

<sup>116</sup> The California Constitution provides that an amendment may be brought by public initiative or by referendum. CAL. CONST. art. XVIII, §§ 2, 3.

<sup>117</sup> Bryan Anderson & Alexei Koseff, *Vacant Governor's Mansion + Bail Measure Has the Votes + California Priorities Summit Today*, SACRAMENTO BEE (Nov. 9, 2018, 5:45 AM), <https://www.sacbee.com/news/politics-government/capitol-alert/article221389490.html> [<https://perma.cc/MCT5-RYM4>].

<sup>118</sup> Michael McGough, *The Fate of California's Cash Bail Industry Will Now Be Decided on the 2020 Ballot*, SACRAMENTO BEE (Jan. 17, 2019, 12:04 PM), <https://www.sacbee.com/news/state/california/article224682595.html> [<https://perma.cc/9FS2-GWWY>] (“We knew with the momentum against [SB 10] from people on all sides of the issue, getting on the ballot would not be the problem,” Jeff Clayton, executive director of the American Bail Coalition, said in a prepared statement. “Now we can move on toward defeating this reckless law.”)

<sup>119</sup> Anderson & Koseff, *supra* note 117; Garcia, *supra* note 113. “[A] referendum asks [California voters] whether they want to overturn a statute written by lawmakers. The bail industry would be asking voters to cast a ‘no’ vote on the ultimate ballot measure to ensure [SB 10’s] defeat.” Jazmine Ulloa, *Bail Bond Industry Moves to Block Sweeping California Law, Submitting Signature for a 2020 Ballot Referendum*, L.A. TIMES (Nov. 20, 2018), <https://www.latimes.com/politics/la-pol-ca-bail-referendum-signatures-20181120-story.html> [<https://perma.cc/NY79-6RDL>].

<sup>120</sup> Anderson & Koseff, *supra* note 117.

<sup>121</sup> Scott Wilson, *California Abolishes Cash Bail, Aiming to Treat Rich and Poor Defendants Equally*, WASH. POST (Aug. 29, 2018), [https://www.washingtonpost.com/national/california-abolishes-cash-bail-aiming-to-treat-rich-and-poor-defendants-equally/2018/08/29/70891a9e-abad-11e8-b1da-f7faa680710\\_story](https://www.washingtonpost.com/national/california-abolishes-cash-bail-aiming-to-treat-rich-and-poor-defendants-equally/2018/08/29/70891a9e-abad-11e8-b1da-f7faa680710_story)

the ACLU of California,<sup>122</sup> Human Rights Watch,<sup>123</sup> and lawmakers on both sides of the political spectrum.<sup>124</sup> Their opposition to SB 10 spans a range of arguments and poses some important questions as to SB 10's underlying policies.

1. *Is SB 10's Judicial Discretion to Detain and Presumption of Detention Overly Broad?*

The original version of SB 10 stated its intent was to “safely reduce the number of people detained pretrial, while addressing racial and economic disparities in the pretrial system.”<sup>125</sup> However, the amended SB 10 states only that its intent is to “permit preventive detention of pretrial defendants.”<sup>126</sup> This change in SB 10 has sparked criticism that SB 10 uses broad language to create a system where judges have nearly unlimited discretion in ordering accused people to be held in preventative detention until their case is resolved.<sup>127</sup> For instance, the ACLU of California argues that SB 10 “seeks to replace the current deeply-flawed system with an overly broad presumption of preventative detention.”<sup>128</sup> This presumption is particularly overbroad when prosecutors are allowed to rely on hearsay at detention hearings.<sup>129</sup> Essentially, the fear is that SB 10 will shift the burden to defendants, rather than prose-

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.html?noredirect=on&utm\_term=.28cb424391a3 [https://perma.cc/S28F-KECZ].

<sup>122</sup> ACLU of California Changes Position to Oppose Bail Reform Legislation, ACLU NORTHERN CAL. (Aug. 20, 2018), <https://www.aclunc.org/news/aclu-california-changes-position-oppose-bail-reform-legislation> [https://perma.cc/T3YX-PDV9].

<sup>123</sup> Jasmine Tyler & John Raphling, *Human Rights Watch Opposes California Senate Bill 10, The California Bail Reform Act*, HUM. RTS. WATCH (Aug. 14, 2018, 9:00 AM), <https://www.hrw.org/news/2018/08/14/human-rights-watch-opposes-california-senate-bill-10-california-bail-reform-act> [https://perma.cc/9XFX-7N94].

<sup>124</sup> State Senate candidate Shannon Grove, in opposition to SB 10, stated, “If you can’t afford bail, don’t commit a crime.” Jessica Weston & Christopher Livingston, *Grove, Fong Rally for Reform at Republican Women Luncheon*, DAILY INDEPENDENT (Oct. 24, 2018, 12:01 AM), <http://www.ridgecrestca.com/news/20181024/grove-fong-rally-for-reform-at-republican-women-luncheon> [https://perma.cc/MC6W-RL62]. Additionally, 34th District California Assemblyman Vince Fong stated in reference to SB 10, “[W]hen it comes to public safety, when it comes to our business climate, the things that are coming out of Sacramento are not making it better.” *Id.*

<sup>125</sup> California Money Bail Reform Act, S.B. 10, 2017 Leg., 2017–18 Sess. § 2 (Dec. 5, 2016) (amended on Sept. 6, 2017); Tyler & Raphling, *supra* note 123.

<sup>126</sup> California Money Bail Reform Act, S.B. 10, 2017 Leg., 2017–18 Sess. § 1 (Cal. 2018) (enacted) (codified at CAL. GOV'T CODE § 27771).

<sup>127</sup> Tyler & Raphling, *supra* note 123.

<sup>128</sup> ACLU of California Changes Position to Oppose Bail Reform Legislation, *supra* note 122.

<sup>129</sup> See Tyler & Raphling, *supra* note 123.

cutors, to prove that they should be released, regardless of risk scores.<sup>130</sup> However, these claims are a vast overstatement of SB 10's mandate.

Under SB 10, at arraignment, defendants—even those deemed to be high-risk individuals—will never be held in preventative detention *unless* certain motions are made and granted by the court.<sup>131</sup> First, the prosecution must file a motion for preventative detention.<sup>132</sup> For the judge to even order that the defendant be held in detention pending that detention hearing, the judge must determine that there is a “*substantial likelihood that no nonmonetary condition or combination of conditions of pretrial supervision will reasonably . . . assure public safety.*”<sup>133</sup> Determining whether there is a substantial likelihood is an incredibly high standard to satisfy. However, if the judge does order preventative detention during that period, the detention hearing must be held within three days of the motion.<sup>134</sup>

Second, the court may order the defendant into preventative detention only if the judge finds “by clear and convincing evidence that no nonmonetary condition or combination of conditions of pretrial supervision will reasonably assure public safety or the appearance of the defendant in court as required.”<sup>135</sup> This determination requires a judge to find that *every* nonmonetary condition of release and *every* combination of conditions of release is insufficient in assuring the public safety or the defendant's appearance in court. This is an incredibly difficult determination to make and would require significant time, money, and effort on behalf of the prosecution.

As such, to order preventative detention, the judge not only has to reject every single condition of release for the defendant, but the judge also has to make this determination by “clear and convincing evidence,” a very high evidentiary legal standard to satisfy. As such, the fear should not be that there is an overly broad presumption of detention that defendants must rebut,

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<sup>130</sup> See Max Rivlin-Nadler, *California Could Soon End Money Bail, But at What Cost?*, APPEAL (Aug. 22, 2018), <https://theappeal.org/california-could-soon-end-money-bail-but-at-what-cost/> [<https://perma.cc/JZR8-653A>].

<sup>131</sup> CAL. DEP'T OF FIN., SB 10 GENERAL OVERVIEW 1 (2018), <https://www.courts.ca.gov/documents/sb10-overview.pdf> [<https://perma.cc/MUZ8-W8FT>].

<sup>132</sup> California Money Bail Reform Act (Senate Bill No. 10), CAL. PENAL CODE § 1320.18(a) (West 2019) (effective Oct. 1, 2019).

<sup>133</sup> *Id.* § 1320.18(d) (emphasis added).

<sup>134</sup> See *id.* § 1320.19(a). In the detention hearing, the defendant has a right to counsel and a right to testify. *Id.* § 1320.19(d). Additionally, the victim must be notified and provided with an opportunity for input. See *id.* § 1320.19(e).

<sup>135</sup> *Id.* § 1320.20(d)(1).

but rather that the possibility of releasing dangerous, high-risk defendants on conditions of release will rise significantly. SB 10 only creates a presumption of preventative detention—which is still rebuttable—for a defendant under specific circumstances, such as if the crime is a violent felony or the defendant is deemed a high-risk to public safety.<sup>136</sup> Further, if the court orders preventative detention, the judge must state the reasons for ordering preventative detention on the record.<sup>137</sup> This requirement not only creates a transparent record of the judge's decision, but it also makes it easier for defendants to appeal the judge's preventative detention decision later on.

Ultimately, the claim that SB 10 creates an overly broad presumption of detention that every accused person must combat is an alarmist claim resulting from exaggeration and fear-mongering. SB 10 is not attempting to give judges unlimited discretion in ordering preventative detention left and right. Rather, the law creates a carefully constructed legal process, with multiple safeguards and high hurdles, for ordering preventative detention: the prosecution must take the time and effort to file a motion for preventative detention, a detention hearing must be held in a timely manner, and a judge must find that the state overcame the high "clear and convincing" evidentiary standard in proving that *no* nonmonetary conditions of release, or combinations thereof, would reasonably assure public safety or the defendant's appearance in court.

## 2. *Is the Cost of Implementing and Funding PAS Too High?*

SB 10 establishes Pretrial Assessment Services (PAS), a program that is tasked with gathering information and using reports to aid judges in determining whether a defendant is a

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<sup>136</sup> See *id.* § 1320.20(d)(1). There is a rebuttable presumption of detention if: (1) The current crime is a violent felony . . . or was a felony offense committed with violence against a person, threatened violence, or with a likelihood of serious bodily injury, or one in which the defendant was personally armed with or personally used a deadly weapon or firearm in the commission of the crime, or . . . personally inflicted great bodily injury in the commission of the crime.

*Id.* § 1320.20(a)(1); or (2) The person was assessed as high risk to public safety; and a) "was convicted of a serious or violent felony . . . within the past 5 years"; b) the defendant is pending sentencing on a serious or violent crime; c) the person has "intimidated, dissuaded, or threatened" the victim with retaliation; or d) the person "was on any form of postconviction supervision" except informal probation. *Id.* § 1320.20(a)(2).

<sup>137</sup> *Id.* § 1320.20(d)(1).

public-safety risk or a flight risk.<sup>138</sup> PAS also recommends conditions of release as alternatives to pretrial detention. However, judges are not bound by the reports and recommendations of the PAS. Instead, PAS reports serve as tools to inform a judge's pretrial detention decision. Judicial officers still have the ability to override the PAS recommendation, if necessary. In the previous bail system, judges were the final authority in the determination of pretrial release or pretrial detention. Under SB 10, judges have similar authority, but they are given a broader toolkit to use in making this decision. The role of PAS in supervising and monitoring released defendants simply encourages judges to impose conditions of release rather than preventative detention. As such, the implementation process of PAS is essential in order for PAS to effectively carry out its role.

In order to adequately implement PAS, the program must be sufficiently researched, adequately funded, and carefully supervised. California's SB 10 should generally model its implementation of SB 10 on New Jersey's CJRA. The CJRA's implementation process took a multiple-pronged approach: it focused on updating courtroom technology, creating pretrial service agencies to supervise defendants released pretrial, increasing court filing fees to cover the costs of the program, educating the public about the legislation, and training the different participants in the criminal justice system about their new roles in the administration of pretrial justice.<sup>139</sup> In addition, New Jersey courtroom officials traveled to several jurisdictions in Arizona, Kentucky, Pennsylvania, and Colorado to learn more about using risk assessment tools within the bail system.<sup>140</sup> To perfect the risk assessment tool prior to its widespread dissemination, the New Jersey Judiciary validated the risk assessment instrument by using data from hundreds of thousands of cases and by testing the tool in a handful of counties.<sup>141</sup> The judiciary then made minor adjustments to the instrument based on these experiences.<sup>142</sup>

California should follow New Jersey's procedures in implementing SB 10. However, in order to carry out a similar pro-

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<sup>138</sup> SB 10: *Pretrial Release and Detention*, *supra* note 58 (under "Does SB 10, the pretrial reform legislation, mean a judge has less discretion to decide who to detain or release before trial?" in "Frequently Asked Questions").

<sup>139</sup> GLENN A. GRANT, CRIMINAL JUSTICE REFORM: REPORT TO THE GOVERNOR AND LEGISLATURE 1-2 (2015), <https://www.judiciary.state.nj.us/courts/assets/criminal/2015cjrannual.pdf> [<https://perma.cc/5CMU-DE5R>].

<sup>140</sup> *Id.* at 3.

<sup>141</sup> *Id.* at 4.

<sup>142</sup> *See id.*

cess of research and testing, California's PAS and judiciary must first be adequately funded. It is at this point that bail reform opponents often interject with righteous pleas on behalf of the taxpayers of California.<sup>143</sup> However, these concerns about funding are heavily exaggerated and overblown. In fact, pretrial services have been estimated to cost as little as \$3 per day, while the cost of pretrial detention is as much as \$85 per day.<sup>144</sup> In Santa Clara County, California, which already uses a pretrial services program, pretrial services cost around \$7 million per year, but the county has saved around \$60 million from no longer detaining unconvicted defendants.<sup>145</sup> As such, it is clear that conditions of release, such as reminders of court dates and programs allowing defendants to notify the court of illness or emergency preventing appearance, are more cost-effective than imposing pretrial detention.<sup>146</sup>

Currently, California spends more than \$12 billion per year on state prisons, a 500% increase in prison spending since 1981 that surpasses spending on education, health, and all other budget items.<sup>147</sup> Thus, it is clear that allocating funds to pretrial services, rather than prisons and pretrial detention of defendants, would save millions in taxpayer money in the long run. However, this fact will likely do nothing to stop bail reform opponents from launching vehement opposition campaigns.<sup>148</sup>

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<sup>143</sup> See Garcia, *supra* note 113.

<sup>144</sup> Whittney Evans, *Virginia Might Be the Next State to Challenge Controversial Cash Bail System*, COMMUNITY IDEA STATIONS (Oct. 22, 2018), <https://www.ideastations.org/radio/news/virginia-might-be-next-state-challenge-controversial-cash-bail-system> [<https://perma.cc/UB9Y-MRNN>].

<sup>145</sup> Harrison, *supra* note 59, at 542.

<sup>146</sup> See Harmsworth, *supra* note 22, at 222. In one study, the Manhattan Bail Project mailed letters to the defendants in their native language to remind them of court dates, resulting in the extremely low 1.6% FTA (failure to appear) rate for Baltimore. See *id.* (citing Charles E. Ares et al., *The Manhattan Bail Project: An Interim Report on the Use of Pretrial Parole*, 38 N.Y.U. L. REV. 67, 75 (1963) and Mitchell P. Pines, *An Answer to the Problem of Bail: A Proposal in Need of Empirical Confirmation*, 9 COLUM. J.L. & SOC. PROBS. 394, 425 (1973)).

<sup>147</sup> Lenore Anderson, *If California Wants Real Criminal Justice Reform, This is the Next Step*, SACRAMENTO BEE (Oct. 24, 2018), <https://www.sacbee.com/opinion/california-forum/article220511650.html> [<https://perma.cc/2GJV-34CA>].

<sup>148</sup> For example, in opposition to New Jersey's CJRA, the American Bail Coalition paid researchers at Towson University \$25,000 to conduct a study on the costs of the CJRA, with a specific focus on the pretrial services unit created under the law. Joe Hernandez, *Who Is Losing Out Under New Jersey's Criminal Justice Changes? Bail Bondsmen*, WHY (Dec. 29, 2016), <https://why.org/articles/who-is-losing-out-under-new-jerseys-criminal-justice-reforms-bail-bondsmen/> [<https://perma.cc/S4AW-PN3K>]. The report, published in 2014, estimated that the CJRA would cost almost \$66 million in its first year. However, the Towson study was "requested and paid for by the bail bond industry," leading to questions about the dubious incentives of the study's funders. *Id.* Similar vehement oppo-

Ultimately, an adequately funded PAS is crucial to the success of SB 10's bail reform efforts and to the administration of nonmonetary release conditions as an alternative to preventative detention. Despite the implementation and start-up costs that PAS will inevitably require, the use of pretrial services is more cost-effective than not using them. As such, the long-term financial outlook favors the use of pretrial services despite the implementation costs necessary to start such services.

### 3. *Are the Risk Assessments in SB 10 Discriminatory?*

Under SB 10, within twelve hours of booking, the booking agency, usually the sheriff, will release defendants arrested for misdemeanors (with some exceptions for domestic violence, stalking, and other serious factors).<sup>149</sup> Within twenty-four hours of booking, PAS will assess all individuals who have not been released by the booking agency—defendants charged with felonies or with misdemeanors where, under an exception, they cannot be released on recognizance.<sup>150</sup> PAS will conduct “pre-arraignment reviews” for these individuals using a validated risk assessment instrument, and PAS will inform the booking agency of eligible low-risk and medium-risk individuals who may be immediately released without a court appearance.<sup>151</sup> Individuals who are assessed as high-risk must be held until arraignment (within forty-eight hours of arrest).<sup>152</sup> Release decisions for these individuals will be made by the court.<sup>153</sup> Prior to arraignment, PAS will provide risk assessment information and other information to the courts, including any recommendations for conditions of release.<sup>154</sup> Courts may choose to perform their own pre-arraignment review under certain enumerated circumstances.<sup>155</sup> If courts choose this route, judicial officers may order the release of additional low- and medium-risk defendants prior to arraignment after receiving information from PAS, including the results of a risk assessment.<sup>156</sup>

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sition campaigns can be expected to arise in response to SB 10. However, the likelihood of success of such campaigns is unclear, depending largely on the public's perception of SB 10.

<sup>149</sup> California Money Bail Reform Act (Senate Bill No. 10), CAL. PENAL CODE § 1320.8 (West 2019) (effective October 1, 2019).

<sup>150</sup> *See id.* § 1320.9(a).

<sup>151</sup> *See id.* § 1320.10(a)–(c).

<sup>152</sup> *See id.* § 1320.10(e).

<sup>153</sup> *See id.*

<sup>154</sup> *See id.* § 1320.9.

<sup>155</sup> *See id.* §§ 1320.11, 1320.15.

<sup>156</sup> *See id.*

Given SB 10's reliance on risk assessments, concerns have been raised about these validated risk assessment instruments, which may consider factors such as race and other demographic factors that have the ability to inappropriately affect risk assessment scores.<sup>157</sup> Over one hundred prominent social justice and civil rights organizations, many of which are leaders in advocating for the reform and abolition of monetary bail systems, have condemned such risk assessment tools.<sup>158</sup> Detractors claim that risk assessments are "like a factory machine that funnels people," rather than "address[ing] the root cause of an issue."<sup>159</sup>

Despite these concerns, risk assessment tools are often utilized as objective bases to release defendants on their own recognizance or with limited pretrial conditions.<sup>160</sup> Further, risk assessment tools have actually been shown to help decrease overall rates of pretrial detention. Indeed, in a 2012 study, researchers analyzed data on 116,000 defendants from 1990 to 2006 and found that if judges had released all low-risk defendants, or those with less than a 30% chance of being rearrested during the pretrial period, 85% of pretrial defendants would have been released.<sup>161</sup>

However, SB 10's use of risk assessment tools may give rise to various legal challenges. In this, there is very little judicial guidance on the constitutional implications of risk assessment tools, and the cases that have examined issues related to risk assessments have not arisen in the pretrial context.<sup>162</sup> There-

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<sup>157</sup> See Michelle Alexander, *The Newest Jim Crow*, N.Y. TIMES (Nov. 8, 2018), <https://www.nytimes.com/2018/11/08/opinion/sunday/criminal-justice-reforms-race-technology.html> [<https://perma.cc/JP2M-HA5N>].

<sup>158</sup> Sarah Lazare, *Bernie Sanders and Kamala Harris Both Fall Short on Abolishing Money Bail*, IN THESE TIMES (Nov. 13, 2018), <http://inthesetimes.com/article/21575/bernie-sanders-and-kamala-harris-both-fall-short-on-bail-abolition> [<https://perma.cc/WF8M-HFNT>]. "Decades of research have shown that such data primarily document the behavior and decisions of police officers and prosecutors, rather than the individuals or groups that the data are claiming to describe." *Id.*

<sup>159</sup> *Id.*

<sup>160</sup> Multiple jurisdictions, such as Kentucky and Washington, D.C., already use risk assessments in their pretrial programs, and these programs generally have low failure to appear rates. *Frequently Asked Questions: Pretrial Detention Reform*, *supra* note 46.

<sup>161</sup> CRIMINAL JUSTICE POLICY PROGRAM, HARVARD LAW SCH., MOVING BEYOND MONEY: A PRIMER ON BAIL REFORM 20 (2016), <http://tinyurl.com/mzy6wzu> [<https://perma.cc/BC4B-CTJD>] (citing Shima Baradaran & Frank L. McIntyre, *Predicting Violence*, 90 TEX. L. REV. 497, 553 (2012)).

<sup>162</sup> See, e.g., *State v. Loomis*, 881 N.W.2d 749, 760 (Wis. 2016) (examining the use of risk assessment at sentencing); *State v. Duchay*, 647 N.W.2d 467 (Wis. Ct. App. 2002) (holding that a court's reliance on a risk assessment instrument in



fore, depending on how the tools are used, substantial constitutional considerations may come into play. For instance, a challenge to SB 10 may attack its use of risk assessments on the ground that these statistical tools rely on aggregate data, thereby undermining “individualized and equal justice.”<sup>163</sup> One could argue that risk assessments disproportionately impact minority groups.<sup>164</sup> Indeed, many critics assert that by relying on underlying factors that are molded and skewed by race or gender discrimination, risk assessment tools actually reinforce and strengthen discrimination and inequality.<sup>165</sup>

For example, risk assessments often consider a defendant’s prior interaction with the criminal justice system as an objective factor.<sup>166</sup> However, the lens through which this factor is viewed may itself be twisted by discrimination—discrimination that caused African Americans and Latinos to be disproportionately exposed to law enforcement in the first place.<sup>167</sup> Similarly, factors such as educational history, housing instability, or other socioeconomic factors are likely to result in racial disparities because these factors correlate strongly with

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sentencing was not a due process violation because the defendant did not show that the information was inaccurate); *Malenchik v. State*, 928 N.E.2d 564, 575 (Ind. 2010) (upholding the use of a risk assessment tool in the sentencing context).

<sup>163</sup> Attorney General Eric Holder expressed the concern that actuarial risk assessment “may inadvertently undermine our efforts to ensure individualized and equal justice.” Attny. Gen. Eric Holder, U.S. Dep’t of Just., Remarks at National Association of Criminal Defense Lawyers 57th Annual Meeting (Aug. 1, 2014), <https://www.justice.gov/opa/speech/attorney-general-eric-holder-speaks-national-association-criminal-defense-lawyers-57th> [<https://perma.cc/2WBM-M3CU>].

<sup>164</sup> CRIMINAL JUSTICE POLICY PROGRAM, HARVARD LAW SCH., *supra* note 161, at 22.

<sup>165</sup> *See id.*; *see, e.g.*, Michael Tonry, *Legal and Ethical Issues in the Prediction of Recidivism*, 26 FED. SENT’G REP. 167, 173 (2014) (concluding that reliance on criminal histories and socioeconomic factors, such as age at time of first arrest, custody status at time of first arrest, and total number of convictions, inherently disadvantage minority defendants).

<sup>166</sup> *See id.*

<sup>167</sup> A California study found that 38% of Latinos and 33.7% of African Americans are released pretrial, compared with 48.9% of whites and 54.6% of Asian Americans. SONYA TAFOYA ET AL., PUB. POL’Y INST. CALIFORNIA, PRETRIAL RELEASE IN CALIFORNIA 14–15 (2017) [https://www.ppic.org/content/pubs/report/R\\_0517\\_STR.pdf](https://www.ppic.org/content/pubs/report/R_0517_STR.pdf) [<https://perma.cc/24KX-K29N>]; *see, e.g.*, MARC MAUER & RYAN S. KING, THE SENT’G PROJECT, UNEVEN JUSTICE: STATE RATES OF INCARCERATION BY RACE AND ETHNICITY 4 (2007) <https://www.sentencingproject.org/wp-content/uploads/2016/01/Uneven-Justice-State-Rates-of-Incarceration-by-Race-and-Ethnicity.pdf> [<https://perma.cc/5K2Y-LWBK>] (finding that “[t]he American prison and jail system is defined by an entrenched racial disparity in the population of incarcerated people”). Research indicates that African American and Hispanic defendants are more likely to be detained pretrial than are white defendants and less likely to be able to post money bail as a condition of release. *See* PRETRIAL DETENTION REFORM WORKGROUP, *supra* note 42, at 14.

race.<sup>168</sup> As such, factors deemed to be objective may not, in fact, be objective at all. Using this same logic, SB 10's use of risk assessments may appear to entrench and exacerbate existing racial and socioeconomic disparities by giving a "scientific imprimatur" to unequal outcomes.<sup>169</sup> If this is the case, how can the use of *any* risk assessment tool pass constitutional muster?

To pass constitutional scrutiny, a risk assessment tool that determines or influences pretrial outcomes must conform to the Equal Protection Clause of the Fourteenth Amendment.<sup>170</sup> However, even though equal protection principles generally prohibit express classifications based on race or sex, or intentional discrimination on those bases, the Constitution does *not* prohibit policies that have an *unintentional* disparate impact on particular groups, even if those disparities are foreseeable.<sup>171</sup> Factors such as prior criminal history, educational history, or housing instability are not express classifications based on race or sex. But even though these factors present as facially neutral, they may have an unintended disparate impact on certain minority groups. Nevertheless, because this impact is unintentional, the use of these factors is constitutionally permissible. As such, an equal protection challenge to the use of risk assessments in SB 10 would likely fail because there is no mandate in SB 10 that requires the tool to use an express classification based on race or sex, or to intentionally discriminate on those bases.<sup>172</sup> Rather, SB 10 merely authorizes courts to consider "[t]he recommendation of Pretrial Assessment Services obtained using a validated risk assessment in-

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<sup>168</sup> CRIMINAL JUSTICE POLICY PROGRAM, HARVARD LAW SCH., *supra* note 161, at 22.

<sup>169</sup> *Id.*

<sup>170</sup> Equal protection principles generally prohibit the government from taking adverse action against a person on the basis of certain protected characteristics, particularly race, national origin, and sex. *See, e.g.*, *Fisher v. Univ. of Tex. at Austin*, 570 U.S. 297, 310 (2013) (stating that government policies that rely on "suspect classifications" will survive judicial scrutiny only if they are narrowly tailored to serve a compelling governmental interest). It has been argued that, "[i]n the risk assessment context, those 'classifications' will consist of the inputs that drive an assessment tool's statistical analysis," and therefore "equal protection considerations counsel strongly against using a system in which race or sex are incorporated into risk scores." CRIMINAL JUSTICE POLICY PROGRAM, HARVARD LAW SCH., *supra* note 161, at 23.

<sup>171</sup> *See, e.g.*, *Personnel Adm'r of Mass. v. Feeney*, 442 U.S. 256, 272-73, 279 (1979) ("[E]ven if a neutral law has a disproportionately adverse effect upon a racial minority, it is unconstitutional under the Equal Protection Clause only if that impact can be traced to a discriminatory purpose.").

<sup>172</sup> *See id.* at 279.

strument.”<sup>173</sup> The law does not mandate what specific factors the risk assessments instruments should use.<sup>174</sup> Individual county risk assessments could be challenged on the grounds that the underlying factors violate equal protection, but SB 10 itself could not successfully be challenged because it does not specifically mandate the use of discriminatory factors.

Opponents of risk assessments also argue that the very premise of a risk assessment tool—a tool that draws on “aggregate data to make decisions about individuals”<sup>175</sup>—violates fundamental norms of fairness and due process. While an *individual’s* conduct is within that individual’s control, that individual has no control over others who share a characteristic relevant for the risk assessment instrument.<sup>176</sup> How then can an individual be judged simply by looking at the aggregate conduct of thousands of other people?

The Constitution’s due process protections require that, before the government deprives a person of liberty, that person must enjoy sufficient procedural safeguards that “minimize substantively unfair or mistaken” outcomes.<sup>177</sup> The main features of such procedural safeguards are reasonable notice and opportunity to be heard.<sup>178</sup> In the pretrial context, the *Salerno* Court emphasized that the procedural due process inquiry for a preventative detention decision turns on whether a defendant enjoys “procedures by which a judicial officer evaluates the likelihood of future dangerousness [that] are specifically designed to further the accuracy of that determination.”<sup>179</sup> As such, an SB 10 challenger could argue that the Constitution requires the *Salerno* procedural due process principles to be reflected in any procedure that relies on risk assessments. Essentially, this argument asserts that a defendant must have an opportunity to contest any potentially inaccurate or substantively unfair risk assessment procedures. This broad argument ultimately leaves all risk assessment tools vulnerable to due process challenges on the ground that the tools have the capacity to produce inaccurate or unfair results. However, having the capacity to produce inaccurate or unfair results is markedly different from *actually producing* inaccurate or unfair re-

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<sup>173</sup> California Money Bail Act (Senate Bill No. 10), CAL. PENAL CODE § 1320.20(f)(6) (West 2019) (effective Oct. 1, 2019).

<sup>174</sup> *See id.*

<sup>175</sup> CRIMINAL JUSTICE POLICY PROGRAM, HARVARD LAW SCH., *supra* note 161, at 22.

<sup>176</sup> *Id.* at 22–23.

<sup>177</sup> *Fuentes v. Shevin*, 407 U.S. 67, 81 (1972).

<sup>178</sup> *See Mathews v. Eldridge*, 424 U.S. 319, 333 (1976).

<sup>179</sup> *United States v. Salerno*, 481 U.S. 739, 751 (1987).

sults, and the success of such a challenge turns on this distinction.

There is currently no case law that illustrates a definition or standard for what constitutes inaccurate or unfair risk assessment results. However, case law in other legal areas suggests some ways that jurisdictions could ensure adequate procedures.<sup>180</sup> For instance, in the sentencing context, the Wisconsin Supreme Court upheld the use of a risk assessment instrument, outlining several requirements for applying the tool consistently with due process. In *State v. Loomis*, Loomis argued that the risk assessment tool violated his due process rights to be sentenced on accurate individualized information. First, he contended that the risk assessment tool placed him within a group and assessed risk based on certain shared characteristics with others in that group. Thus, there was a danger of overestimating the risk of an individual defendant based on limited information. It is the character of the offender that the court must consider, Loomis argued, not the class of people with whom he is similar.<sup>181</sup>

Loomis also asserted that because it was not disclosed how his risk scores were determined or how the factors were weighed, he had been denied information that the Circuit Court considered at sentencing.<sup>182</sup> Unless Loomis could review how the factors were weighed and how the risk scores were determined, he claimed the accuracy of the risk assessment tool could not be verified and therefore it violated his due process rights. The court rejected his arguments, stating that even though Loomis could not review and challenge how the risk assessment algorithm calculated risk, he could at least review and challenge the resulting risk scores set forth in the report. The court concluded this, despite acknowledging that studies of risk assessment tools have raised questions about the accuracy of such tools.

The *Loomis* court held that risk scores may not be considered the determinative factor in deciding whether an offender can be supervised safely and effectively in the community.<sup>183</sup> The court further held that sentencing judges considering risk reports must receive an accompanying advisory alerting them to four points: (1) that the company that created the tool has

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<sup>180</sup> See, e.g., *State v. Loomis*, 881 N.W.2d 749, 764–66 (Wis. 2016) (considering the use of a risk assessment instrument in the sentencing context).

<sup>181</sup> See *id.*

<sup>182</sup> *Id.* at 761–63.

<sup>183</sup> *Id.* at 769.

invoked its proprietary interest to prevent disclosure of how factors are weighted or risk scores are determined; (2) that risk assessment scores are based on group data and are able to identify groups of high-risk offenders, not a particular high risk offender; (3) that some studies of the tool being used have “raised questions about whether they disproportionately classify minority offenders as having a higher risk of recidivism”; and (4) that the tool is based on a national sample that has not been validated for Wisconsin and that risk assessment tools must be constantly monitored and recalibrated for accuracy as the population changes.<sup>184</sup>

In the pretrial detention context, courts have held that there should be safeguards in place to protect the weighty liberty interests of a defendant because presumptively innocent defendants face a deprivation of liberty.<sup>185</sup> In the case of bail reform laws and SB 10, these safeguards should include a variation of the four *Loomis* factors, thereby providing an adequate advisory for judges to consider with regard to these risk assessment tools. These safeguards would essentially ensure that the defendant is provided with a substantive understanding of how the risk assessment tool works, and the defendant should be given a meaningful opportunity to contest the tool’s application, if necessary. The best way to ensure that these procedural safeguards are implemented uniformly throughout California is for SB 10 to provide that the safeguards must include: “disclosing the defendant’s risk assessment score, the factors considered in determining the score, the relative weights given to different factors, and information about when and how the instrument was validated and re-normed, including information about the population samples used in validating it.”<sup>186</sup> However, an adequate implementation of these procedural safeguards depends on the strength and efficiency of each county’s PAS.

An efficient PAS would have the power to regulate the procedural framework that ensures that relevant information about a risk assessment’s accuracy is disclosed. PAS may do this by conducting and researching studies demonstrating race disparities or other inaccuracies caused by risk assessments in that county, and by setting out distinct limitations for the role

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<sup>184</sup> *Id.* at 764.

<sup>185</sup> See *United States v. Salerno*, 481 U.S. 739, 750–51 (1987).

<sup>186</sup> CRIMINAL JUSTICE POLICY PROGRAM, HARVARD LAW SCH., *supra* note 161, at 24 (citing Melissa Hamilton, *Risk-Needs Assessment: Constitutional and Ethical Challenges*, 52 AM. CRIM. L. REV. 231, 271 (2015) (“considering potential due process requirements in various contexts”)).

that the tool may play in shaping pretrial decisions. Because SB 10 allows each county in California to choose its own validated risk assessment, it is up to the PAS of each county to determine the manner in which they conduct their pretrial assessments and use their risk assessment tools.<sup>187</sup> This individualization of risk assessment tools allows each county to tailor its risk assessments tool and PAS pre-arraignment practices to meet that county's specific needs.

However, despite the advantages of giving counties this power, critics argue that SB 10 vests these counties with too much discretion in deciding what risk assessment tools to use and how exactly they should be used, especially since SB 10 does not require that the same risk assessment be implemented throughout the state.<sup>188</sup> While such concerns have some validity, it is an exaggeration to claim that SB 10 vests counties with a new type of power to choose in this area. Indeed, counties have *always* had this power to some extent. For instance, a 2015 survey of counties indicated that forty-six of the fifty-eight California counties already use some type of pretrial program, and that 70% established their programs in the past five years.<sup>189</sup> Further, at least forty-two counties use a type of pretrial risk assessment tool that provides judges with information about the risk of releasing a defendant before trial.<sup>190</sup>

### III

#### THE BIG PICTURE: A CONUNDRUM FOR THE CRIMINAL JUSTICE SYSTEM

Given SB 10's various advantages and weaknesses, the criminal justice system is faced with a conundrum: should it implement SB 10 and fund the various PAS programs necessary to administer SB 10, or should SB 10 be repealed, thereby maintaining the current wealth-based bail system despite the many known consequences for both individual rights and society? SB 10 represents a new door that has not yet been opened—it is both hopeful and foreboding. Will it achieve its goals, or open Pandora's box to even more bail problems? And is the possibility of facing new and unexpected problems really

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<sup>187</sup> CAL. DEP'T OF FIN., *supra* note 131, at 4.

<sup>188</sup> See Tyler & Raphling, *supra* note 123.

<sup>189</sup> CALIFORNIANS FOR SAFETY & JUSTICE, THE CRIME & JUSTICE INST., PRETRIAL PROGRESS: A SURVEY OF PRETRIAL PRACTICES AND SERVICES IN CALIFORNIA 6 (2015), [https://safeandjust.org/wp-content/uploads/PretrialSurveyBrief\\_8.26.15v2.pdf](https://safeandjust.org/wp-content/uploads/PretrialSurveyBrief_8.26.15v2.pdf) [<https://perma.cc/N62L-2ARJ>].

<sup>190</sup> *Id.* at 7.

threatening enough to forgo SB 10 altogether? This dichotomy is one that has long-plagued criminal justice reform advocates.

### A. Conditions of Pretrial Detention: A Thirteenth Amendment Case Study

An illustration of the plight of the pretrial detainee and the conditions of pretrial detention starts with the Thirteenth Amendment.<sup>191</sup> The Thirteenth Amendment, the language of which has garnered attention recently,<sup>192</sup> guarantees that “[n]either slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.”<sup>193</sup> In the pretrial detention context, at least one court has recently determined that certain conditions of pretrial detention could violate the Thirteenth Amendment.<sup>194</sup>

In *McGarry v. Pallito*, McGarry was denied bail and ordered into pretrial detention, where he was required to work in the prison laundry for long hours, sometimes fourteen-hour shifts, in hot, unsanitary conditions.<sup>195</sup> When he objected to this work, he was told that his refusal would put him in either administrative segregation or “in the hole,”<sup>196</sup> and that he would receive an Inmate Disciplinary Report, which could affect when sentenced inmates were eligible for release. The Second Circuit found that even though McGarry was a pretrial detainee, he was threatened by physical and legal coercion to work, and therefore he had stated a claim that sufficiently al-

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<sup>191</sup> While this Note entertains the possibility of a Thirteenth Amendment challenge to SB 10 as an academic exercise, it does not argue that this legal challenge is likely to be used to challenge SB 10, nor does it argue that this challenge would have a significant likelihood of success if it were raised.

<sup>192</sup> On November 6, 2018, Colorado voters approved an amendment to the Colorado Constitution that completely abolishes slavery. Bill Chappell, *Colorado Votes to Abolish Slavery, 2 Years After Similar Amendment Failed*, NPR (Nov. 7, 2018), <https://www.npr.org/2018/11/07/665295736/colorado-votes-to-abolish-slavery-2-years-after-similar-amendment-failed> [<https://perma.cc/Z3C4-AQ4X>]. This amendment will change Article II, Section 26 of the state’s constitution, which closely mirrors the Thirteenth Amendment to the U.S. Constitution and which, for over 100 years, stated, “There shall never be in this state either slavery or involuntary servitude, except as a punishment for crime, whereof the party shall have been duly convicted.” *Id.* The new amendment instead states, “There shall never be in this state either slavery or involuntary servitude.” *Id.*

<sup>193</sup> U.S. CONST. amend. XIII, § 1.

<sup>194</sup> *McGarry v. Pallito*, 687 F.3d 505, 511–12 (2d Cir. 2012).

<sup>195</sup> *Id.* at 509–12.

<sup>196</sup> “In the hole” referred to a punishment of isolation for twenty-three hours per day and the use of shackles. *Id.* at 511–12.

leged that his Thirteenth Amendment right to be free from involuntary servitude was violated.

Thirteenth Amendment challenges may arise in other forms as well, depending on the circumstances of the pretrial detention. *McGarry* contemplated rehabilitation during incarceration and stated that “it is clearly established that a state may not ‘rehabilitate’ pretrial detainees. The Supreme Court has unambiguously and repeatedly held that a state’s authority over pretrial detainees is limited by the Constitution in ways that the treatment of convicted persons is not.”<sup>197</sup> And in *McGinnis v. Royster*, the Supreme Court concluded that “it would hardly be appropriate for the State to undertake in the pretrial detention period programs to rehabilitate a man still clothed with a presumption of innocence.”<sup>198</sup> Further, in *Bell v. Wolfish*, the Supreme Court held that convicted prisoners retain constitutional protections during incarceration, and the Court reasoned that “[a] fortiori, pretrial detainees, who have not been convicted of any crimes, retain at least those constitutional rights that we have held are enjoyed by convicted prisoners.”<sup>199</sup>

Considering these rulings, the current bail system and its overuse of pretrial detention—especially for individuals who are detained because they simply cannot afford to pay their bail amounts—raise significant concerns about the criminal justice system’s view of the presumption of innocence in America. How can it be in accordance with the Constitution to subject a man “clothed with a presumption of innocence”<sup>200</sup> to pretrial detention? A pretrial detainee—someone who has not yet been convicted of *any* crime—is given “at least those constitutional rights . . . enjoyed by convicted prisoners.”<sup>201</sup> But under the presumption of innocence, shouldn’t the constitutional protections include much more than that? The Supreme Court has not given much direction on this issue, and the pretrial detainee is thus left in an ambiguous constitutional void in which they are put in pretrial detention by a wealth-based bail system, treated as convicted detainees by the criminal justice system, and condemned as criminals by the public.

California’s SB 10 is an attempt to fill this void. It seeks to create a presumption of release for all low-risk defendants,

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197 *Id.* at 513.

198 *McGinnis v. Royster*, 410 U.S. 263, 273 (1973).

199 *Bell v. Wolfish*, 441 U.S. 520, 545 (1979).

200 *McGinnis*, 410 U.S. at 273.

201 *Bell*, 441 U.S. at 545.



construct a careful legal process for ordering preventative detention, and allow more instances of release on conditions as an alternative to pretrial detention. Yet, despite the nobility of this pursuit, SB 10 also generates a new kind of threat: the creation of a bail system that is potentially worse, and potentially more dangerous to individual rights, than the previous one.

### B. Opening Pandora's Box to a Potentially Worse Bail System

In any reform attempt, there is always a possibility that eradicating the old way will result in a new status quo that is significantly worse. SB 10 seeks to reform the bail system by allowing courts to release more defendants by imposing conditions of release as an alternative to pretrial detention. However, will SB 10's use of conditions of release replace the current practice of pretrial incarceration with a new regime of "e-carceration?"<sup>202</sup> Furthermore, which practice poses a bigger threat to individuals? These questions have recently come to the forefront of the SB 10 bail reform policy debate.<sup>203</sup>

In a regime of "e-carceration," if a pretrial detainee is released prior to trial, a court may impose restrictive conditions of release that essentially create an "open-air digital prison."<sup>204</sup> For instance, a court may release a defendant pretrial, but it may order that the defendant wear an electronic-monitoring ankle device with GPS tracking—a condition that seems reasonable on its face and appears much less restrictive than pretrial detention. However, that ankle device costs the defendant around \$300 each month in out-of-pocket expenses, and it severely restricts the defendant's permitted zones of movement, making it hard to keep a job, attend classes, or care for children.<sup>205</sup> Ultimately, even though that defendant is released from physical pretrial detention, she remains confined in a prison of e-carceration. She can live in her own home, yet she is stuck in a web of restrictive conditions and she is constantly monitored by an all-seeing technological spider. In an era where foreign governments have the ability to hack into national elections<sup>206</sup> and Facebook has the audacity to sell its

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<sup>202</sup> Alexander, *supra* note 157.

<sup>203</sup> *Id.*

<sup>204</sup> *Id.*

<sup>205</sup> *Id.*

<sup>206</sup> See Jane Mayer, *How Russia Helped Swing the Election for Trump*, NEW YORKER (Oct. 1, 2018), <https://www.newyorker.com/magazine/2018/10/01/how-russia-helped-to-swing-the-election-for-trump> [<https://perma.cc/MT2J->

customers' private data,<sup>207</sup> the prospect of giving the government, or government contractors, unfettered access to a person's whereabouts is a frightening one. However, challenging these conditions of release in court has seen little success.

In *Holland v. Rosen*, Holland claimed that the conditions of his pretrial release were unconstitutional because they violated the Fourth Amendment.<sup>208</sup> In response, the Third Circuit assumed, without explicitly deciding, that home detention and electronic monitoring *could* constitute a search and seizure, but nevertheless found no violation because (1) Holland has a reduced expectation of privacy because he was arrested on probable cause for a dangerous offense, and (2) the State "has a substantial interest in ensuring that persons accused of crimes are available for trials" and a "legitimate and compelling" interest in preventing crime by arrestees."<sup>209</sup>

On the issue of conditions of release, the *Holland* ruling is somewhat troubling. Even if a court finds that there is probable cause for a crime, does a defendant's *reduced* expectation of privacy amount to having *no* expectation of privacy at all? After all, that is what electronic ankle monitoring constitutes—a complete lack of privacy for an unconvicted, and presumably innocent, defendant. A GPS-tracking device allows the government to track an individual's every movement for the purpose of ensuring their appearance at court. However, would not a less-intrusive condition of release have sufficed to ensure this outcome? The answer is almost certainly yes. Having PAS monitor the defendant by conducting weekly check-ins, either by phone or in person, would allow the government to keep track of the defendant, while also ensuring the defendant appears in court. There are numerous other conditions of release that would produce the same result.

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95GU]; see also Nicole Perlroth, *D.N.C. Says It Was Targeted Again by Russian Hackers After '18 Election*, N.Y. TIMES (Jan. 18, 2019), [https://www.nytimes.com/2019/01/18/technology/dnc-russian-hacking.html?rref=collection%2Fnewseventcollection%2Frussian-election-hacking&action=click&contentCollection=politics&region=stream&module=stream\\_unit&version=latest&contentPlacement=7&pgtype=collection](https://www.nytimes.com/2019/01/18/technology/dnc-russian-hacking.html?rref=collection%2Fnewseventcollection%2Frussian-election-hacking&action=click&contentCollection=politics&region=stream&module=stream_unit&version=latest&contentPlacement=7&pgtype=collection) [<https://perma.cc/SKF4-KFKB>] (reporting on the DNC's belief that a Russian group attempted to hack the DNC right before midterm elections in 2018).

<sup>207</sup> See Alexis C. Madrigal, *Facebook Didn't Sell Your Data; It Gave It Away*, ATLANTIC (Dec. 19, 2018), <https://www.theatlantic.com/technology/archive/2018/12/facebooks-failures-and-also-its-problems-leaking-data/578599/> [<https://perma.cc/B57G-58E4>].

<sup>208</sup> *Holland v. Rosen*, 895 F.3d 272, 278 (3d Cir. 2018).

<sup>209</sup> *Id.* at 302.

SB 10 provides measures to guard against intrusions into individual privacy by mandating that courts use the least restrictive conditions of release available. Under SB 10, individuals who are assessed as low-risk during a pre-arraignment review will be released on their own recognizance by PAS and the booking agency within twenty-four hours of booking (exceptions for those arrested for crimes such as domestic violence, multiple DUI offenses, and other factors).<sup>210</sup> Based upon the parameters set forth in state and local rules of court, individuals who are assessed as medium-risk (except for those arrested for crimes such as domestic violence, multiple DUIs, and other factors) will be released by PAS and the booking agency with the least restrictive nonmonetary conditions of release, such as supervision by PAS, GPS monitoring, or drug testing, that will ensure public safety and return to court.<sup>211</sup> Further, SB 10 provides that defendants will not be required to pay for these nonmonetary conditions of release.<sup>212</sup> As such, although the threat of an “e-carceration” regime is ever-present, SB 10 consciously seeks to safeguard against it.

#### CONCLUSION

California’s bail system not only infringes on individual rights, but also exacerbates a cobweb criminal justice system. The *In re Humphrey* court framed the issue perfectly when it stated that the problem with the bail system stems “from the enduring unwillingness of our society, including the courts, to correct a deformity in our criminal justice system that close observers have long considered a blight on the system.”<sup>213</sup> California sought to rectify this “deformity”<sup>214</sup> of a wealth-based bail system by passing SB 10.

While legal arguments contending that SB 10 violates the state constitutional right to bail may be entertained, these arguments have a low likelihood of success. However, legislation alone does not ensure success; rather, SB 10 needs adequate funding and research to effectively implement PAS programs throughout California’s counties.<sup>215</sup> A carefully constructed

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<sup>210</sup> California Money Bail Reform Act (Senate Bill No. 10), CAL. PENAL CODE § 1320.10(b) (West 2019) (effective Oct. 1, 2019).

<sup>211</sup> See *id.* § 1320.10(c).

<sup>212</sup> See *id.* § 1320.10(d).

<sup>213</sup> *In re Humphrey*, 228 Cal. Rptr. 3d 513, 545 (Cal. Ct. App. 2018) (citation omitted).

<sup>214</sup> *Id.*

<sup>215</sup> “Though legislation is desperately needed, administration of the bail system is committed to the courts. It will be hard, perhaps impossible, for judicial

implementation plan, akin to New Jersey's plan for the CJRA, is essential to SB 10's success. If SB 10 is not properly implemented, funded, researched, and supervised, it will almost certainly increase the number of pretrial detainees and possibly even create a new regime of "e-carceration" in California.<sup>216</sup>

It is clear that bail reforms are inextricably linked to the decarceration strategies underpinning them, but if SB 10's decarceration strategy is simply to replace one form of incarceration with another—"e-carceration"—then this bail reform will inevitably fail. It would satisfy some immediate problems, but would also create more problems in the future. This infinite cycle of problems and solutions ultimately stems from the nature of America's cobweb justice system, in which the true roots of crime go much deeper to include mental health crises, substance abuse, unaddressed trauma, housing and economic instability, and discriminatory police practices.<sup>217</sup> However, looking at previous bail reform examples, SB 10 shows significant promise in reforming one piece of California's criminal justice system. It may not be clear whether the answer to bail reform lies behind the SB 10 door, or if reformers are simply knocking on the door from the inside, but what is clear is that the current bail system is not working. It discriminates on the basis of wealth, it takes advantage of the criminal justice system for capitalist gain, and it profits none but the bail bond industry. Thus, SB 10 may have flaws, but it is a hopeful step forward in reforming California's bail practices and in creating a fairer and more equitable criminal justice system.

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officers to fully rectify the bail process without greater resources than our trial courts now possess." *In re Humphrey*, 228 Cal. Rptr. 3d at 545.

<sup>216</sup> See Lazare, *supra* note 158.

<sup>217</sup> Anderson, *supra* note 147.