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THE CALIFORNIA MONEY BAIL REFORM ACT:

Ensuring Pretrial Justice and Public Safety

Assemblymember Rob Bonta, 18th District

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I. The Origins of Bail

"In our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception."[1]

Despite Chief Justice William Rehnquist's declaration in *Salerno*, liberty has been the exception and pretrial detention the norm for thousands of Californians who are currently in jail pretrial simply because they are poor. California currently has a money bail system that penalizes poverty, setting a price on a person's access to pretrial release based on the size of their wallet, instead of the size of their risk. How did bail transform from "a device to free untried prisoners"[2] to a tool that, in recent years, has created a new reality in which approximately 63 percent of those incarcerated in California's jails have neither been convicted nor pled guilty?[3] And what can be done to restore equity and public safety considerations to the system?

This Article briefly reviews the origins of the bail system; discusses the economic, human, and public safety costs of the existing system; analyzes pending cases and an appellate opinion; and outlines a path to this solution while acknowledging where California lies today on that path.

A. *History of Bail*

California Supreme Court Chief Justice Tani Cantil-Sakauye established a Pretrial Detention Reform Workgroup (Workgroup) in October 2016 "to provide recommendations on how courts may better identify ways to make release decisions that will treat people fairly, protect the public, and ensure court appearances."[4] The Workgroup's report provides

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1. United States v. Salerno, 481 U.S. 739, 755 (1987). Despite Chief Justice Rehnquist's noble declaration, the dissent by Justices Marshall and Brennan noted in upholding the Bail Reform Act of 1984, that:

   > This case brings before the Court for the first time a statute in which Congress declares that a person innocent of any crime may be jailed indefinitely, pending the trial of allegations which are legally presumed to be untrue, if the Government shows to the satisfaction of a judge that the accused is likely to commit crimes, unrelated to the pending charges, at any time in the future. Such statutes, consistent with the usages of tyranny and the excesses of what bitter experience teaches us to call the police state, have long been thought incompatible with the fundamental human rights protected by our Constitution. Today a majority of this Court holds otherwise. Its decision disregards basic principles of justice established centuries ago and enshrined beyond the reach of governmental interference in the Bill of Rights.

   Id. at 755–56 (Marshall, J. & Brennan, J., dissenting).
2. State of New Mexico v. Brown, 338 P.3d 1276, 1283 (N.M. 2014) (quoting Daniel J. Freed & Patricia M. Wald, Bail in the United States: 1964 (1964)).
3. Human Rights Watch, "Not in it for Justice": How California's Pretrial Detention and Bail System Unfairly Punishes Poor People (2017), https://www.hrw.org/report/2017/04/11/not-it-justice/how-californias-pretrial-detention-and-bail-system-unfairly [https://perma.cc/JKE2-PW52].
4. Pretrial Det. Reform Workgroup, Pretrial Detention Reform—Recommendations to the Chief Justice 5 (2017), https://newsroom.courts.ca.gov/

a history of the bail system in the United States, noting its origins preceded the Norman Conquest in Anglo-Saxon England.[5] In Anglo-Saxon England, crimes were typically punished by monetary compensation to the victim.[6,7] Medieval law enforcement typically required a surety post the fine amount as bail to guarantee the accused's appearance at trial and payment of the fine upon conviction, with the accused being released pending trial.[8] The period after the Norman Conquest in 1066 saw monetary fines replaced with capital and corporal punishment, and abusive increases in the time between an accused's arrest and trial.[9] This later led to the codification of the common law right to bail into English law and incorporation of the presumption of innocence and rights to personal liberty into the Magna Carta.[10] Bail was limited to defined offenses, centered on the *release of the accused* and appearance at trial, and set based on factors such as "the strength of the evidence against the accused and the accused's criminal history."[11]

The same principles enshrined in the Magna Carta—the presumption of innocence and right to personal liberty—formed the foundation of the American bail system.[12] In the nascent years of our Republic, the bail system "did not contemplate profit or indemnification in the posting of the bond."[13] As the nation's frontier expanded westward, so did the likelihood defendants could escape justice.[14] As such, the nineteenth century saw the bail system evolve into a surety system, where "secured bonds were typically administered through commercial sureties and their agents, and the deposit of money or the pledge of assets became a principal condition of release."[15] Thus the seeds of our current system—a system that is broken, discriminatory, and punishes poor people simply for being poor—were sown.

The "tough on crime" sentiment of the late 20th century further eroded the original premises of bail: pretrial release and appearance at trial. In 1970, the first law placing community safety on an equal footing

internal_redirect/cms.ipressroom.com.s3.amazonaws.com/262/files/20179/PDRReport-FINAL%2010-23-17.pdf [https://perma.cc/P29T-BJWV].

5. *Id.* at 9.
6. *Id.* (citing Brown, 338 P.3d at 1283).
7. Timothy R. Schnacke et al., Pretrial Justice Inst., The History of Bail and Pretrial Release 1–2 (2010), https://www.pretrial.org/download/pji-reports/PJI-History%20of%20Bail%20Revised.pdf [https://perma.cc/DN9Y-LE5B].
8. Pretrial Det. Reform Workgroup, *supra* note 5, at 9 ("Bail began 'as a device to free untried prisoners.'" (citation omitted)). *See also Brown*, 338 P.3d at 1285 ("No commercial bail bond industry existed in medieval England, where pretrial release was conditioned upon the accused securing a reputable friend or relative to personally assure the accused's appearance for trial.").
9. Pretrial Det. Reform Workgroup, *supra* note 5, at 9.
10. *Id.*
11. *Id.*
12. *Id.*
13. *Id.* at 9–10.
14. *Id.* at 10.
15. *Id.*

with future court appearance at trial was passed.[16] Ostensibly to "address the alarming problem of crimes committed by persons on release . . . [and to] give the courts adequate authority to make release decisions that give appropriate recognition to the danger a person may pose to others if released,"[17] Congress later passed the Bail Reform Act of 1984.[18] The Act allowed "a federal court to detain an arrestee pending trial if the Government demonstrates by clear and convincing evidence after an adversary hearing that no release conditions 'will reasonably assure . . . the safety of any other person and the community.' "[19] Thus, a pretrial defendant could now be detained in jail indefinitely. The journey of the bail system from one designed to free untried prisoners to one allowing unlimited detention and based on ability to pay was now complete.

II. The Costs of Money Bail

As the interpretation of sufficient bail sureties and its intended goals were turned on its head, the resulting harm to society has been severe and widespread. The costs to public safety, our economy, public budgets, and people impacted by a fundamentally broken money bail system are too significant to ignore.

As a former Chair of the California Assembly Select Committee on the Status of Boys and Men of Color, I began my investigation of these costs by holding an informational briefing in Oakland, California in 2016.[20] I learned from issue-area field experts, legal practitioners, including the Alameda County Public Defender's Office and the San Francisco District Attorney's Office, and impacted community members, that our current money bail system is neither just nor safe. Right now, we are penalizing the poor for being poor. This is not pretrial justice, and we, both individually and collectively, pay a heavy price for that.

One of the primary reasons I pursued money bail reform as a legislator is because the current bail system is demonstratively unsafe. In fact, there is minimal supervision or financial incentive to deter an individual from committing a new crime while on pretrial release, with the individual or bail bond company only forfeiting their nonrefundable premium when the defendant does not show up to court.[21] Under the current bail

16. District of Columbia Court Reform and Criminal Procedure Act of 1970, Pub. L. 91–358, 84 Stat. 475 (1970); Pretrial Det. Reform Workgroup, *supra* note 5, at 11.
17. State of New Mexico v. Brown, 338 P.3d 1276, 1287 (N.M. 2014) (quoting S. Rep. 98–225, at 3 (1983), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3185).
18. Bail Reform Act of 1984, 18 U.S.C. §§ 3141–3150 (2012).
19. United States v. Salerno, 481 U.S. 739, 741 (1987) (internal citation omitted).
20. Rob Bonta, *Let's Reform California's Money Bail System Together!*, Official Website 18th Cal. Assembly District, https://a18.asmdc.org/article/lets-reform-californias-money-bail-system-together [https://perma.cc/P7TD-W984] (last visited Jan. 23, 2018).
21. Cal. Penal Code § 1305 (West 2004). A defendant who is unable to post their entire bail bond amount will normally pay ten percent of their bond as a nonrefundable premium to a licensed bail bond company to gain pretrial release. *Bail*

system, wealthy defendants are released even though they might pose a flight risk or a threat to public safety, while poorer defendants who pose no such threat or risk remain locked up.

In California, there are recent examples of this dangerous threat to public safety. Less than a year ago, Kevin Janson Neal was bailed out by his mother for assault charges and subsequently went on a shooting spree in Tehama County, murdering five people and wounding many more.[22] In the case of Mark Anthony Hill, the defendant bailed out on robbery charges in Shasta County, and was subsequently charged with attempted murder, assault with a deadly weapon, and aggravated mayhem.[23] While out on money bail, Mr. Hill fled pre-arraignment and is still at large.[24]

There are also documented downstream implications of pretrial incarceration, with one study showing that even very short stays in jail for low- and moderate-risk defendants greatly increase pretrial failure and recidivism rates, increasing the likelihood of arrest on new criminal activity and failure-to-appear (FTA) rates.[25] Conversely, for high-risk defendants, pretrial supervision reduced FTA rates 33 percent, and defendants supervised pretrial for six months or more were 22 percent less likely to be arrested for new crimes before case disposition.[26]

Bonds—How They Work, Cal. Bail Agents Ass'n, http://www.cbaa.com/How_Bail_Works.html [https://perma.cc/7PMG-ADZV] (last visited Mar. 11, 2018). Even when the charges are dropped, or the defendant is acquitted or found not guilty, that ten percent premium must still be paid to the bail bond agent. *Id.* Further, if the premium is paid in installments, bail bond companies will charge interest on any remaining principal. *Id.*

22. *See* Associated Press, *California Shooting Gunman Threatened Victim, Son, Neighbor Says*, CBS News (Nov. 20, 2017, 10:10 AM), https://www.cbsnews.com/news/california-shooting-gunman-kevin-janson-neal-threatened-victim-son-neighbor [https://perma.cc/AZY5-GJF2]; Ryan Sabalow et al., *Locked Out of School, Tehama County Gunman Shot at Children From Outside*, Sacramento Bee (Nov. 14, 2017, 10:10 AM), http://www.sacbee.com/news/local/crime/article184541668.html [https://perma.cc/482T-8NEF]; Times Editorial Board, Editorial, *Tehama Shooting is Deadly Evidence that California Needs to Reform its Bail System*, L.A. Times (Nov. 15, 2017, 2:30 PM), http://www.latimes.com/opinion/editorials/la-ed-tehama-shootings-bail-reform-20171115-story.html [https://perma.cc/T5CU-2AUV].

23. Redding Police Department, *Update Avant Shooting*, City of Redding: Redding Police News Releases (Apr. 22, 2017, 1:40 AM), http://www.cityofredding.org/Home/Components/News/News/2593/2037?npage=5 [https://perma.cc/3P5Q-JTY9].

24. Josh Copitch, *One Arrested, One Still at Large in Redding Attempted Murder*, KRCR News Channel 7 (Sept. 6, 2017), http://www.krcrtv.com/news/local/shasta/one-arrested-one-still-at-large-in-redding-attempted-murder/617232652 [https://perma.cc/7D88-X3CW].

25. Laura & John Arnold Foundation, Pretrial Criminal Justice Research 2 (2013), http://www.arnoldfoundation.org/wp-content/uploads/2014/02/LJAF-Pretrial-CJ-Research-brief_FNL.pdf [https://perma.cc/9H3D-ALXU].

26. *Id.* at 6.

A second cost is to our economy. Nationally, one in three people are in jail because they cannot afford money bail,[27] and roughly nine out of ten defendants who remained in pretrial detention could not afford the bail amount set for them.[28] As mentioned earlier, best estimates in California indicate that approximately 46,000 county jail inmates on any given day have not been sentenced.[29] These inmates are thousands of workers who are disconnected from their jobs and day-to-day responsibilities before they even reach the courtroom.

California's median bail amounts are five times the national average at $50,000,[30] even though research shows that higher bail amounts are not associated with better court appearances.[31] Our state's bail schedules are even more out of reach considering the federal Supplemental Poverty Measure, which lists California as the state with the highest poverty rate in the nation when accounting for geographical variations like cost-of-living.[32]

A third cost is a symptom of a money bail industry, including the large surety companies that underwrite it, that has exploited taxpayer dollars and government coffers to pad their profits, and commodified human vulnerability for shareholders' benefit. Because of defendants' inability to afford bail, we spend an average $114 a day per jail bed to incarcerate people in California,[33] including pretrial defendants who could be safely released and supervised at a much lower cost.[34] California has higher rates of pretrial detention compared to the national average, higher rates of multiple FTAs in court, and higher rearrest rates for

27. Bernadette Rabuy & Daniel Kopf, *Detaining the Poor: How Money Bail Perpetuates an Endless Cycle of Poverty and Jail Time*, Prison Pol'y Initiative (May 2016), https://www.prisonpolicy.org/reports/DetainingThePoor.pdf [https://perma.cc/P2PD-JNAC].
28. Brian A. Reaves, *Felony Defendants in Large Urban Counties, 2009—Statistical Tables*, U.S. Dep't Just. Bureau Just. Stat. (Dec. 2013), https://www.bjs.gov/content/pub/pdf/fdluc09.pdf [https://perma.cc/L7LJ-89D4].
29. Sonya Tafoya, Pretrial Detention and Jail Capacity in California 2 (2015), http://www.ppic.org/content/pubs/report/R_715STR.pdf [https://perma.cc/3P-PL-FYS9].
30. *Id.* at 4.
31. Michael R. Jones, Unsecured Bonds: The As Effective and Most Efficient Pretrial Release Option 14 (2013), http://www.pretrial.org/download/research/Unsecured+Bonds,+The+As+Effective+and+Most+Efficient+Pretrial+Release+Option+-+Jones+2013.pdf [https://perma.cc/AY8J-AGPY].
32. Alissa Anderson & Sara Kimberlin, *New Census Figures Show That 1 in 5 Californians Struggle to Get By*, Cal. Budget & Pol. Ctr. (Sept. 2017), http://calbudgetcenter.org/resources/new-census-figures-show-1-5-californians-struggle-get [https://perma.cc/2SXA-2V26].
33. Magnus Lofstrom & Brandon Martin, Just the Facts: California's County Jails 1 (2013), http://temp.rcrcnet.org/sites/default/files/documents/PPIC_CA_County_Jails.pdf [https://perma.cc/UYH3-SBXH].
34. Pretrial Justice Inst., Pretrial Justice: How Much Does it Cost? 5–6 (2017), https://university.pretrial.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=4c666992–0b1b-632a-13cb-b4ddc66fadcd [https://perma.cc/YVM2-6LWC].

nonviolent felonies.[35] In my experience as legislator, I have witnessed how costly pretrial detention forces local jurisdictions to spend more on incarceration and less on other public services, like education, transportation, or health care. Furthermore, certain county jails are releasing inmates early,[36] with beds inefficiently used to incarcerate pretrial defendants who could be safely released pending their trial.

35. Tafoya, *supra* note 30 at 3–4. According to data from the United States Department of Justice, Bureau of Justice Statistics, California has a pretrial detention rate of 59 percent, compared to the rest of the U.S. at 32 percent. *Id.* at 4, fig. 3. In addition, below is a table recreated from the Public Policy Institute of California's report:

	Multiple Failures to Appear (%)	% Rearrested in Pretrial Period			
		Any felony	Drug felony	Property felony	Violent felony
California	6.6	12.4	5.7	3.9	1.4
Rest of U.S.	2.9	10.1	3.7	3.3	1.9

Id. at fig. 4.

36. Cal. Bd. of State & Cmty. Corr., Jail Profile Survey, https://app2.bscc.ca.gov/joq/jps/query.asp?action=q [https://perma.cc/HM86-67V7] (last visited Apr. 16, 2018). Counties with at least one jail facility with a court-ordered population cap (as of Dec. 2016):

1. Calaveras
2. Fresno
3. Kern
4. Los Angeles
5. Placer
6. Riverside
7. Sacramento
8. San Bernardino
9. San Joaquin
10. Santa Barbara
11. Solano
12. Sutter
13. Tulare
14. Yolo

Facilities Under Court-Ordered Population Caps (as of March 2017)

Jurisdiction	Facility
Calaveras Sheriff's Dept.	Calaveras Co. Adult Detention Facility
Fresno Sheriff's Dept.	Fresno South Annex Jail
Fresno Sheriff's Dept.	Fresno County Main Jail
Fresno Sheriff's Dept.	Fresno North Annex Jail
Kern Sheriff's Dept.	Central Receiving Facility
Kern Sheriff's Dept.	Lerdo Maximum
Kern Sheriff's Dept.	Lerdo Minimum
Kern Sheriff's Dept.	Lerdo Pretrial Facility
Los Angeles Sheriff's Dept.	Peter Pitchess South Facility
Los Angeles Sheriff's Dept.	Peter Pitchess North Facility
Los Angeles Sheriff's Dept.	Peter Pitchess East Facility
Los Angeles Sheriff's Dept.	Century Regional Detention Center
Los Angeles Sheriff's Dept.	North County Correctional Facility

The bail bond industry has also originated the myth that it provides taxpayers with a free public service when it comes to fugitive recovery of a defendant who fails to appear for their hearing. A recent report from the County of Santa Clara proposing new methods for risk assessment and monitoring of pretrial defendants shows that fugitive recovery is in fact a responsibility that falls onto local law enforcement, as the ones who serve the bench warrant.[37] Therefore, in addition to absorbing the

Jurisdiction	Facility
Los Angeles Sheriff's Dept.	Twin Towers Correctional Facility
Los Angeles Sheriff's Dept.	Los Angeles Central Jail
Marin Sheriff's Dept.	Marin County Jail
Placer Sheriff's Dept.	So. Placer Minimum Security
Placer Sheriff's Dept.	South Placer Jail
Placer Sheriff's Dept.	Placer County Main Jail
Riverside Sheriff's Dept.	Blythe Jail
Riverside Sheriff's Dept.	Indio Jail
Riverside Sheriff's Dept.	Robert Presley Detention Center
Riverside Sheriff's Dept.	Southwest County Detention Center
Riverside Sheriff's Dept.	Larry D Smith Correctional Facility
Sacramento Sheriff's Dept.	Sacramento County Main Jail
San Bernardino Sheriff's Dept.	San Bernardino Central Detention Center
San Bernardino Sheriff's Dept.	San Bernardino County–Glen Helen
San Bernardino Sheriff's Dept.	San Bernardino High Desert Detention Center
San Bernardino Sheriff's Dept.	West Valley Detention Center
San Joaquin Sheriff's Dept.	San Joaquin Honor Farm
San Joaquin Sheriff's Dept.	San Joaquin Main (J. Zunino) Jail
Santa Barbara Sheriff's Dept.	Santa Barbara County Main Jail
Solano Sheriff's Dept.	Stanton Correctional Facility
Solano Sheriff's Dept.	Claybank Facility
Solano Sheriff's Dept.	Solano County Justice Center
Sutter Sheriff's Dept.	Sutter County Jail
Tulare Sheriff's Dept.	Tulare County Jail
Yolo Sheriff's Dept.	Leinberger Center
Yolo Sheriff's Dept.	Monroe Detention Center

Counties that were over total capacity (as of December 2016):
1. Amador
2. Fresno
3. Los Angeles
4. Mendocino
5. Monterey
6. Orange
7. Riverside
8. Santa Barbara

37. *See generally* James R. Williams & Garry Herceg, Bail and Release Work Group Consensus Report on Optimal Pretrial Justice (2016), https://sccgov.iqm2.com/Citizens/FileOpen.aspx?Type=30&ID=92623 [https://perma.cc/4DAE-2LGE].

externalized costs of incarcerating defendants who are unable to afford their bail, we as the State and as taxpayers also pick up the tab when the bail bond industry fails to ensure their client's appearance in court.

Last but definitely not least, there is the human cost. Jails concentrate individuals in settings where there is a high risk of violence, substance abuse, mental illness, and infectious diseases,[38] including for those whose charges are ultimately dropped or are found not guilty in court. Defendants unable to pay their bail and who remain incarcerated pretrial also run the risk of losing their job, child custody, or their car that may still be parked on a street or in a paid lot. The California Department of Justice published data showing approximately eighty percent of all jail deaths occur among people in pretrial detention, with suicide accounting for a quarter of these deaths.[39]

Money bail in its present form also has disparate impacts based on race.[40] For example, bail is set 19 percent higher for Hispanic men compared to White men, and 35 percent higher for Black men.[41] Unfortunately, and not surprisingly, the burden of money bail payments, and associated costs of pretrial detention due to an inability to afford bail, disproportionately burdens women of color.[42]

The supposedly free and benevolent system of money bail is putting Californians on the hook for a variety of costs, with some paying the ultimate price through a preventable end to one's life.

III. The Path Forward

The solutions to California's pretrial problems are well-researched, and other states and jurisdictions across the country and in California have proven what works. For the Golden State, it is a matter of how to apply evidenced-based best practices in a way that works for California, given its unique size, geographic and demographic diversity, and county-by-county implementation of the criminal justice system.

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38. Nicholas Freudenberg, *Jails, Prisons, and the Health of Urban Populations: A Review of the Impact of the Correctional System on Community Health*, 78 J. Urb. Health 214 (2001).
39. *Death in Custody: Side-By-Side Interactive Charts*, OpenJustice, https://openjustice.doj.ca.gov/death-in-custody/custody-stages [https://perma.cc/U56H-7AVU] (last visited Jan. 24, 2018).
40. Cynthia E. Jones, *"Give Us Free": Addressing Racial Disparities in Bail Determinations*, 16 N.Y.U. J. Legis. & Pub. Pol'y 919 (2013).
41. *Race & Bail in America*, Pretrial Just. Inst., http://www.ma4jr.org/wp-content/uploads/2015/10/Race-Bail.pdf [https://perma.cc/33Y8-J2YY] (last visited Jan. 24, 2018).
42. Saneta deVuono-Powell et al., Who Pays? The True Cost of Incarceration on Families 7 (2015). According to this report, women of color experience multiple challenges in meeting basic needs after paying court fines and fees, attorney's fees, and due to detention of their partner and the additional loss of family income, including in some cases child support. *Id.* at 7, 9. Of the families who were surveyed, twenty percent responded that the bail bond was particularly difficult. *Id.* at 14.

For example, in the District of Columbia, nearly 88 percent of defendants are released with nonfinancial conditions, and over 91 percent were not rearrested while in the community before trial.[43,44] It is one of many examples of effective pretrial services that rely on risk, not money, with cobenefits of a more prudent use of taxpayer dollars[45] and access to equal justice for all in the pretrial process.

Nationally, reforms to pretrial justice systems have cut across party lines, coming from both red and blue states, progressive and conservative constituencies.[46] New Jersey has implemented paradigmatic changes to its pretrial justice system,[47] joining the District of Columbia[48] and Kentucky.[49] Other states have implemented pieces of 21st century pretrial reforms, such as the use of unsecured bonds in Colorado[50] or validated pretrial risk assessments in Ohio.[51]

In California, counties have also begun to innovate to the extent possible under the California Constitution and Penal Code. The County of Santa Clara saved $31.3 million in just six months by keeping 1,400

43. *Research and Data: Performance Measures*, Pretrial Serv. Agency for D.C., https://www.psa.gov/?q=data/performance_measures [https://perma.cc/J5EG-TV9K] (last visited Jan. 24, 2018).
44. Ann E. Marimow, *When it Comes to Pretrial Release, Few Other Jurisdictions Do it D.C.'s Way*, Wash. Post (July 4, 2016), https://www.washingtonpost.com/local/public-safety/when-it-comes-to-pretrial-release-few-other-jurisdictions-do-it-dcs-way/2016/07/04/8eb52134-e7d3-11e5-b0fd-073d5930a7b7_story.html?utm_term=.a21d77dbf711 [https://perma.cc.9TD3-97HX].
45. Pretrial Justice Inst., *supra* note 35 at 6.
46. Harv. Law Sch. Criminal Justice Policy Program, Moving Beyond Money: A Primer on Bail Reform 1, 7–8 (2016), http://cjpp.law.harvard.edu/assets/FINAL-Primer-on-Bail-Reform.pdf [https://perma.cc/JX5K-CYAH].
47. Stuart Rabner, *Bail Reform in New Jersey*, Nat'l Ctr. for St. Cts. (2017), http://www.ncsc.org/~/media/Microsites/Files/Trends%202017/Bail-Reform-New-Jersey-Trends-2017.ashx [https://perma.cc/36AB-ADY2]; Law Journal Editorial Board, *Bail Reform is Working and Meaningful*, N.J.L.J. (May 26, 2017, 3:55 PM), https://www.law.com/njlawjournal/almID/1202787675652 [https://perma.cc/5A7H-E2M6].
48. Pretrial Justice Inst., Key Features of Holistic Pretrial Justice Statutes & Court Rules 1 (2015), https://university.pretrial.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=743bab92-f9b4-a1f5-dcd8-eab810535231 [https://perma.cc/CES9-S2HP].
49. *Id.* at 1–2. *See generally* James Austin et al., Kentucky Pretrial Risk Assessment Instrument Validation (2010), https://www.pretrial.org/download/risk-assessment/2010%20KY%20Risk%20Assessment%20Study%20JFA.pdf [https://perma.cc/4UVG-3P29]; Tara Boh Klute & Mark Heyerly, Report on Impact of House Bill 463: Outcomes, Challenges and Recommendations (2012), https://www.pretrial.org/download/law-policy/Kentucky%20Pre%20Post%20HB%20463%20First%20Year%20Pretrial%20Report.pdf [https://perma.cc/M7UX-7GXZ].
50. Jones, *supra* note 32 at 22–23.
51. *See generally* Edward Latessa et. al, Creation & Validation of the Ohio Risk Assessment System Final Report (2009), http://www.ocjs.ohio.gov/ORAS_FinalReport.pdf [https://perma.cc/229M-PGM8].

defendants out of jail pretrial,[52] while simultaneously improving court appearance rates and significantly limiting new arrest rates while on pretrial release.[53] While Santa Clara may be leading as an individual jurisdiction to the extent to which it has pursued evidence-based reforms, forty-six of California's fifty-eight counties recently surveyed responded that they had implemented some level of pretrial service.[54] Following Realignment,[55] it is clear that our local jurisdictions are moving towards other options to further decrease their respective jail populations in a manner that further improves public safety.

Voluntary innovation at the county level is one approach, and as an attorney and former litigator, I also believe that litigation can bring about change as well, though sometimes limited, as demonstrated by recent lawsuits in California.

A. *The Interplay Between Litigation and Policymaking*

The promulgation of new laws, or the reformation of existing ones, is a complicated process that simultaneously demonstrates the power of a representative government and highlights its challenges. While most are clear about the three separate branches of government in the United States, their interplay with one another, such as how each branch impacts the others or their limits in doing so, is less obvious.

While the legislative branch makes laws, the judicial branch interprets the law, with profound effects on how it impacts society. Through this role, courts can strike down unconstitutional laws, uphold or invalidate parts or all of existing laws, and apply laws to a particular set of facts and circumstances before them. But, this process is limited. Numerous legal parameters in areas of procedure, jurisdiction, and constitutional jurisprudence, inter alia, restrict the extent by which a petitioner, or class of plaintiffs, can alter the law through the judicial process. Perhaps most significant, a petitioner cannot even begin the journey of amending the current legal landscape without first proving harm (i.e., standing to seek relief), which is not always a simple task.[56] Other, more substantive legal

52. Santa Clara Bd. of Supervisors Mgmt. Audit Div., Management Audit of the Office of Pretrial Services 11 (2012), https://www.sccgov.org/sites/bos/Management%20Audit/Documents/PTSFinalReport.pdf [https://perma.cc/4FYW-HQ9H].

53. Aaron Johnson, Public Safety and Justice Committee Annual Report 135 (2017), http://sccgov.iqm2.com/Citizens/FileOpen.aspx?Type=1&ID=8459&Inline=True [https://perma.cc/5KJF-ZWMK].

54. Californians for Safety & Justice & Crime & Justice Inst., Pretrial Progress: A Survey of Pretrial Practices and Services in California 6 (2015), https://university.pretrial.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=88e80bbe-29de-71c8-e774-9e843cfa63c8 [https://perma.cc/PMF6-RMBN].

55. *The Cornerstone of California's Solution to Reduce Overcrowding, Costs, and Recidivism*, Cal. Dep't Corrections & Rehabilitation, https://www.cdcr.ca.gov/realignment [https://perma.cc/TMH7-KM9Y] (last visited Jan. 25, 2018).

56. *See, e.g.*, Clapper v. Amnesty Int'l USA, 568 U.S. 398, 401 (2013).

> The question before us is whether respondents have Article III stand-

challenges facing those seeking to avail themselves of the judicial process have been highlighted in recent court cases involving bail, including *Buffin v. City & Cty. of San Francisco*, No. 15-cv-04959, 2016 U.S. Dist. LEXIS 142734 (Oct. 14, 2016) and *Welchen v. Cty. of Sacramento*, No. 2:16-cv-00185, 2016 U.S. Dist. LEXIS 140860 (Oct. 10, 2016).

B. *The Limits and Challenges of Impacting the Law Through the Judiciary and Litigation*

Buffin illustrates some of the challenges inherent in impact litigation. Petitioner Riana Buffin was arrested for grand theft and a conspiracy at a department store.[57] She was taken to jail and her bail set at $30,000.[58] She was kept in jail for approximately forty-six hours before being released after the District Attorney decided to dismiss the charges.[59] Included in the class-action suit was coplaintiff Crystal Patterson's complaint alleging discrimination based on her indigent status.[60] After being charged with assault and detained in jail, Patterson posted bail through a private bond company, after which she was also discharged without formal charges being filed against her.[61] In addition to the class-plaintiffs' claim of constitutional violations based on the Equal Protection Clause of the Fourteenth Amendment, petitioners sought declaratory and injunctive relief on behalf of themselves and putative class members.[62] Finally, the named plaintiffs sought monetary damages, attorneys' fees, and costs from defendants.[63]

Buffin named the City and County of San Francisco and the State of California as defendants[64] before filing: (1) an emergency motion for a

> ing to seek this prospective relief. Respondents assert that they can establish injury in fact because there is an objectively reasonable likelihood that their communications will be acquired under § *1881*a at some point in the future. But respondents' theory of future injury is too speculative to satisfy the well-established requirement that threatened injury must be "certainly impending." *E.g.*, Whitmore v. Arkansas, *495* U. S. *149*, *158 110* S.Ct. *1717*, *109* L.Ed.2d *135* (*1990*) . . . . As an alternative argument, respondents contend that they are suffering *present* injury because the risk of § *1881*a-authorized surveillance already has forced them to take costly and burdensome measures to protect the confidentiality of their international communications. But respondents cannot manufacture standing by choosing to make expenditures based on hypothetical future harm that is not certainly impending. We therefore hold that respondents *lack* Article III standing.

Id. (emphasis added).

57. Buffin v. City & County of San Francisco, No. 15-cv-04959-YGR, 2016 U.S. Dist. LEXIS 142734, at *3 (N.D. Cal. Oct. 14, 2016).
58. *Id.*
59. *Id.*
60. *Id.* at *4.
61. *Id.* at *4.
62. *Id.* at *2.
63. *Id.* at *2.
64. *Id.* at *1–2 (Note that plaintiffs later amended their complaint to include then-State Attorney General Kamala Harris).

temporary restraining order; (2) a preliminary injunction for immediate release from jail; and (3) a motion to certify their class-action lawsuit in which they were seeking monetary damages.[65] Finally, the plaintiffs sued the county, city, and later the Attorney General of California for prospective declaratory and injunctive relief for themselves and on behalf of "putative class members."[66]

Much of the class action lawsuit, however, collapsed under the weight of procedural defects and pleading errors. The Court denied plaintiffs' motions for an emergency restraining order and preliminary injunction because the petitioners had already been released from jail. The Court also denied class certification, citing a poorly drafted complaint.[67] Additionally, the Court dismissed the Attorney General as a defendant citing the State's right to sovereign immunity under the Eleventh Amendment pursuant to the *Ex Parte Young* Exception.[68] However, while the Sheriff in *Ex Parte Young* was found to be immune from monetary damages under the Eleventh Amendment, plaintiffs' motion for prospective declaratory and injunctive relief against the Sheriff under the Fourteenth Amendment was granted, which preserved the opportunity for future plaintiffs to seek legal remedies based on California's discriminatory bail schedule.[69] Finally, the Court granted the Attorney General's motion to dismiss plaintiffs' Equal Protection action for failure to state a cognizable claim, but provided defendants an opportunity to amend their complaint.[70]

Ms. Buffin's attempt to change how California's bail law disproportionately impacts poor people through litigation fell far short of the expected goal. As of now, California's bail law still faces substantial legal obstacles and an uncertain future. As of this writing both sides have filed for summary judgment. Highlighting the difficulties in utilizing the judicial system as a means of remedying seemingly unjust laws, *Buffin* was never even heard on the merits—demonstrating that litigation alone is often an inadequate vehicle for delivering sweeping changes to California's bail practices.

As with *Buffin*, similar facts and pleadings were filed in *Welchen* when a fifty-year-old homeless man sleeping in Sacramento was arrested by police for suspicion of second-degree burglary of an uninhabited dwelling.[71] Plaintiff was taken to jail and held in custody unless he posted

65. *Id.* at *5–6.
66. *Id.* at *2.
67. *Id.* at *7 ("Given the unintelligible nature of plaintiffs' complaint, the Court otherwise denied without prejudice plaintiffs' . . . motion for class certification.").
68. *Id.* at *39–40; Ex Parte: Edward T. Young, 209 U.S. 123 (1908).
69. *Buffin*, 2016 U.S. Dist. LEXIS 142734, at *30–31.
70. *Id.* at *7. The Court identified "analytical, legal, and factual gaps' in plaintiffs' allegations and requests for relief that rendered the complaint unintelligible. Based thereon, plaintiffs were directed to file an amended complaint to address the many issues identified by the Court.
71. *Welchen v. County of Sacramento*, No. 2:16-cv-00185-TLN-KJN, 2016 U.S. Dist.

a bond for a percentage of the bail fee.[72] But since he could not afford to pay the $10,000 premium, he was forced to remain in custody until his initial court appearance.[73] The same day, Welchen filed a class-action suit against the county and then-Attorney General Harris, alleging violations of his Constitutional rights under the Due Process and Equal Protection Clauses of the Fourteenth Amendment.[74] He further alleged that the county operates a "wealth-based detention scheme" resulting in "two systems of pretrial justice: one for the rich and one for the poor."[75]

The claims for relief in *Welchen* were nearly identical to those in *Buffin*. It included motions for (1) a temporary restraining order, (2) preliminary and permanent injunctions, and (3) class certification.[76] The *Welchen* plaintiffs similarly sued the state and Attorney General for violations of the Due Process and Equal Protection Clauses under the Fourteenth Amendment. Plaintiffs ran into the same procedural problems as they did in *Buffin*, albeit for slightly different reasons.[77] While the *Buffin* Court eventually granted defendant's motion to dismiss for failure to produce a more "definite' claim of relief, the Court in *Welchen* granted the defendant's motion to dismiss due to an issue of whether the plaintiffs were bringing a "procedural or substantive due process claim."[78] Plaintiffs in *Welchen* also requested declaratory judgment for the defendant's alleged continuous violation of Fourteenth Amendment Equal Protection Clause.[79]

The Attorney General answered by filing motions to dismiss the claims asserting sovereign immunity under the Eleventh Amendment of the U.S. Constitution, contending that any claims against her should be denied as "she is immune from suit in federal court under the Eleventh Amendment."[80] The Attorney General also argued that the *Younger* Ab-

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LEXIS 140860, at *2 (N.D. Cal. Oct. 10, 2016).

72. *Id.*
73. *Id.*
74. *Id.*
75. *Id.* at *2–3 ("[B]y 'tying [an arrestee's] pretrial freedom to their wealth-status,' Defendants have allegedly created a 'pay-for-freedom system condition[ing] [an arrestee's] release on their ability to afford money bail.'").
76. *Id.* at *3–4.
77. *Id.* at *32 (emphasis added) ("Because the operative Complaint is being dismissed, Plaintiffs' pending motion for class certification (ECF No. 3) is *DENIED AS MOOT*.").
78. Buffin v. City & County of San Francisco, No. 15-cv-04959-YGR, 2016 U.S. Dist. LEXIS 142734, at *7 (N.D. Cal. Oct. 14, 2016) ("Given the unintelligible nature of plaintiffs' complaint, the Court otherwise denied without prejudice plaintiffs' pending motion for preliminary injunction and motion for class certification"); *See Welchen*, 2016 U.S. Dist. LEXIS 140860, at *30 ("The AG also raised concerns in her motion to dismiss about the lack of specificity within the Complaint: 'Plaintiff's complaint does not specify whether he brings a procedural or substantive due process claim, but he cannot state a claim for substantive due process.'").
79. *Welchen*, 2016 U.S. Dist. LEXIS 140860, at *3.
80. *Id.* at *8.

stention Doctrine barred a federal challenge to ongoing state criminal proceedings.[81] Finally, the Attorney General moved to dismiss plaintiff's Fourteenth Amendment claim under the Equal Protection and Due Process Clauses for failure to state a claim.

In addressing each one of plaintiffs" claims, the Court ruled that the Attorney General was not immune from lawsuits under the Eleventh Amendment because the *Ex parte Young* exception did not apply in this case.[82] Without the shield of the Eleventh Amendment, plaintiffs could seek permanent and declaratory relief against individual state officials in their official capacities.[83] However, plaintiff's claims for relief in *Welchen* still met a fate similar to those in *Buffin*.[84]

Buffin and *Welchen* demonstrate the limitations of the judicial process in effecting transformational policy change and highlight the need for concomitant action by the legislative branch if such change is to

81. *Id.*

82. *Id.* at *9, 24 ("Based on the foregoing reasons, the Court finds that Defendants have not met their burden of showing that: (1) there is an ongoing state proceeding; (2) the proceedings implicate important state interests; and (3) the Plaintiff is able to litigate its federal claims in the criminal state proceedings against him. See *Middlesex*, 457 U.S. at 433. Therefore, the Court finds that the Younger Doctrine does not apply to the instant case and abstention would be inappropriate.").

83. *Id.* at *9.

84. *Id.* at *29–30, 31–32.

> County also asserts that the Complaint fails to accurately depict the bail system and Defendant County's role in the system. (ECF No. *17* at *5–6*) The AG also raised concerns in her motion to dismiss about the lack of specificity within the Complaint: "Plaintiff's complaint does not specify whether he brings a procedural or substantive due process claim, but he cannot state a claim for substantive due process." This Court agrees. Without clarity as to the Bail System, the legal claims being made by Plaintiff, and the factual assertions that Plaintiff is relying on in making his claim, it is impossible for this Court to determine whether Plaintiff has adequately pleaded that the Bail Law has a punitive purpose or imposes restrictions that are excessive in relation to the legitimate regulatory purpose. Thus, the Court grants Defendant County's motion for a more definite statement under Federal Rule of Civil Procedure *12*(e). Plaintiff is given leave to file an amended complaint as to this claim . . . . Here, rational basis review is proper for assessing the Bail Law at issue because wealth status is not a suspect class. "Where a statutory classification does not itself impinge on a right or liberty protected by the Constitution, the validity of classification must be sustained unless the classification rests on grounds wholly irrelevant to the achievement of [any legitimate governmental] objective." *Harris v. McRae*, *448* U.S. *297*, *322*, *100* S. Ct. *2671*, *65* L. Ed. 2d *784* (*1980*). *The state's interest in ensuring criminal defendants appear for trial dates is a legitimate one, and detaining individuals before their arraignment is rationally related to that legitimate interest. Therefore, the Bail Law meets rational basis review and Plaintiff fails to state a claim upon which relief can be granted under the Equal Protection Clause.*

Id. (citations omitted) (emphasis added).

occur. Moreover, the legislature, with its finger on the pulse of their constituents, can more effectively protect the most vulnerable populations of society and give voice to the values of the people in their city, county, district, and/or state.

C. *Alternative Judicial Safeguards Under Petitions for Writs of Habeas Corpus*

Judicial advocates might argue that while courts admittedly face unique challenges in amending state and federal laws, they are also endowed with institutional protections granted by the Constitution that, unlike laws, cannot be bargained or voted away. The Constitution,[85] statutory law, and case law establish a defendant's right to use a Writ of Habeas Corpus to challenge detention.[86] However, while writs are well established in American jurisprudence and cannot be withdrawn as a right, they are still subject to procedural limitations not unlike the previously discussed cases.[87] Moreover, while a Writ of Habeas Corpus might provide an individual defendant with a remedy, a single Writ cannot change overall policies for an entire population of residents in a state in the same way a piece of legislation can.[88]

For example, a Writ of Habeas Corpus filed by petitioner Christian Rodriguez-Ziese against Sheriff Vicki Hennessy and the Attorney General of California alleged constitutional violations of procedure by setting a bail amount that the petitioner could never afford and by failing

85. U.S. Const. art. I, § 9, cl. 2 ("The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.").

86. Jonathan Kim, *Habeas Corpus*, Cornell L. Sch. Legal Info. Inst. (June 2017), https://www.law.cornell.edu/wex/habeas_corpus [https://perma.cc/7TK8-EPHU]; *see also* In re Humphrey, No. A152056, 2018 Cal. App. LEXIS 64, at *18–19 ("Habeas corpus is an appropriate vehicle by which to raise questions concerning the legality of bail grants or deprivations.") (quoting Harris v. Nelson, 394 U.S. 286, 290–91 (1969) (quoting the Supreme Court "[the] writ of habeas corpus is the fundamental instrument for safeguarding individual freedom against arbitrary and lawless state action" and "administered with the initiative and flexibility essential to ensure that miscarriages of justice within its reach are surfaced and corrected.")).

87. Kim, *supra* note 86 ("[T]he writ of habeas corpus only functions to test jurisdictional defects that may invalidate the legal authority to detain the person, and the reviewing court only examines the power and authority of the governmental authority to detain the person, and does not review the correctness of the authorities' conclusion to detain the person.").

88. *See California Money Bail Reform Act: Hearing on AB 42 Before the Assemb. Comm. on Public Safety*, 2017 Leg., Reg. Sess. 8 (Cal. 2017) ("With AB 42, and mirror legislation in the Senate, we are developing a system that is a smarter, safer option for thousands of people being held in jail pretrial on nonviolent or misdemeanor charges. A system of pretrial assessment and services will allow our overflowing county jails to AB 42 Page 8 target their limited space on those people who are truly a threat to the public or a flight risk for the courts. Overcrowded jails are in no one's best interest, and the time to act is now.").

to consider alternative, nonfinancial conditions for release.[89] The Writ was filed in state court first and the Attorney General declined to defend the bail amount set on petitioner because "bail was set without any factual finding that the financial condition was one that Petitioner could afford, or any consideration of alternative, nonfinancial conditions of release."[90] After exhausting all state remedies, petitioner filed a claim in federal district court requesting the "Court issue an emergency writ of habeas corpus' to secure release.[91] Additionally, the Attorney General "agreed that Petitioner did not receive constitutionally adequate process during the setting of bail"[92] by failing to procure "a valid order of pretrial detention that is "narrowly tailored to serve a compelling state interest."'[93] Thus, the California Attorney General agreed that the petition for habeas corpus should be granted.[94] However, while this particular petition was successful, it was granted pursuant to the specific and unique facts presented in this case to the district court, and did not alter statewide bail policy for every California resident.

Even when courts issue strong opinions on the constitutionality of certain laws, the opinions can still be limited in their scope. For example, in *In re Humphrey*, petitioner Kenneth Humphrey, a retired sixty-three-year-old man, was arrested and charged with first degree residential robbery and inflicting injury on an elder and dependent adult.[95] Because Mr. Humphrey's charges did not involve a capital crime and there was no evidence that his actions caused great bodily harm, he contended he was entitled to bail as a matter of right.[96] In lieu of bail, the defense requested that the petitioner be released on his own recognizance citing numerous arguments including lack of recent criminal history, ties to the community, advanced age, and acceptance to an addiction facility.[97] The prosecutor and judge, however, agreed on a $600,000 dollars money bail bond, citing "public safety" concerns.[98] Mr. Humphrey then filed a motion for a bail hearing and a request for release arguing that financial bail was set beyond his means, violating both the Equal Protection and Due Process Clauses of the Fourteenth Amendment. Mr. Humphrey also argued that the amount of bail—$600,000 dollars—violated the Eighth Amendment's proscription against excessive bail.[99] While setting bail is

89. Emergency Petition for Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2241, Rodriguez-Ziese v. Hennessy, No. 5:17-cv-06473 (N.D. Cal. Nov. 11, 2017), ECF No. 1.
90. Rodriguez-Ziese v. Hennessy, No. 17-cv-06473-BLF, 2017 U.S. Dist. LEXIS 201147, at *5 (N.D. Cal. Dec. 6, 2017).
91. *Id.* at *1.
92. *Id.* at *5.
93. *Id.* at *9 (citations omitted).
94. *Id.* at *2.
95. In re Humphrey, 228 Cal. Rptr. 3d 513, 518 (Cal. Ct. App. 2018).
96. *Id.* at 542–45.
97. *Id.* at 518, 521.
98. *Id.* at 519–21.
99. In re Humphrey, 19 Cal. App. 5th 1006, 1019 (Cal. Dist. Ct. App. 2018). *See*

a common and legal occurrence, Humphrey argued that treating defendants differently based on their income violates the Equal Protection Clause of the Fourteenth Amendment.

The appeals court ruled in favor of Humphrey citing constitutional-based principles and relevant case law.[100] First, due process under the Fourteenth Amendment requires that pretrial detention satisfies rigorous safeguards "including an adversarial hearing with counsel, an opportunity to present evidence, application of specific legal and evidentiary standards, and a finding that no less restrictive condition or combination of conditions can mitigate individualized risks."[101] Second, equal protection under the Fourteenth Amendment stemmed from well-established legal precedent on wealth-based detentions.[102]

1. Future Danger to Inflict Bodily Injury to Another and Flight Risk

On the first Due Process claim, the Court found that the trial court violated the Petitioner's pretrial liberty rights by failing to consider the risk factors of future danger and flight risk.[103] The Court held that the district attorney did not establish "clear and convincing evidence that that there is a substantial likelihood Petitioner's release would result in great bodily harm to others or that Petitioner threatened another with great bodily harm and that there is a substantial likelihood he would carry out the threat if released as required."[104] Additionally, because the lower court failed to explain why Petitioner's "willingness to participate in supervised residential drug treatment" as a condition of release was

Petition for Writ of Habeas Corpus Memorandum of Points and Authorities and Application for Immediate Release 4, 5, 10, In re Humphrey, 19 Cal. App. 5th 1006 (2018) (No. A152056) ("He argued that a detention hearing with proper and constitutional procedures and findings must be held if the court is to use secured money bail to accomplish the functional equivalent of a detention order."); ("By requiring money bail without making the inquiries or findings required for an order of pretrial detention, the trial court violated the Equal Protection and Due Process Clauses of the Fourteenth Amendment."); ("Because Humphrey cannot pay the financial condition required, the lower court imposed a de facto order of pretrial detention absent the procedural protections, legal standards, and substantive findings that must accompany a de facto order of pretrial detention under State and Federal law.").

100. In re Humphrey, 228 Cal. Rptr. 3d at 526 ("As we shall describe, the principles underlying these cases dictate that a court may not order pretrial detention unless it finds either that the defendant has the financial ability but failed to pay the amount of bail the court finds reasonably necessary to ensure his or her appearance at future court proceedings; or that the defendant is unable to pay that amount and no less restrictive conditions of release would be sufficient to reasonably assure such appearance; or that no less restrictive nonfinancial conditions of release would be sufficient to protect the victim and community.").
101. Petition for Writ of Habeas Corpus, *supra* note 101, at 11 (quoting United States v. Salerno, 481 U.S. 739, 750 (1987)).
102. *Id.* at 13–17.
103. In re Humphrey, 228 Cal. Rptr. 3d at 526 at 537–38.
104. *Id.* at 542 (internal quotes omitted).

insufficient, the appellate court reasoned that there was no possible way of discerning whether he posed a danger to the community or presented a flight risk.[105]

D. *Ability to Pay or Consideration of Other, Less Restrictive Alternatives*

The Court found that Petitioner's Equal Protection rights had been violated because the trial court did not inquire into his ability to pay or consider less restrictive alternatives to bail. It held that the trial court had a duty to investigate Petitioner's ability to pay the set bail and that they abrogated that duty, defeating the dual purpose of bail: "assuring [P]etitioner's appearance [in court] and protecting public safety."[106] The Court also found that it was not able make a definitive conclusion as to whether the bail had been set pursuant to a legitimate government purpose or simply to "impermissibly punish petitioner for his poverty"[107] because the trial court failed to inquire about Petitioner's ability to pay. Additionally, since the prosecution "did not present *any* evidence, let alone clear and convincing evidence," in arguing that "no condition or combination of conditions of release" would satisfy the public safety requirements, the lower court failed "*to satisfy the purposes of money bail*."[108]

Further, while the Court made an attempt to reduce bail, the reduction was "ineffectual" as it could only be meaningful "if the court had reason to believe it possible for petitioner to post bail in the lower amount; but the court did not find or explain such a possibility."[109] Finally, the Court held that Petitioner actually met the requirements for "nonmonetary bail" but that anomalously, the lower court ruled to order him detained on a bail schedule that was "impossible for petitioner to pay."[110] Thus, the Court held that the trial court "erred in setting bail at $350,000 without inquiring into and making findings regarding petitioner's ability to pay and alternatives to money bail and, if petitioner's

105. *Id.* at 537 ("The court's failure to explain the reasoning behind this incongruous order makes it impossible for us to know whether the trial court's determinations that petitioner was dangerous and presented a flight risk were based upon an individualized evaluation of his circumstances and propensities or solely upon the generalizations of future criminality *Podesto's* standards were meant to prevent . . . or even whether the court fully recognized the incongruity of its decision." (internal quotation marks omitted)).
106. *Id.* at 529–31 ("The court's error in failing to consider those factors eliminated the requisite connection between the amount of bail fixed and the dual purposes of bail, assuring petitioner's appearance and protecting public safety.").
107. *Id.* at 1031 (""[W]hen the government detains someone based on his or her failure to satisfy a financial obligation, the government cannot reasonably determine if the detention is advancing its purported governmental purpose unless it first considers the individual's financial circumstances and alternative ways of accomplishing its purpose.") (quoting Hernández v. Sessions, 872 F.3d 976, 991 (9th Cir. 2017)).
108. *Id.* at 542 (emphasis added).
109. *Id.*
110. *Id.* at 517.

financial resources would be insufficient and the order would result in his pretrial detention, making the findings necessary for a valid order of detention."[111]

As a remedy, the Court ruled that "[P]etitioner is entitled to a new bail hearing at which he is afforded the opportunity to provide evidence and argument, and the court considers his financial resources and other relevant circumstances, as well as alternatives to money bail."[112] Moreover, the court clarified protocols for how trial courts should determine whether money bail is an appropriate option at all by stating: "if . . . petitioner is unable to afford the amount of money bail it finds necessary to ensure petitioner's future court appearances, it may set bail at that amount only upon a determination by clear and convincing evidence that *no less restrictive alternative will satisfy that purpose.*"[113]

While *Humphrey* resulted in a favorable ruling for the Petitioner and a major win for bail reform advocates in California, the existing bail framework still has gaps. *Humphrey* did not strike down the use of a money bail system in California; rather, it sought to address the legality of how bail is administered in the state of California. Thus, while the court provided bail reformers with a significant holding on the shortcomings of money bail and its administration, there is still a patchwork of missing rules which only legislative action can fill.

E. *The Necessary Symbiosis Between the Legislative and Judicial Branch*

These cases highlight the importance of both the judiciary and the legislature in creating laws or rules that reflect the moral will of the people, especially in times of political turmoil. Often the tension between the branches raises important philosophical questions that are best answered when each sets out to address the limitations of their respective fora. In the case of money bail, when California legislators introduced Senate Bill 10[114] and Assembly Bill 42,[115] both *Hennessey* and *Humphrey* had not yet been decided. However, even after the respective judges ruled in favor of both petitioners, greater action is still needed to fill the holes in bail reform left by the case law.

This context provided a platform for the legislature to take center stage in reforming money bail, especially in regard to two critical concepts that were either left ambiguous or unaddressed by recent court decisions: (1) the implementation of a risk assessment tool for measuring and/or calculating the public safety risk of any defendant; and (2) an emphasis on pretrial services. Even in cases such as *Humphrey*, the appeals courts never established a rubric for evaluating the public safety risk that

111. *Id.* at 544.
112. *Id.*
113. *Id.* (emphasis added).
114. *See* S. 10, 2017–2018 Cal. Leg., Reg. Sess. (2017).
115. *See* Assemb. 42, 2017–2018 Cal. Leg., Reg. Sess. (2017).

a defendant posed. Rather, the appellate court merely ruled that lower courts must *consider* a defendant's risk to public safety before setting bail. Indeed, courts will often defer to the legislative branch to supply policies that extend beyond the narrow legal arguments analyzed by judges. Since *Humphrey* never established the criteria by which judges could assess the many variables that factor into to what risk actually means, SB 10 and AB 42 could provide courts with that protocol.

Second, by focusing on pretrial services, bail reform legislation will provide courts with another resource for both keeping the public safe and providing care to defendants better served by social services rather than detention in jail. Pretrial services, in lieu of bail, would not only embed another layer of assurances for courts in guaranteeing a defendant's appearance, but they would also increase public safety by monitoring and supervising defendants awaiting hearings and trials. Breaking away from a historical dependency on detention and punishment, these services would focus on a more flexible, attenuated response to the complex problems facing our society and defendants in terms of pretrial release.

IV. California's Road to Reform

I, and my joint author Senator Bob Hertzberg (18th Senate District), introduced the California Money Bail Reform Act in 2017.[116] In the state that normally leads, rather than follows, successful pretrial justice reforms, this bill was long overdue. Senator Hertzberg and I introduced separate and identical legislation on the first day of our current two-year legislative session on December 5, 2016. I was proud to do so, standing with my other legislative coauthors and bill cosponsors, including the American Civil Liberties Union of California, Anti-Recidivism Coalition, California Public Defenders Association, Californians for Safety and Justice, Ella Baker Center for Human Rights, Essie Justice Group, Service Employees International Union—California, Silicon Valley De-Bug, and Western Center on Law and Poverty.

We stand side-by-side with over one hundred more nonprofits, faith-based institutions, philanthropic foundations, community-based organizations, legal organizations, grassroots campaigns, and others who registered their formal support with us during the 2017 legislative session.[117] Institutional stakeholders are also very important to bail reform in California, especially those who would be charged with implementation of validated pretrial risk assessments and pretrial supervision. Partners in local government include the counties, courts, district attorneys, probation

116. *See* S. 10, 2017–2018 *supra* note 115; *see also* Assemb. 42, 2017–2018 *supra* note 116.

117. Assembly Comm. on Pub. Safety, 2017–2018, S.B. 10 Bill Analysis (Cal. 2017), http://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=201720180SB10# [https://perma.cc/2TJ6-3UMN] (follow "07/10/17—Assembly Public Safety' hyperlink) (showing the most up to date list of supporters because S.B. 10 matriculated further in the legislative process than A.B. 42.).

departments, public defenders, and sheriffs, among others. Fortunately, our local government partners and the statewide Judicial Council agree that the money bail system is a problem in need of a solution. For over a year, we expended significant energy and effort to give details of what that solution might look like.

The California Money Bail Reform Act is a paradigm-shifting legislative proposal that would fundamentally transform our pretrial release system into one that is safer, transparent, and just. It is complex and wide-ranging, especially considering that California's administration of justice and public safety occurs largely at the local level in our 58 counties. Local flexibility is closely guarded in policy discussions at the State Legislature, where we often balance the desire to pass laws and create programs that provide equal benefit to Californians, a challenge given the reality that we are the most populous and diverse state in the union.[118] There are inherent and pronounced challenges to developing statewide policies that are equitable, whether it be demographics, urban versus rural, or the growing wealth gap.

Senator Hertzberg and I have proposed common-sense policies that are proven to work, based on years or decades of experience in other states, and that account for California's unique challenges given its scale and diversity. As such, the foundation of the California Money Bail Reform Act is rooted in restoring equity to the pretrial justice system and strengthening public safety by employing three primary strategies. One strategy would require the use of a validated risk assessment tool to support the judiciary in making individualized pretrial release determinations based on risk. The second would clarify existing Constitutional provisions related to pretrial detention, such as for capital crimes or felony offenses involving acts of violence on another person when the facts are evident or presumption great,[119]so that prosecutors may request pretrial detention for a defendant, and judges may grant that request through a process that ensures procedural justice for defendants and victims. The third complementary strategy would be to develop pretrial services that will be responsible for preparing the report that makes release recommendations to the court, and supports defendants in successfully meeting the conditions of their pretrial release.

Through these reforms, California can strengthen public safety, inform judicial discretion with validated tools that seeks to illuminate an individual's flight or public safety risk, and give defendants a fair opportunity for pretrial release. A 21st Century California must do more to ensure that defendants are not detained simply because they cannot afford money bail.

118. State of Cal. Dep't of Fin., Population Projections, 2017–2018 Projections (Cal. 2016), http://www.dof.ca.gov/Forecasting/Demographics/Projections [https://perma.cc/4F4L-28RV].

119. Cal. Const. art. I, § 12.

Towards the end of last year, bail reform efforts in the Legislature benefitted from two breakthroughs. First, in August, Governor Edmund G. Brown, Jr. issued a joint statement with both bill authors and Chief Justice Tani Cantil-Sakauye. This statement represented a partnership between California's three branches of government to work together on reforms that "prioritize public safety and cost-efficiency."[120] Second, in October, the Chief Justice published a blog for the *Harvard Law Review*, writing that "[t]he current money bail system relies on the financial resources of the accused regardless of whether or not the person poses a significant risk to the victim and to public safety."[121]

Not long after, Chief Justice Cantil-Sakauye endorsed the findings of her *Pretrial Detention Reform Work Group*,[122] which was comprised of judges and one court executive officer. In releasing the report, she announced: "I support the conclusion that California's current pretrial system unnecessarily compromises victim and public safety and agree with the recommendation to replace our current system of money bail with one based on a defendant's risk to the public."[123] To my excitement, our legislative proposals to reform the money bail system closely aligned with the ten recommendations developed as part of the Chief Justice's expert work group and its year of intensive research in the problem and proposed solutions.[124]

As we near the completion of the second year of our 2017–18 legislative session, this partnership between the executive, judicial, and legislative branches of our state government has created a new political context for our policymaking. Just as New Jersey's recent reforms involved all three branches of their state government, California now has that same commitment and collaboration as part of our road towards systemic reform.

In Governor Brown's proposed California budget for 2018–19, he includes new investments in correctional rehabilitation and reentry services to further implement criminal justice reforms from the last decade,

120. Press Release, Edmund G. Brown, Governor of Cal., Governor Brown, Chief Justice Cantil-Sakauye, Senator Hertzberg and Assemblymember Bonta Commit to Work Together on Reforms to California's Bail System, (Aug. 25, 2017), https://www.gov.ca.gov/news.php?id=19917 [https://perma.cc/63AD-Q6K9].

121. Hon. Tani G. Cantil-Sakauye, *Costs of Money Bail to Justice*, Harv. L. Rev.: Blog (Oct. 17, 2017), https://blog.harvardlawreview.org/costs-of-money-bail-to-justice [https://perma.cc/6XBY-N53T].

122. Pretrial Det. Reform Workgroup, *supra* note 5.

123. Press Release, Cal. Courts, Chief Justice Workgroup: Money Bail is "Unsafe and Unfair" (Oct. 24, 2017), https://newsroom.courts.ca.gov/news/chief-justice-workgroup-money-bail-is-unsafe-and-unfair [https://perma.cc/WY24-7XQY].

124. *Id.*

including Proposition 57[125] and Realignment.[126] Without bail reform, many of these criminal justice reforms will never achieve their goal of reducing our incarcerated population and recidivism rates to the extent we know is possible.[127] In some ways, reforms that would bring about a safer and more cost-efficient pretrial justice system represent the upstream intervention requisite to achieve the downstream public safety and corrections benefits that California seeks.

On the other hand, despite the overwhelming and diverse support for legislative efforts in California, some seek to retain the present money bail system with only minor tweaks. This includes statewide associations like the California District Attorneys Association, Peace Officers Research Association of California, California Bail Agents Association, Professional Bail Agents of the United States, and the American Bail Coalition, among others.[128] The opposition, including the bail bonds companies and the sureties that back them, agree that there is a problem with money bail here in California; they prefer minor tweaks within this system.

Critics point to AB 42 stalling on the Assembly Floor as an indicator that California is not yet ready for paradigm-shifting reforms. I could not disagree more. SB 10, the Senate version of the California Money Bail Reform Act, is only one committee hearing away from a floor vote in the Assembly, which is currently considered the more moderate house of the California State Legislature. SB 10 is now different than the AB 42 that my Assembly colleagues earlier voted on, with many details having been filled in and refined as part of the legislative process. That is in addition to the aforementioned developments out of the offices of the Governor and the Chief Justice in the second half of 2017. My discussions with colleagues regarding their concerns largely revolved around potential unknowns related to public safety or preemption concerns, but rarely concerns with keeping the predatory[129] and inequitable money bail industry intact as is.

In fact, both SB 10 and AB 42 remain largely intact in terms of their policy provisions, even if they are at different stages in the State Legislature. Indeed, California is ready for money bail reforms that will bring about safer communities and more justice to ALL Californians, not just

125. Cal. Sec'y of State, Prop 57 Criminal Sentences. Parole. Juvenile Criminal Proceedings and Sentencing. Initiative Constitutional Amendment and Statute, http://vigarchive.sos.ca.gov/2016/general/en/propositions/57 [https://perma.cc/E6AM-5FNL].

126. Cal. Dep't of Corrections & Rehabilitation, *The Cornerstone of California's Solution to Reduce Overcrowding, Costs, and Recidivism*, Public Safety Realignment, https://www.cdcr.ca.gov/realignment [https://perma.cc/V5QK-REHV] (last visited May 19, 2018).

127. Harv. Law Sch. Criminal Justice Policy Program, *supra* note 47, at 2.

128. Assembly Comm. on Public Safety, *supra* note 118.

129. UCLA Sch. of Law Criminal Justice Reform Clinic, The Devil in the Details: Bail Bond Contracts in California (2017), https://static.prisonpolicy.org/scans/UCLA_Devil%20_in_the_Details.pdf [https://perma.cc/3PS7-NFLW].

those who can afford it. As we witnessed last year, it will not be easy. But, politics and policy do appear to be converging on a pretrial solution that is right for California.

Since I started this Article with a quote, I will end with another, this time from Chief Justice Tani Cantil-Sakauye's Pretrial Detention Reform Workgroup: "A pretrial system that relies exclusively on the financial resources of the accused is inherently unsafe and unfair."[130] It is time to make California's bail system safe and fair.

130. Pretrial Det. Reform Workgroup, *supra* note 5, at 51.