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MOVING AWAY FROM HYSTERIA IN THE CALIFORNIA BAIL DEBATE:

The Need for Data and a State Constitutional Amendment

Eric Siddall

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A national movement to change bail and pretrial detention is underway.[1] In California, bail reform advocates have attempted to pass Senate Bill 10 which would radically alter the state's trial court administration of bail.[2] Advocates claim that reform is necessary because detention rates are too high and that the current bail system unfairly penalizes the poor. Although the effort failed to pass last year, it regained

1. Jurisdictions including, New Mexico, Kentucky, New Jersey, and Washington, D.C., have all adopted or considered measures to end money bail. *See, e.g.*, Jon Schuppe, *POST BAIL*, NBC News (Aug 22, 2017), https://www.nbcnews.com/specials/bail-reform [https://perma.cc/BN85-FGWE].
2. S.B. 10, 2017–2018 Leg., Reg. Sess. (Cal. 2017). (Reference made to S.B. 10 in this Article refer to the original draft of the legislation. Since the writing of this Article, an amended version of S.B. 10 was passed by the legislature and signed into law by Governor Brown. This Article does not refer or reflect any views as to the amended version of S.B. 10.)

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strength after the Judicial Council and Governor Brown endorsed the concept of bail reform.[3]

The bail reform debate took a radical turn in a recent decision made by the California Court of Appeals. In *In Re Humphrey*, the San Francisco Public Defender's Office filed a writ of habeas corpus, arguing that judges in California violated a defendant's due process rights by failing to inquire about a defendant's ability to post bail and whether there could be less restrictive conditions of release.[4] Representing a stark departure from legal precedent, the Court of Appeals and the California Attorney General agreed with the defense's argument that judges are required to make these inquiries.[5]

In light of these changes, this Article argues that: (1) detention rates are not nearly as high as reformers portray, and specifically in Los Angeles County, those held in jail are the very defendants we want, and are constitutionally required, to detain; (2) bail reform advocates have unscrupulously used *Humphrey* to exploit the public's fear that indigent defendants are unfairly placed in custody for minor crimes; and (3) the California Court of Appeals and the California Attorney General undermined the state's constitutional public safety protection provisions by ignoring legal precedent and finding that the current bail system violated due process.

California's Current Bail System

In order to evaluate the merits of bail reform proponents' critique that the bail system needs to be changed, one must first understand how California's pretrial detention system currently functions. Rather than endorsing the current system, this explanation is simply meant to provide background information before turning to the three main critiques addressed in this Article.

First, the Constitution of the State of California grants a right to bail in almost all criminal matters in the state.[6] By contrast, the federal system does not have a right to bail and instead considers it discretionary, only guaranteeing a prohibition against excessive bails.[7]

The California Constitution explicitly guarantees a right to bail for all but three categories of defendants.[8] This is an important difference

3. 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://newsroom.courts.ca.gov/news/chief-justice-issues-statement-on-bail-reform [https://perma.cc/BR5H-5BTR].
4. *In re* Humphrey, 228 Cal. Rptr. 3d 513 (Ct. App. 2018).
5. *Id.* at 518.
6. *See* Cal. Const. art. I, § 12.
7. U.S. Const. amend. VIII.
8. Cal. Const. art. I, § 12; *In re Underwood*, 508 P.2d 721, 724 (Cal. 1973) ("Our constitutional language expressly providing that all persons shall be bailable except for a capital offense was consciously added to the 'no excessive bail' language adopted from the Eighth Amendment in order to make clear that, unlike

from the federal system, which affords Congress plenary power to detain without affording defendants the right to bail. No such power is given to the California legislature. This limitation is one of the main obstacles to meaningful bail reform, because presently there is no ability to create a detention system—in the vast majority of cases—without bail.

The California Constitution discusses bail in two sections: Article 1, Section 12[9] and Article 1, Section 28.[10] Section 12 read as follows:

> 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 offenses on another person, when 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.[11]

This guarantees a constitutional right to bail with the exception of three different categories.[12] As the California Supreme Court has explained,

> Article 1, section 12, of the California Constitution 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.'[13]

The first category where bail is not offered as a matter of right is for defendants charged with capital offenses.[14] This exception was part of

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the federal rule, all except the one class of defendants were to be bailable.") *superseded by constitutional amendment*, Cal. Const. art. I § 12, *as stated in*, *In re* White, 229 Cal. Rptr. 3d 827 (Ct. App. 2018).

9. Cal. Const. art. I § 12.
10. Cal. Const. art. I § 28.
11. Cal. Const., *supra* note 9.
12. *See In re* Weiner, 38 Cal. Rptr. 2d 172, 174 (Ct. App. 1995) ("Except under limited circumstances, the California Constitution guarantees a pretrial right to release on nonexcessive bail.").
13. *In re* York, 892 P.2d 804, 807 (Cal. 1995).
14. The term "capital offense" has been interpreted to mean any offense that carries the maximum penalty even when the defendant is not eligible for the death

California's original 1849 Constitution,[15] and much later in 1982, a state constitutional amendment expanded the list of crimes ineligible for bail to include sections (b) and (c) as described above.[16]

However, unlike capital offenses, these last two categories, sections (b) and (c), must be proven by the prosecutor by "clear and convincing evidence."[17] In 1983 these two additional exceptions were found not to violate the federal constitution.[18]

The next section regarding bail, Article I, section 28, twice addresses bail. It first states:

> (b) In order to preserve and protect a victim's rights to justice and due process, a victim shall be entitled to the following rights . . .
> (3) To have the safety of the victim and the victim's family considered in fixing the amount of bail and release conditions for the defendant.[19]

This provision requires courts to consider public safety when setting bail. Los Angeles County's current bail schedules reflect this mandate by setting bail for felony "bookmaking"—a low-level felony with little risk of harm to others—at $10,000, a low-level felony whereas bail for a charge of murder, a crime with a much greater social harm, is $2,000,000.[20]

When the state Constitution discusses bail a third time, it addresses the question of public safety.

> (f) In addition to the enumerated rights provided in subdivision (b) that are personally enforceable by victims as provided in subdivision (c), victims of crime have additional rights that are shared with all of the People of the State of California. These collectively held rights include, but are not limited to, the following . . .
> (3) Public Safety Bail. A person may be released on bail by sufficient sureties, except for capital crimes when the facts are evident or the presumption great. Excessive bail may not be required. In setting, reducing or denying bail, the judge or magistrate shall take into consideration the protection of the public, the safety of the victim, 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. Public safety and the safety of the victim shall be the primary considerations.

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penalty or the prosecutor elects not to pursue death as a punishment. *See* People v. Superior Court (Kim), 25 Cal. Rptr. 2d 38, 38 (Ct. App. 1993).

15. Cal. Const. art. I, § 7 (1849).
16. Cal. Const. art. I § 28.
17. *See In re* Nordin, 192 Cal. Rptr. 38, 39 (Ct. App. 1983).
18. *Id.* at ("We conclude that nothing in the Eighth Amendment to the United States Constitution affects the state's right to determine the standards of eligibility for admission to bail.").
19. Cal. Const. art. I, § 28 (b)(3).
20. Superior Court of California County of Los Angeles, 2018 Felony Bail Schedule 5, 9 (2018), https://www.lacourt.org/division/criminal/pdf/felony.pdf [https://perma.cc/T4AC-52SX].

> A person may be released on his or her own recognizance in the court's discretion, subject to the same factors considered in setting bail. Before any person arrested for a serious felony may be released on bail, a hearing may be held before the magistrate or judge, and the prosecuting attorney and the victim shall be given notice and reasonable opportunity to be heard on the matter
> When a judge or magistrate grants or denies bail or release on a person's own recognizance, the reasons for that decision shall be stated in the record and included in the court's minutes.[21]

This section was intended to make bail discretionary; the operative word used here was "may," which grants judge's discretion. Despite this seeming discretion, courts have held that Section 12 is still applicable and that bail, notwithstanding Section 28, is still a matter of right, unless one of the three applicable detention rules apply.[22]

Therefore, California judges are currently limited to three pretrial options with regards to bail: (1) under certain limited conditions where they have discretion, they can deny bail; (2) for the vast majority of crimes, they must set bail; and (3) they can release defendants on their own recognizance with certain conditions.

A. *The Presumption of Innocence and Bail*

Another important point in understanding how the current system functions relates to the presumption of innocence. The presumption that an individual is innocent until proven guilty is a bedrock principle in the American criminal justice system. Although this is true at trial, this presumption does not exist during pretrial proceedings, such as bail hearings. On this point, the United States Supreme Court stated:

> The presumption of innocence is a doctrine that allocates the burden of proof in criminal trials; it also may serve as an admonishment

21. Cal. Const. art. I, § 28 (f)(3).

22. The issue of whether there is a right to bail in California was in dispute because of two competing ballot propositions—4 and 8—in 1982. Proposition 4 amended Article 1, section 12, but retained language guaranteeing a right to bail for most crimes. Proposition 8 eliminated the right to bail. The current state of the law is that the language of Proposition 4 controls because Proposition 4 had more votes. *In re* York, 892 P.2d 804, 1140 n.4 (Cal. 1995) ("Because Proposition 4 received more votes than did Proposition 8, the bail and OR release provisions contained in Proposition 4 are deemed to prevail over those set forth in Proposition 8.") *aff'd* 135 P.3d 32 (Cal. 2006) ("Proposition 4 stated that all accused persons 'shall' be admitted to bail, subject to certain limitations, while Proposition 8 would have rendered bail discretionary in all cases and would have extended the restrictions it imposed upon bail to OR release. [citation] In view of these circumstances, we adhere to the view that the amendments to article I, section 12 proposed by Proposition 4 took effect, and that the provisions of article I, section 28, subdivision (e) proposed by Proposition 8 did not take effect.").

In 2008, the voters passed Proposition 9, *Marsy's Law*, which again passed the language used in Proposition 8. Cal. Const. art. I § 28. Then the California Court of Appeal found that, "Proposition 9 did *not* repeal section 12." *In re* Humphrey, 228 Cal. Rptr. 3d at 544 n.28 (Ct. App. 2018). This essentially maintained the current state of the law that states bail is constitutionally protected.

> to the jury to judge an accused's guilt or innocence solely on the evidence adduced at trial and not on the basis of suspicions that may arise from the fact of his arrest, indictment, or custody, or from other matters not introduced as proof at trial. (citation omitted) . . . Without question, the presumption of innocence plays an important role in our criminal justice system. 'The principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law.' (citation omitted). But it has no application to a determination of the rights of a pretrial detainee during confinement before his trial has even begun.[23]

The California Supreme Court affirmed this position in *York*:

> The rule set forth in *Bell v. Wolfish,* (citation omitted) mirrors established California law. (See *Ex parte Duncan* (1879) (holding no presumption of innocence attaches to a pretrial determination of the amount of bail to be set) (citation omitted); see also *Blunt v. United States* (D.C. App. 1974) ("The presumption of innocence . . . has never been applied to situations other than the trial itself. To apply it to the pretrial bond situation would make any detention for inability to meet conditions of release unconstitutional.") (citation omitted). Clearly, whether a pretrial detainee is released OR with—or without—conditions has no bearing upon the presumption of innocence to which that person is entitled *at trial.* We therefore reject petitioners' contention that the OR release conditions challenged in the present case infringe upon the presumption of innocence to which petitioners are entitled.[24]

Since the presumption of innocence does not apply in detention, whose purpose is not to punish the accused, it has long been held that pretrial detention and conditions of release, including bail, are legitimate government regulatory prerogatives.

The application of bail in California is largely driven by county-specific bail schedules. Judges in each county set bail through a bail schedule.[25] To protect the rights of each defendant, a judge has a right to a bail review hearing once bail is set.[26] The purpose of the schedule is

23. Bell v. Wolfish, 441 U.S. 520, 533 (1979); *See also People v. Superior Court (Clements)*246 Cal. Rptr. 122, 128 (Ct. App. 1988); *Blunt v. United States*, 322 A.2d 579, 584 (D.C. 1974) ("The presumption of innocence . . . has never been applied to situations other than the trial itself. To apply it to the pretrial bond situation would make any detention for inability to meet conditions of release unconstitutional. No cases so hold, and the history of criminal jurisprudence in this country and England, where many are held for inability to meet release conditions, reveals the inapplicability of the presumption to pretrial detention.").
24. *In re* York, 892 P.2d 804 (Cal. 1995) (citations omitted).
25. Cal. Penal Code § 1269b(c) (2004) ("It is the duty of the superior court judges in each county to prepare, adopt, and annually revise a uniform countywide schedule of bail for all bailable felony offenses and for all misdemeanor and infraction offenses except Vehicle Code infractions.").
26. Cal. Penal Code § 1270.2 (1986) ("When a person is detained in custody on a criminal charge prior to conviction for want of bail, that person is entitled to an

to guarantee uniformity within each county, and this measures attempts to eliminate bias for or against certain defendants because of irrelevant factors, such as race.

I. Mass Pretrial Detention: Senate Bill 10

Contextualizing the constitutional and statutory bases for bail provides important background to understand both the formal and informal critiques of the bail system. Of course a criminal justice system that penalizes someone for simply being accused is undesired. Moreover, all sides would agree that the criminal justice system should not detain low-level offenders who pose little flight risk; this consideration is precisely why pretrial release is presumed on misdemeanor offenses.[27] Yet, despite the reality that low-level offenders are presumed to be granted pretrial release, bail reform advocates have advanced the myth that California is the modern form of Charles Dickens's England, with jails filled to the brim with first-time, indigent, low-level offenders languishing behind bars, losing their livelihoods, families, and dignity. In an apparent effort to support this myth, SB 10's preamble claims that, "[i]n 2016, the percentage of people in California jails awaiting trial or sentencing rose to 66 percent."[28]

Notwithstanding the fact that jails were traditionally meant to house pretrial defendants, this 66 percent figure is not sourced and, considering the available data, as shown below, it is unreliable. Further, if this number is true, 66 percent is not comparably out of line with the federal system which lacks a monetary bail system.[29]

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automatic review of the order fixing the amount of the bail by the judge or magistrate having jurisdiction of the offense. That review shall be held not later than five days from the time of the original order fixing the amount of bail on the original accusatory pleading. The defendant may waive this review.").

27. *See* Cal. Penal Code § 1270(a) (1996) ("A defendant who is in custody and is arraigned on a complaint alleging an offense which is a misdemeanor, and a defendant who appears before a court or magistrate upon an out-of-county warrant arising out of a case involving only misdemeanors, shall be entitled to an own recognizance release unless the court makes a finding on the record, in accordance with Section 1275, that an own recognizance release will compromise public safety or will not reasonably assure the appearance of the defendant as required.").
28. S.B. 10, 2017–2018 Leg., Reg. Sess. (Cal. 2017).
29. *See* Amaryllis Austin, *The Presumption for Detention Statute's Relationship to Release Rates*, 81 Fed. Prob. J. 52, 53 (2017). http://www.uscourts.gov/sites/default/files/81_2_7_0.pdf. ("Since the passing of the Bail Reform Act of 1984, pretrial detention rates in the federal system have been steadily increasing. Including defendants charged with immigration charges, the federal pretrial detention rate increased from 59 percent in 1995 to 76 percent in 2010 (Bureau of Justice Statistics, 2013). During the same time period, the percentage of defendants charged with drug offenses who were detained pretrial increased from 76 percent to 84 percent, and defendants charged with weapons offenses who were detained pretrial increased from 66 percent to 86 percent (Bureau of Justice Statistics, 2013). Even after excluding immigration cases, from 2006 to 2016, the

The use of the 66 percent number may be intended to create the impression that California has a mass pretrial detention problem; however, there is no evidence to make that determination, and the data in counties such as Los Angeles points to a contrary conclusion.

In October 2017, the Judicial Council released a 108-page report discussing the history of bail, describing the current system, and recommendations for reform,[30] and this report concedes that statewide data on the matter is scarce. It refers to the 66 percent number cited by SB 10 but acknowledges that this number includes "individuals who are ineligible for release."[31] In other words, this 66 percent includes some that are ineligible for bail, either because they committed a crime while on probation or because a judicial hold has been placed by another jurisdiction.

The only concrete data cited by the Judicial Council on the percentage of bail-eligible inmates awaiting trial came from three counties: Fresno (15 percent), San Francisco (53 percent), and San Mateo (59 percent).[32] Curiously, despite the fact that these three counties are some of the more populous in the state, all of them fall below the 66 percent figure cited by Senate Bill 10.

Analysis by the San Diego District Attorney's Office found the pretrial population was considerably lower than 66 percent. In October 2017, there were a total of 5,670 inmates in San Diego County jail. Of these, 1,077 inmates, or 19 percent of the total inmate population, had pending case with no other holds.[33]

Examining Los Angeles County's data reveals the number of bail-eligible individuals held in custody at approximately 26 percent.[34] The substantial difference (forty percent) between the 26 percent bail-eligible population of the state's largest county and the 66 percent claimed by reformists further undermines the movement's credibility. Why? Los Angeles County has the distinction of being the largest contributor of the state's prison population; it prosecutes one out of every three California

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pretrial detention rate increased from 53 percent to 59 percent.").

30. Pretrial Detention Reform Workgroup, Pretrial Detention Reform: Recommendations to the Chief Justice (2017).
31. *Id.* at 24.
32. *Id.* at 25, n.71.
33. San Diego District Attorney's Office Internal Report (on file with author). The San Diego District Attorney's Office prepared an internal report to determine the number of in-custody defendants who were bail eligible. This number was determined by obtaining information from the San Diego Sheriff's Department, then they matched the inmate data to their data in their own propriety software called Case Management System. Using their Case Management System, they were able to match their own currently charged cases that were unresolved and had a pending court date, such as a preliminary hearing or trial date, with the Sheriff's data. The conclusion was that only 19 percent of the jail population was eligible for bail.
34. This number is shown in the analysis conducted below using the data provided by the Los Angeles County Sheriff Department.

prisoners.[35] Therefore, not only is Los Angeles California's most populous county, it contributes more than any other county to California's criminal population, far outdistancing Riverside County which only accounts for 7.6 percent of the prison population. If California largest criminal contributor only holds 26 percent of its bail-eligible custodies, it is highly unlikely that the statewide level of holds is 66 percent, especially when no other county with available data exceeds this level.

The Los Angeles Sheriff Department (LASD) jail population is instructive on this point. The LASD average daily inmate population in March 2017 was 16,894,[36] and of this, 6,988 were categorized as pretrial service custodies, representing roughly 41 percent of the jail population.[37] Yet this number does not accurately reflect those eligible for bail, as in this instance, 2,555 inmates were on no-bail holds.[38] Accounting for this, the relevant population instead is 4,433, only an approximate 26 percent of all inmates.

Closer examination reveals a clear explanation as to why those 26 percent remain in custody. If we look at the entire pretrial jail population, this includes bail-eligible and nonbailable custodies, and of this subset 91 percent are in custody on a felony.[39] Breaking this number down further, 62 percent of this subset are in custody for violence against a person, weapons related charges, or sex offenses.[40]

Conversely, one must note a group who is not in custody: low-level offenders. Of those who are bail-eligible, drug offenders make up only 37 inmates, or .7 percent of the pretrial in-custody population.[41] Minor property crime offenders make up 1.7 percent.[42] Most significantly, bail-eligible misdemeanor property offenders represent less than 1 percent of the total inmate population.[43] Despite constituting 60 percent of the arrestees taken into custody—about 15,671 in total—misdemeanor offenders account for 606 of the inmates actually in jail, and of that number, only 349 are eligible for bail, or .02 percent of the total misdemeanants taken into custody.[44] This means that 99.08 percent of suspects arrested for misdemeanor offenses are either released on their own recognizance, have their cases rejected by prosecutors, or are ineligible for bail because of a preexisting condition.

35. Cal. Dep't of Corr. & Rehab., Office of Research, Div. of Internal Oversight and Research, Offender Data Points (2017).
36. L.A. Cty. Sheriff's Dep't, Custody Division Quarterly Report: January–March 2017 7 (2017).
37. *Id.* at 24.
38. *Id.* at 30.
39. *Id.* at 28.
40. *Id.*
41. *Id.*
42. *Id.*
43. *Id.*
44. *Id.* at 8, 29.

The fact that so few misdemeanor offenders are in custody despite the large number of arrests and charged misdemeanor cases—112,000 per year by the Los Angeles County District Attorney's Office alone—is proof that low-level offenders are typically not the ones in custody.[45] Further, most misdemeanor offenders never see the inside of any jail facility pursuant to Penal Code section 853.6, which states that misdemeanants, "instead of being taken before a magistrate, be released . . . "[46] As such, even though misdemeanor filings are extremely high, they likely represent an insignificant number of pretrial detainees.[47]

Considering that the vast majority of misdemeanor offenders are not in custody and that most bail-eligible custodies are being charged with crimes of violence, Los Angeles County's data suggests that we do not put defendants in custody who do not deserve to be there, low-level offenders, and that we do put in custody those who do deserve to be there, those charged with violent crimes. Those in custody are there because judges determined that the accused presented a danger to the public or seemed unlikely to appear in court. Moreover, defendants receive bail review hearings, a lawyer, and all the protections afforded by both the federal and state constitutions to ensure that their rights are enforced and that procedural safeguards are in place to make sure that there is sufficient evidence to charge and keep them in custody.

These aforementioned data sets are verifiable; SB 10's are not. The 66 percent figure is repeated so frequently that people begin to believe it, but the data underlying that figure is nowhere to be found. Why is there no attempt to systematically gather data and portray the true scope of the problem? To have sound solutions to the critical problem of bail, we must depend on verifiable information.

The second myth widely perpetuated by bail reform advocates is that defendants are languishing in jail awaiting their day in court. All defendants have a right to a speedy trial, and in practice, they receive this right. In California, a defendant can theoretically have his trial within thirty days of being charged with a misdemeanor or ninety days if charged with a felony. The only person who can legitimately delay the process is the defendant. For example, a defendant must have his preliminary hearing within 10 court days of being arraigned.[48] If the preliminary hearing is not heard within 10 days and the defendant is in custody, the case must

45. *About LADA*, Los Angeles County District Attorney's Office, http://da.co.la.ca.us/about/office-overview (last visited Mar. 7, 2018) [https://perma.cc/Y9F8-VDB6]. The 112,000 misdemeanor filings do not include the filings of other prosecutorial offices in Los Angeles County that prosecutor misdemeanor cases, such as the Los Angeles City Attorney's Office, the Long Beach City Attorney's Office, and the Santa Monica City Attorney's Office, or with any other city attorney's office.
46. Cal. Penal Code § 853.6(a)(1) (2004).
47. *Id.*
48. Cal. Penal Code § 859(b) (1997).

be dismissed unless the district attorney establishes "good cause."[49] Assuming "good cause" is established, the defendant must be released from custody if the short 3-day continuance is granted.[50]

After a judge holds the defendant to answer, the district attorney has fifteen days to file the information, or the case is dismissed.[51] Once the information is filed, the prosecution has an additional 60 days to try the case or the case is dismissed.[52] The only person in the courtroom who can consent to an extension of these deadlines is the defendant.[53]

The two core arguments advanced by reformers are false; there are not large numbers of low-level offenders in our jails, nor are these poor souls waiting in *debtors' prison* while evil prosecutors delay their trials. The data and the law regarding speedy trial, continuances, and dismissals reveal these claims for what they are truly are: myths meant to sway the public's sympathy.

II. Low-Level Offenders: The False Persona of Kenneth Humphrey

These false claims about the current bail system exist on both macro and micro levels. As the Part above suggests, reformers have painted a false picture of numerous low-level offenders who spend long periods of time in custody eagerly awaiting their trial. In an attempt to substantiate their argument, reformers used Kenneth Humphrey's case to impress upon the public the story of the indigent low-level offender who was trapped within the bail system. *In re Humphrey* was supposed to be the Oliver Twist of California's bail system.[54]

On February 5, 2018, San Francisco's Public Defender, Jeffrey Adachi, along with a board member of the Civil Rights Corp, wrote an oped criticizing judges' and prosecutors' bail use in California. Mr. Adachi summarized the *Humphrey* case facts as follows: Humphrey, a senior citizen, stole $5 and a bottle of cologne from his neighbor.[55] As a result of this crime, Humphrey's bail was set at $350,000 and he languished in jail for 250 days.[56]

If these were the only facts, then Mr. Adachi would have a very persuasive argument about the injustices of the current bail system. But this

49. *Id.*
50. *Id.*
51. Cal. Penal Code § 1382(a)(1) (2010).
52. Cal. Penal Code § 1382(a)(2) (2010).
53. *See, e.g.*, Cal. Penal Code § 1382 (2010); Cal. Penal Code § 1050 (2004). Under extremely limited circumstances, prosecutors can file a continuance under Cal. Penal Code *§ 1050(g)(2), but those situations are rare.* Unlike the defendant, the prosecution cannot simply state that they need more time to prepare the case.
54. *In re Humphrey*, 228 Cal. Rptr. 3d 513 (Cal. Ct. App. 2018).
55. Jeff Adachi & Chesa Boudin, *He Stole $5 and a Bottle of Cologne. His Bail was Set at $350,000*, L.A. Times (Feb. 5, 2018), http://www.latimes.com/opinion/op-ed/la-oe-adachi-boudin-money-bail-20180205-story.html [https://perma.cc/U65J-4V2S].
56. *Id.*

is not the reality of the case. In the criminal complaint, Humphrey was charged with four counts, including robbery and residential burglary. All of the counts were held to answer after the judge heard the evidence.[57] Humphrey had four prior strike offenses: one for robbery committed on October 3, 1980, a second and third strike for robbery and attempted robbery committed on January 21, 1986, and a fourth strike for robbery committed on July 31, 1992.[58] Due to California's strike law, Humphrey was facing over 40 years to life—a pretty strong incentive to flee the state.[59] At a statutory minimum, he faced 17 years in state prison.[60]

In the case in question, the victim was particularly vulnerable—a 79-year-old, frail, elderly man who used a walker.[61] En route to his apartment, the defendant pursued the victim and demanded money.[62] The defendant followed the victim into the victim's apartment and entered his bedroom, and once there he ordered the victim onto the bed and threatened to put a pillowcase over the victim's head.[63] The threat prompted the victim to open his wallet and show Humphrey that he only had two dollars.[64] The victim told Humphrey that he had some additional money on the dresser that he saved for his grandchildren's Christmas presents, which amounted to about five dollars.[65] Humphrey proceeded to demand the victim's cell phone, but when the victim told him it was password protected, he threw it on the floor.[66] The defendant took the money from both the wallet and dresser and the victim's cologne.[67] As he was leaving the apartment, the defendant kicked the victim's walker to another room, immobilizing the victim.[68]

Were Humphrey's actions the most heinous crime? Of course not. But these facts are a far cry from the narrative that a "senior citizen" spent 250 days in jail for merely stealing $5 and a bottle of cologne. The trial court in *In re Humphrey* did what was legally required under California state law. Judges are supposed to consider various constitutionally mandated factors, including "protection of the public, the safety of the victim, the seriousness of the offense charged, the previous criminal

57. Preliminary Hearing Transcript at 30:2–31:7, People v. Humphrey, No. 17007715 (Cal. Super. Ct. 2017).
58. Complaint at 3–4, People v. Humphrey, No. 17007715 (Cal. Super. Ct. 2017).
59. Cal. Penal Code §§ 667(d), 667.5(b), 1170.12(b) (West through Ch. 10 of 2018 Reg. Sess.).
60. Cal. Penal Code §§ 667(a)(1), 667.5(b) (West through Ch. 10 of 2018 Reg. Sess).
61. *In re* Humphrey, 228 Cal. Rptr. 3d 513, 518 (Ct. App. 2018).
62. *Id.*
63. *Id.*
64. *Id.*
65. *Id.*
66. *Id.*
67. *Id.*
68. Preliminary Hearing Transcript, *supra* note 57 at 12:4–12:16, 15:16.

record of the defendant, and the probability of his or her appearing at the trial or hearing in the case."[69]

This is, of course, why Mr. Adachi conveniently neglected to provide the facts he should have known, since his office represented Humphrey. Failing to mention that his client threatened the 79-year-old victim with violence while the victim was isolated and vulnerable or that the defendant was facing a life sentence constitute critical omissions.

Mr. Adachi went so far as to write, " . . . even the district attorney concedes he poses no threat to society."[70] This was a puzzling statement since the appellate opinion in this case, of which Adachi and his Civil Right Corp colleague likely had knowledge, stated that "the prosecutor added that [Humphrey] should be considered 'a great public safety risk.'"[71]

Mr. Adachi's attack on public safety is brazen not for the position he takes, but for its glaring lack of candor. The fictitious persona he crafts of Mr. Humphrey, the person caught merely stealing some cologne and cash, is clearly not the person that we want in custody pending trial. The real Mr. Humphrey, the defendant with the extensive criminal record who targets and exploits vulnerable victims is the one who should be in custody.

Simply, bail opponents like Adachi neglect the facts because they do not comport with their narrative.

III. The Humphrey Decision and the Assault on Article I, Sections 7 and 28 of the California Constitution

The first two Parts dealt with politicians using questionable data and facts to advance their cause, which considering the current political climate, seems to have become the new normal. A more troubling position, however, is that taken by the *In re Humphrey* court and the California attorney general considering their respective roles in the criminal justice system.

The court and the California Attorney General took positions in *In re Humphrey* that reflected their personal preferences on bail while ignoring the state constitution, statutory authority, and federal and state decisional authority.

For example, Attorney General Becerra abdicated his role in defending existing law and public safety. Originally, the Attorney General properly defended traditional bail considerations.

> Relying upon the "Public Safety Bail" provision of section 28, subd. (f)(3), of the California Constitution—which states that "[i]n setting, reducing or denying bail. . . . [p]ublic safety shall be the primary consideration"—the Attorney General distinguished the federal cases petitioner relies upon and argued that the magistrate did not violate

69. Cal. Const. art. I, § 28(f)(3).
70. Adachi & Boudin, *supra* note 55.
71. *In re* Humphrey, 228 Cal. Rptr. 3d at 521.

> petitioner's rights to due process or equal protection by deciding not to further reduce bail or release petitioner on his own recognizance.[72]

However, Becerra's office later withdrew this argument and conceded to the San Francisco Public Defender's position.

> The Department of Justice has determined that it will not defend any application of the bail law that does not take into consideration a person's ability to pay, or alternative methods of ensuring a person's appearance at trial. Given this determination, after further deliberations, we withdraw our earlier assertion that the magistrate was not obligated to make any additional inquiry into petitioner's ability to pay under the circumstances of this case.[73]

There is nothing in any decision authority, statutory law, or constitutional language to justify this position. The *In re Humphrey* court acknowledged that:

> [t]he only requirement in the bail statutes that a court considering imposition of money bail take into account the defendant's financial circumstances is that the court consider 'any evidence offered by the detained person' regarding ability to post bond. (§ 1270.1, subd. (c).) Nothing in the statutes requires the court to consider less restrictive conditions as alternatives to money bail.[74]

Not one case cited by the *In re Humphrey* court held that judges are required to consider the defendant's financial circumstances and the less restrictive conditions when setting bail. Yet, that is exactly what the Court and the Attorney General held by judicial fiat.

In 1879, the California Supreme Court first took up the question of whether bail fixed above the defendant's ability to pay was the functional equivalent of a denial of bail.[75] Duncan's bail was set at $113,000, equivalent to $2.7 million in present dollars, on a forgery case.[76] The defense argued that the bail was prohibitively high and his client could not make bail.[77] Therefore, the bail amount was in violation of the constitutional provisions against excessive bail.[78] [79] The court rejected this argument, stating:

> The able counsel for the prisoner, who has exhausted every means that ingenuity and learning could suggest for the relief of his client, argues that the mere fact that the prisoner is unable to procure

72. *Id.* at 518.
73. *Id.*
74. *Id.* at 525.
75. *Ex parte* Duncan, 54 Cal. 75, 77 (1879).
76. *Id.* At 76.
77. *Id.* at 77.
78. *Id.*
79. The holding in *In re Humphrey* does not rely upon the 8th Amendment, but the Due Process Clause. However, in reaching the Due Process Clause argument, the court accepted the defendant's position that "requiring money bail as a condition of pretrial release at an amount it is impossible for the defendant to pay is the functional equivalent of a pretrial detention order. *In re* Humphrey, 228 Cal. Rptr. 3d at 517.

> the bail demanded of him shows that it is excessive in amount, and should therefore be reduced. But I am unable to assent to that proposition. Undoubtedly the extent of the pecuniary ability of a prisoner to furnish bail is a circumstance among other circumstances to be considered in fixing the amount in which it is to be required, but it is not in itself controlling. If the position of the counsel were correct, then the fact that the prisoner had no means of his own, and no friends who were able or willing to become sureties for him, even in the smallest sum, would constitute a case of excessive bail, and would entitle him to go at large upon his own recognizance.[80]

Ex parte Duncan was decided 139 years ago. At that point in time, the only purpose of bail was to assure a defendant would come to court. Since *Duncan*, public safety has become the primary purpose of bail. While the public safety standard was not legally relevant when the case was decided, the logic behind *Ex parte Duncan* still holds true. If we used "the pecuniary ability of a prisoner to furnish bail" as a controlling factor, then everyone would be released, an absurd outcome for a properly functioning bail system.[81]

The *In re Humphrey* court relied upon a number of cases that are either irrelevant under today's standard of review or simply contrary to the *Humphrey* decision. First, the court cites *US v. Leathers82*, but the *Leathers* court operated in a period of time when courts were prohibited from considering public safety as a factor. "The structure of the Act and its legislative history make it clear that in noncapital cases pretrial detention cannot be premised upon an assessment of danger to the public should the accused be released."[83]

In re Humphrey's reliance on *In re Christie* is also dubious.[84] In that case, the question before the court was whether the pretrial judge could arbitrarily deviate from the bail schedule.

> Although article I, section 12 of the California Constitution permits preventive detention, there is no contention that the instant matter qualifies. For all other offenses, bail is a matter of right. (Cal. Const., art. I, § 12; § 1271 (holding bail before conviction is a matter of right) (citation omitted)). We are asked, therefore, to determine if a sum of bail 10 times the presumptive amount specified in the bail schedule is excessive. (§ 1269b, subd. (c).) Because the record made by the trial court is inadequate, we are unable to perform our task.[85]

In re Humphrey, like *In re Christie*, was a case where the pretrial judge deviated from the bail schedule, but in *In re Humphrey*, the scheduled bail was lowered from $600,000 to $350,000.[86] By contrast, the judge in *In re Christie* raised bail 10 times over the schedule amount without

80. *Ex parte* Duncan, 54 Cal. at 77–78.
81. *Id.* at 78.
82. *U.S. v. Leathers*, 412 F.2d 169 (D.C. Cir. 1969).
83. *Id.* at 171.
84. *In re* Christie, 112 Cal. Rptr. 2d 495 (2001).
85. *In re* Christie, 112 Cal. Rptr. 2d at 497 (as modified) (internal citations omitted).
86. *Id.* at 522.

giving a reason why he was deviating from the uniform bail schedule, and therefore the logic behind the *In re Christie* ruling is not applicable because the trial judge in *In re Christie* was asked to supplement the record because he was deviating from the schedule rather than applying it.[87] Further, unlike in *In re Christie*, San Francisco County not only has a bail schedule in compliance with Penal Code section 1269b(c), but it also has a pretrial service procedure consistent with the protocols outlined in the SB 10, the very bill that is mentioned by the judges in *In re Humphrey* as being the necessary remedy for California's bail problems.[88]

The *In re Humphrey* decision was mainly based upon the 1987 United States Supreme Court decision, *US v. Salerno*.[89] *Salerno* challenged the federal bail law, the Bail Reform Act of 1984, that gave the courts power to detain certain defendants accused of a violent felony without bail.[90] *In re Humphrey* considered *Salerno* relevant:

> because of the heavy emphasis the opinion places on the extensive safeguards mandated by the Bail Reform Act to assure the accuracy of a judicial assessment that the release of a particular arrestee would endanger public safety. These safeguards, which the court relied upon in upholding the statute, are relevant to our consideration of the inquiries and findings necessary before a presumptively innocent arrestee may be detained prior to trial.[91]

Yet, *Salerno's* issue was whether detaining the defendant without the possibility of bail was constitutional.[92] In other words, *Salerno's* issue was more akin to determining the constitutional validity of Article I, Section 12 of the state constitution that created certain exceptions to the general rule that every defendant be offered bail.[93]

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87. *Id.* at 496.
88. San Francisco implemented a risk assessment tool that was an algorithm developed by the Arnold Foundation. http://www.sfpretrial.org/arnold-public-safety-assessment. SB 10 requires counties to establish similar types of pretrial risk assessment tools. SB 10, Section 38 requires a similar type of risk assessment tool.
89. *U.S. v. Salerno*, 481 U.S. 739 (1987).
90. *Id.*
91. *In re* Humphrey, 228 Cal.Rptr.3d 513,532 (Ct. App. 2018).
92. *Salerno*, 481 U.S. at 745.
93. *Salerno's* discussion of the federal provisions mimic the language of Article I, Section 12 of the California state constitution. *See* U.S. v. Salerno, 481 U.S. 739, 742 (1987) ("To this end, § 3141(a) of the Act requires a judicial officer to determine whether an arrestee shall be detained. Section 3142(e) provides that '[i]f, after a hearing pursuant to the provisions of subsection (f), the judicial officer finds that no condition or combination of conditions will reasonably assure the appearance of the person as required and the safety of any other person and the community, he shall order the detention of the person prior to trial.' Section 3142(f) provides the arrestee with a number of procedural safeguards. He may request the presence of counsel at the detention hearing, he may testify and present witnesses in his behalf, as well as proffer evidence, and he may cross-examine other witnesses appearing at the hearing. If the judicial officer finds that no conditions of pretrial release can reasonably assure the safety of other persons and the community, he must state his findings of fact in writing, § 3142(i),

The relevant conclusion in *Salerno* was that pretrial detention was not a penalty against the accused, but a legitimate government solution to public safety issues, including future dangerousness and witness intimidation.

> We conclude that the detention imposed by the Act falls on the regulatory side of the dichotomy. The legislative history of the Bail Reform Act clearly indicates that Congress did not formulate the pretrial detention provisions as punishment for dangerous individuals. (Citation omitted). Congress instead perceived pretrial detention as a potential solution to a pressing societal problem. (Citation omitted). There is no doubt that preventing danger to the community is a legitimate regulatory goal.[94]

It further found that "the pretrial detention contemplated by the Bail Reform Act is regulatory in nature, and does not constitute punishment before trial in violation of the Due Process Clause."[95] This was the important distinction, as *Salerno* found that pretrial detention was not a form of punishment, and that the due process clause was not violated. "We have repeatedly held that the Government's regulatory interest in community safety can, in appropriate circumstances, outweigh an individual's liberty interest."[96]

There is not one case cited in *In re Humphrey* which held that using the uniform bail schedule to fix bail without consideration of defendant's ability to pay or least restrictive options violated the defendant's due process rights.

Rather, the court relied on its own words, not precedent, in its ruling. Judge Kline began his opinion by admitting judicial frustration for the lack of legislative progress on the issue of bail reform, and noting that this lack of progress required him to reform the system himself.

> Nearly forty years ago, during an earlier incarnation, the present Governor of this state 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.) The Legislature did not respond . . .
> [section omitted]
> This time the Legislature initiated action. Senate Bill No. 10, the California Money Bail Reform Act of 2017, was introduced at the commencement of the current state legislative session . . . We hope sensible reform is enacted, but if so it will not be in time to help resolve this case.

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and support his conclusion with "clear and convincing evidence,' § 3142(f).").

94. *Id.* at 747. (internal citations omitted).
95. *Id.* at 748.
96. *Id.*

> Meanwhile, as this case demonstrates, there now exists a significant disconnect between the stringent legal protections state and federal appellate courts have required for proceedings that may result in a deprivation of liberty and what actually happens in bail proceedings in our criminal courts.[97]

In what Judge Kline labeled his "Closing Observations," he editorialized that, "[t]he problem, as our Chief Justice has shown, requires the judiciary, not just the Legislature, to change the way we think about bail and the significance we attach to the bail process."[98]

Conclusion

The criminal justice system should reform the way pretrial detention and release are conducted in our courts as fixing a monetary value is not the most effective way to protect the public. However, SB 10 and the *In re Humphrey* decision approach this problem in the wrong way. They create a hybrid system that incorporates the old money bail system for some offenders with a system that attempts to eliminate bail for others.[99] But if they are being sincere in seeking a system that still protects the public, how does maintaining money bail for those who are considered a public safety risk protect the public?

California needs a constitutional solution to this problem, rather than a statutory or decision-by-decision one. We need to find a solution not through partisan lenses supported by dubious facts and data, but by relying on verifiable evidence and sound law.

We need a solution that addresses our public safety concerns and preserves the integrity of the judicial system while, limiting pretrial custody exposure only to those we need to detain regardless of income.

The solution that seems to complement the justice system is one that first examines public safety first and emanates from this starting point. An effective way to determine this is to create a list of offenses or conditions that create a rebuttable presumption of detention similar to the federal system,[100] and for all other charges not within this framework, the prosecution would have to prove beyond clear and convincing evidence that the defendant is a public safety risk. If the person is not determined to be a public safety risk, then the court shall determine the least restrictive manner to ensure that this person returns to court. This system is fair and does not penalize someone because of his financial circumstances, and moreover, it plays the critical role of protecting the public.

A constitutional amendment is the only solution to our current problem. It will give uniformity to the current pretrial detention system that, over a long period of time, has developed internal inconsistencies.

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97. *In re Humphrey*, 228 Cal. Rptr. 3d 513, 516–517 (2018).
98. *Id.* at 545.
99. SB 10 continues to use money bail for defendant's considered a risk to the public. *See* S.B. 10 2017, Leg., Reg. Sess. §§ 12, 14, 17–18 (Ca. 2017).
100. 18 U.S.C.A. § 3142 (2008).

The most obvious of these inconsistencies is the emphasis on public safety, as articulated in Article I, Section 28,[101] and yet the requirement for bail on almost all cases, as articulated in Article I, Section 12.[102] There is no rational explanation as to why posting a $2 million bond for a defendant charged with murder protects the public, and only a constitutional amendment can resolve this internal contradiction.

It is imperative that we resolve this problem. As the Judicial Council's 2017 Report concludes, the "current pretrial release and detention system unnecessarily compromises victims and public safety because it bases a person's liberty on financial recourses rather than the likelihood of future criminal behavior and exacerbates socioeconomic disparities."[103] This cannot be the reality for a judicial system in a civilized society.

101. Cal. Const. art. I, § 28 (1849).
102. Cal. Const. art. I, § 12 (1849).
103. *Id*.