

SB 10: Punishment Before Conviction? Alleviating Economic Injustice in California with Bail Reform

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Code Sections Affected

Penal Code §§ 825, 1269, 1269a, 1269b, 1269c, 1275, 1275.1, 1277, 1278, 1284, 1289, 1295, 1318, and 1318.1 (amended, repealed, and added); 1275a, 1275b, 1318.2 and 1318.3 (added); 1270, 1270.1, 1270.2, 1288, 1319, and 1319.5 (amended and repealed).
SB 10 (Hertzberg); Held in Assembly Appropriations.

TABLE OF CONTENTS

I. INTRODUCTION 534

II. LEGAL BACKGROUND 537

 A. *Bail Bonds Historically* 537

 B. *The Federal Bail Reform Act of 1966* 539

 C. *Existing California Law* 540

 D. *Different Approaches Around the United States* 541

III. SENATE BILL 10 542

 A. *Section 1275, 1275a & 1275b of the Penal Code* 543

 B. *Other Provisions* 544

IV. ANALYSIS..... 545

 A. *Will SB 10 Do What It Says It Will Do?*..... 545

 1. *Will SB 10 Lower Jail Populations?*..... 546

 2. *Will SB 10 Enhance Public Safety?* 546

 3. *Will SB 10 Provide Costs or Savings?*..... 548

 B. *Impact on the Bail Industry and Moving Forward*..... 550

 C. *Avoiding Constitutional Issues*..... 550

V. CONCLUSION..... 552

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I. INTRODUCTION

On an early spring morning in 2010, sixteen-year-old Kalief Browder was heading home through the Bronx, coming back from a party.¹ A squad car pulled up, and officers stopped the young man to question him about a robbery.² As more police arrived, an officer accused Kalief of robbing a man and taking a backpack.³ “I didn’t rob anybody,” he said.⁴ “You can check my pockets.”⁵ After finding nothing in the search, the police handcuffed and brought him to the precinct for interrogation, saying, “most likely you can go home.”⁶ Browder maintained his innocence, yet the prosecution charged him with robbery, grand larceny, and assault.⁷ The judge set bail at \$3,000—more than Browder’s family could afford.⁸ A week later, Kalief turned 17 in Rikers Island.⁹ Browder spent three long years maintaining his innocence, refusing to plea, waiting for a trial, and suffering unimaginable abuse from the inmates and staff.¹⁰ Four days after his 20th birthday, the prosecution dropped all charges and Kalief Browder returned home.¹¹ Two years after his release, Kalief hanged himself as a result of the trauma he experienced in Rikers.¹² His inability to afford a \$3,000 bail sent him down the path that led him to take his own life.¹³ Kalief told ABC News, “[t]he way the system is, you’re guilty ‘till proven innocent.”¹⁴

The consequences of pretrial detention are often unforeseen and have severe results.¹⁵ Individuals locked up for even a few days can lose their jobs, homes, or

1. Jennifer Gonnerman, *Before the Law*, NEW YORKER (Oct. 6, 2014), <http://www.newyorker.com/magazine/2014/10/06/before-the-law> (on file with *The University of the Pacific Law Review*).

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.*

7. *Id.*

8. *Id.*

9. *Id.*

10. *See id.* (“[T]he U.S. Attorney for the Southern District of New York described [Rikers] as a place with a ‘deep-seated culture of violence,’ where attacks by officers and among inmates are rampant.”).

11. *Id.*

12. *See* Jennifer Gonnerman, *Kalief Browder, 1993-2015*, NEW YORKER (June 7, 2015), <http://www.newyorker.com/news/news-desk/kalief-browder-1993-2015> (on file with *The University of the Pacific Law Review*) (“[Kalief] endured about two years in solitary confinement, where he attempted to end his life several times.”).

13. Alysia Santo, *No Bail, Less Hope: The Death of Kalief Browder*, MARSHALL PROJECT (June 9, 2015), <https://www.themarshallproject.org/2015/06/09/no-bail-less-hope-the-death-of-kalief-browder#.CXkb6jApz> (on file with *The University of the Pacific Law Review*).

14. ABC News, *Kalief Browder’s Life Behind Bars and Who He Might Have Been*, YOUTUBE (June 18, 2015), <https://www.youtube.com/watch?v=kv6gS14JcFA> (transcript on file with *The University of the Pacific Law Review*).

15. Paul Heaton, *ARTICLE: The Downstream Consequences of Misdemeanor Pretrial Detention*, 69

custody of their children.¹⁶ Some judges are adjusting their outlook on pretrial detention after learning that detaining low-risk defendants before trial makes them significantly more likely to be repeat offenders.¹⁷ People with the financial means to post bail have the advantage of preparing a stronger defense from the outside.¹⁸ They can enroll in programs, look for evidence or witnesses that support their case, and appear well-presented in court, which all show the judge that a strict punishment is not necessary.¹⁹ People without financial means have none of these advantages.²⁰ They often will plead guilty just to get out of jail, even if innocent, which will disrupt their lives even more—all because they could not afford bail.²¹ California’s average bail is \$50,000—five times higher than the rest of the country.²² California taxpayers spend millions of dollars every day to house approximately 47,000 detainees awaiting trial.²³ These defendants make up about 60% of the jail population.²⁴ Many of them could be safely released after a risk assessment to await trial and attend court on their own, at no cost to taxpayers.²⁵ Instead, the current system jails until trial those who cannot afford bail.²⁶

“In our society, liberty is the norm, and detention prior to trial or without trial is the carefully limited exception.”²⁷ The Supreme Court of the United States

STAN. L. REV. 711, 713 (2017).

16. Heaton, *supra* note 15, at 713.

17. Michael Hardy, *In Fight Over Bail’s Fairness, a Sheriff Joins the Critics*, N.Y. TIMES (Mar. 9, 2017), <https://www.nytimes.com/2017/03/09/us/houston-bail-reform-sheriff-gonzalez.html> (on file with *The University of the Pacific Law Review*); see CHRISTOPHER LOWENKAMP, MARIE VANNOSTRAND & ALEXANDER HOLSINGER, LAURA & JOHN ARNOLD FOUND., THE HIDDEN COSTS OF PRETRIAL DETENTION 3 (2013), available at http://www.arnoldfoundation.org/wp-content/uploads/2014/02/LJAF_Report_hidden-costs_FNL.pdf (on file with *The University of the Pacific Law Review*) (“When held 2-3 days, low-risk defendants are almost 40 percent more likely to commit new crimes before trial than equivalent defendants held no more than 24 hours.”).

18. HUMAN RIGHTS WATCH, “NOT IN IT FOR JUSTICE”: HOW CALIFORNIA’S PRETRIAL DETENTION AND BAIL SYSTEM UNFAIRLY PUNISHES POOR PEOPLE 4 (2017) available at https://www.hrw.org/sites/default/files/report_pdf/us_bail0417_web_0.pdf (on file with *The University of the Pacific Law Review*).

19. *Id.*

20. Heaton, *supra* note 15, at 714; Alexandra Natapoff, *Why Misdemeanors Aren’t So Minor*, SLATE (Apr. 27, 2012), http://www.slate.com/articles/news_and_politics/jurisprudence/2012/04/misdemeanors_can_have_major_consequences_for_the_people_charged_.html (on file with *The University of the Pacific Law Review*).

21. Heaton, *supra* note 15, at 714; Natapoff, *supra* note 20.

22. *It’s Time to do Away with California’s Cash Bail System*, SACRAMENTO BEE (Apr. 7, 2017, 8:00 AM), <http://www.sacbee.com/opinion/editorials/article143174454.html> (on file with *The University of the Pacific Law Review*).

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.*

27. U.S. v. Salerno, 481 U.S. 739, 755 (1987).

wrote those words 30 years ago.²⁸ But courts across the country incarcerate poor people awaiting trial because they cannot afford the cost of bail, while wealthy individuals in the same position, charged with the same crime, walk free.²⁹ The current system does not focus on detaining those who pose a threat to society, or who are flight risks—it disproportionately punishes the poor and people of color.³⁰ The system allows multi-millionaires, like Robert Durst, who was charged with murder, to post \$250,000 in bail and skip town,³¹ while 16-year-old Kalief Browder, wrongfully charged with robbing someone and taking a backpack, spent three years of his life in Rikers Island awaiting trial.³²

Although Kalief’s story occurred in New York, the inequities of the bail system are widespread across the country and are especially present in California.³³ To address these economic inequalities in California’s criminal justice system, SB 10 requires each county to establish pretrial service agencies that are charged with providing tailored recommendations to the courts on pretrial detention or release based on the nature of the defendant’s flight risk and potential threat to public safety.³⁴ The agencies will be responsible for providing services and supervision of the defendants.³⁵ But the primary factor for the agency’s recommendation is focused on the defendant’s potential flight risk, and the safety of the community.³⁶

SB 10 aims to lower the number of inmates in California’s jails who are locked up solely because they cannot afford bail.³⁷ This legislation is a complete reform of the pretrial decision-making in California, which will undoubtedly

28. *Id.*

29. *Locked Up for Being Poor*, N.Y. TIMES (May 5, 2017), https://www.nytimes.com/2017/05/05/opinion/locked-up-for-being-poor.html?_r=0 (on file with *The University of the Pacific Law Review*).

30. Jazmine Ulloa, *Some Say California’s Bail System is Broken. Here’s How Two Legislators Plan to Help Fix It*, L.A. TIMES (June 13, 2017), <http://www.latimes.com/politics/la-pol-sac-bail-reform-analysis-20170609-htmstory.html> (on file with *The University of the Pacific Law Review*).

31. Polly Mosendz, *Robert Durst’s History of Skipping Bail Comes Back to Haunt Him*, NEWSWEEK (Mar. 23, 2015), <http://www.newsweek.com/robert-durst-jinx-denied-bail-316108> (on file with *The University of the Pacific Law Review*).

32. Gonnerman, *supra* note 1.

33. Kamala D. Harris and Rand Paul, *Kamala Harris and Rand Paul: To Shrink Jails, Let’s Reform Bail*, N.Y. TIMES (July 20, 2017) <https://www.nytimes.com/2017/07/20/opinion/kamala-harris-and-rand-paul-lets-reform-bail.html> (on file with *The University of the Pacific Law Review*); *It’s Time to do Away with California’s Cash Bail System*, *supra* note 22.

34. SENATE FLOOR, FLOOR ANALYSIS OF SB 10, at 1 (May 30, 2017); Jazmine Ulloa, *Here’s How State Lawmakers Plan to Reform the Bail System in California*, L.A. TIMES (Mar. 26, 2017), <http://www.latimes.com/politics/la-pol-sac-bail-reform-legislation-20170326-story.html> (on file with *The University of the Pacific Law Review*).

35. SENATE FLOOR, FLOOR ANALYSIS OF SB 10, at 6–7 (May 30, 2017).

36. Marisa Lagos, *Lawmakers Aim to Limit Cash Bail, Say it ‘Punishes Poor for Being Poor’*, KQED NEWS (Mar. 27, 2017), <https://www.kqed.org/news/2017/03/27/lawmakers-aim-to-limit-cash-bail-say-it-punishes-poor-for-being-poor/> (on file with *The University of the Pacific Law Review*).

37. *Id.*

diminish the commercial bail bond industry.³⁸ Part II lays out the historical context of bail in the United States, the federal approach, California's current system, and other approaches around the United States.³⁹ This article then looks at the present essential provisions of SB 10 that will overhaul the current bail system, followed by an analysis of what SB 10 will do if approved the coming year.⁴⁰

II. LEGAL BACKGROUND

Senator Hertzberg, along with many coauthors, introduced SB 10 to shift pretrial detention decision-making to focus on the magnitude of the risk to society, rather than detaining defendants who are unable to afford bail.⁴¹ Part A addresses the historical perspective of bail along with its current problems.⁴² Part B discusses the federal reform movement that took place in the 1960s.⁴³ Part C addresses the California Constitution along with existing California law, and part D examines the different approaches to solving the inequalities in the bail system around the country.⁴⁴

A. *Bail Bonds Historically*

Most jurisdictions in the United States have two ways to make bail: either post the whole sum up front or go through a commercial bondsman.⁴⁵ Almost no one can afford the full amount of bail up front.⁴⁶ Those who can pay a commercial bail bondsman typically pay 10% of the bail amount for their freedom, while the bondsman will cover the rest.⁴⁷ In California the average bail is \$50,000; the presumed innocent defendant must then pay a non-refundable \$5,000 payment to the bail bonds company for their freedom.⁴⁸ Given that 47%

38. *Jails Exist For Punishment or Public Safety, Not For Locking People up Who Can't Afford Bail*, L.A. TIMES (May 31, 2017), <http://www.latimes.com/opinion/editorials/la-ed-bail-reform-20170531-story.html> (on file with *The University of the Pacific Law Review*).

39. *Infra* Part II.

40. *Infra* Parts III–IV.

41. Lagos, *supra* note 36.

42. *Infra* Part II.A.

43. *Infra* Part II.B.

44. *Infra* Part II.C–D.

45. Nick Pinto, *The Bail Trap*, N.Y. TIMES (Aug. 13, 2015), <https://www.nytimes.com/2015/08/16/magazine/the-bail-trap.html> (on file with *The University of the Pacific Law Review*).

46. RICHARD G. SINGER, CRIMINAL PROCEDURE II: FROM BAIL TO JAIL 11 (2008).

47. *Id.*

48. Bob Hertzberg, *Bail System Will be Fairer if California Passes This Bill*, THE PRESS-ENTERPRISE (May 31, 2017, 12:04 AM), <http://www.pe.com/2017/05/31/bail-system-will-be-fairer-if-california-passes-this-bill/> (on file with *The University of the Pacific Law Review*).

of Americans do not have \$400 for an emergency expense, it is clear how the current system harms the poor.⁴⁹

Bail is a common law relic that originated in England during the Middle Ages as a way to ensure a defendant's appearance at trial without incarcerating him until then.⁵⁰ The defendant or the defendant's relatives would pledge a bond for his or her freedom.⁵¹ This bond might be secured by money or real property as collateral to ensure the defendant arrived at court, or it sometimes would be unsecured.⁵² Without this system of pretrial release, jails would quickly overcrowd if every defendant awaiting trial were incarcerated.⁵³ In 1689, England banned the practice of incarcerating individuals before trial by setting exorbitant bail, proclaiming, "excessive bail shall not be required, nor excessive fines imposed."⁵⁴ A century later, the United States Constitution adopted the same language in the Eighth Amendment.⁵⁵ Though bail stems from English common law, commercial bail bonds were never permitted in England—this was an American invention.⁵⁶

Popular shows like "Dog the Bounty Hunter"⁵⁷ have normalized the bail bond industry to Americans, even though the United States stands as an outlier as one of only two countries on the planet that has commercial bail bonds companies.⁵⁸ There are important reasons why the United States adopted a commercial bail system at the inception of our nation.⁵⁹ At the time, most states' constitutions guaranteed the absolute right to receive bail except in capital cases—separating themselves from English law.⁶⁰ Early America had vast frontiers and the lack of community ties or close proximity to neighbors made it difficult for courts to receive sureties or bonds for many defendants.⁶¹ Nomadic defendants could easily skip town and avoid ever facing justice for their crimes.⁶² America's fondness for capitalism and entrepreneurialism, coupled with the spirit

49. *Id.*

50. Pinto, *supra* note 45; Adam Liptak, *Illegal Globally, Bail for Profit Remains in the U.S.*, N.Y. TIMES (Jan. 29, 2008), <http://www.nytimes.com/2008/01/29/us/29bail.html> (on file with *The University of the Pacific Law Review*).

51. Pinto, *supra* note 45.

52. Pinto, *supra* note 45; Liptak, *supra* note 50.

53. SINGER, *supra* note 46, at 11.

54. Pinto, *supra* note 45.

55. Pinto, *supra* note 45; U.S. CONST. amend. VIII.

56. WAYNE H. THOMAS JR., BAIL REFORM IN AMERICA 12 (1976).

57. *Dog the Bounty Hunter* (A&E).

58. Last Week Tonight, *Bail: Last Week Tonight with John Oliver* (HBO), YOUTUBE (June 7, 2015), <https://www.youtube.com/watch?v=IS5mwymTIJU> (transcript on file with *The University of the Pacific Law Review*); Liptak, *supra* note 50.

59. THOMAS, *supra* note 56, at 11–12.

60. *Id.* at 12.

61. *Id.*

62. *Id.*

of sovereignty, spawned the creation of the bail bond industry in the early 1800s.⁶³ Commercial bail bonds were an effective tool in early America for ensuring the defendant's return for trial, and preventing jail overcrowding.⁶⁴

Money bail has seen a steady incline over the past 20-years.⁶⁵ An ACLU study found that the percentage of people required to post money bail increased from 37%–61% from 1990 to 2009.⁶⁶ Most defendants and families face two realistic possibilities:⁶⁷ wait in jail for trial, possibly for months—an option that has been proven to increase the likelihood of conviction as well as be dangerous to the detainee's physical and mental health⁶⁸—or pay 10% to a commercial bondsman, if possible, potentially leaving the family with massive debt.⁶⁹

B. The Federal Bail Reform Act of 1966

Criticism of the money bail system is not a new trend.⁷⁰ Famous French political scientist Alexis de Toqueville voiced his derision of the system in the early 1800s: “[Bail] is hostile to the poor and favorable only to the rich.”⁷¹ A recognition of the inequality of money bail toward the indigent spurred parts of the country to begin reform in the 1960s.⁷² In 1961, the Vera Foundation began an experimental study called the Manhattan Bail Project, which looked at the effects of pretrial detention on defendants.⁷³ The Manhattan Bail Project proved successful—individuals judged not to be public safety or flight risks were released and overwhelmingly returned for their court dates.⁷⁴ Shortly after the release of the promising results of the Manhattan Bail Project, with the support of Attorney General Robert Kennedy, Congress passed the Federal Bail Reform Act of 1966.⁷⁵ This Act created a presumption that all federal criminal defendants be released on their personal recognizance, without any requirement of bail.⁷⁶ The

63. Liptak, *supra* note 50.

64. THOMAS, *supra* note 56, at 12.

65. Gillian B. White, *Who Really Makes Money Off of Bail Bonds?*, THE ATLANTIC (May 12, 2017), <https://www.theatlantic.com/business/archive/2017/05/bail-bonds/526542/> (on file with *The University of the Pacific Law Review*).

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.*

70. See ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 63 (1835) (criticizing the commercial bail system in his book, *Democracy in America*, “[Bail] is hostile to the poor and favorable only to the rich.”).

71. *Id.*

72. SINGER, *supra* note 46, at 12.

73. Heaton, *supra* note 15, at 724.

74. SINGER, *supra* note 46, at 12.

75. THOMAS, *supra* note 56, at 6–7.

76. *Id.* at 7.

use of money bail should only be utilized if nonfinancial conditional release would not sufficiently assure the defendant's return to court.⁷⁷ The passage of this Act prompted a dozen states to revise their bail laws over the succeeding five years.⁷⁸ While alleviating the problem of poverty was a central focus in the 1960s, the bail reform movement among the states ended swiftly when the Nixon administration arrived.⁷⁹ The new president shifted focus from poverty to crime and the "law and order" candidate brought sweeping, lasting changes to the criminal justice system.⁸⁰

C. Existing California Law

Article I Section 12 of the California Constitution states that "a person shall be released on bail by sufficient sureties," with few offenses as exceptions.⁸¹ The offenses excluded from receiving bail are capital crimes and felony offenses involving acts of violence or sexual assault, both where the facts are evident or the presumption of guilt is great.⁸² Another exception is any felony offense where the defendant has threatened another with great bodily harm and there is a substantial likelihood that the threat would be carried out if the person were released.⁸³

Under Penal Code section 1275, when deciding bail, a judge shall consider the safety of the public, the seriousness of the charge, prior criminal history, and the likelihood of the defendant returning to court.⁸⁴ To assess the seriousness of the crime, the judge will consider the harm and threats towards the victim, the alleged use of a firearm, or the alleged possession or use of controlled substances.⁸⁵

Under Penal Code section 1269(b), an officer in the jail may accept bail in the amount fixed by the arrest warrant or by the bail schedule and set a place and time for the individual's appearance in court.⁸⁶ Every year superior court judges must review the countywide bail schedule for misdemeanor offenses.⁸⁷ Judges have discretion to decide the amount of bail, which must be "reasonable and

77. *Id.*

78. *Id.*

79. *Id.* at 8.

80. *Id.* at 8–9.

81. CAL. CONST. art. I, § 12.

82. *Id.*

83. *Id.*

84. CAL. PENAL CODE § 1275(a) (West 2017).

85. *Id.*

86. *Id.* at § 1269b(a).

87. *Id.* at § 1269b(c).

sufficient” for the individual to appear in court.⁸⁸ Section 1270 provides that a court may release an individual who has been arrested for any offense other than a capital offense, on his or her own recognizance, and section 1270.1 allows a judge to deviate from the bail schedule for safety reasons.⁸⁹ Penal Code sections 1318 and 1319 designate conditions for the individual’s release or remained custody.⁹⁰

D. Different Approaches Around the United States

Over the years, various jurisdictions have attempted to reform the bail system, but the majority of states still adhere to the money bail practice.⁹¹ Four states have completely banned commercial bail bondsmen: Illinois, Kentucky, Oregon and Wisconsin.⁹² Washington D.C. was influenced by the federal system, and got rid of money bail decades ago—it has a system that is completely absent of money, with pretrial officers allowing most defendants to go with just a signature.⁹³ The District of Columbia is showing the nation that it is possible to create a more just system without jeopardizing public safety.⁹⁴ In 2016, New Mexico citizens voted to bar judges from detaining low-risk defendants who pose little threat but cannot make bail.⁹⁵ Arizona updated its pretrial court system, essentially abolishing bail.⁹⁶ New Jersey is the latest state in the union to tackle reform—the state completely eliminated bail and replaced it with a risk assessment system.⁹⁷ This effectively freed 40% of the defendants who were only locked up because they could not afford bail.⁹⁸

88. *Id.* at § 815a.

89. *Id.* at §§ 1270, 1270.1.

90. *Id.* at §§ 1318, 1319.

91. Heaton, *supra* note 15, at 733.

92. *Id.*

93. Ann 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=.28919afdaa11 (on file with *The University of the Pacific Law Review*).

94. *See id.* (“There is no evidence you need money to get people back to court,” said Morrison, a judge since 1979. “It’s irrational, ineffective, unsafe and profoundly unfair.”).

95. An-Li Herring, *States and Cities Take Steps to Reform ‘Dishonest’ Bail System*, NPR (Dec. 17, 2016, 8:00 AM), <http://www.npr.org/2016/12/17/505852280/states-and-cities-take-steps-to-reform-dishonest-bail-system> (on file with *The University of the Pacific Law Review*).

96. *It’s Time to do Away with California’s Cash Bail System*, *supra* note 22.

97. #783: *New Jersey Bails Out*, CAPITAL PUBLIC RADIO (July 12, 2017), <http://www.npr.org/sections/money/2017/07/12/536905881/episode-783-new-jersey-bails-out> (downloaded using iTunes) (on file with *The University of the Pacific Law Review*).

98. *Id.*

Santa Clara County, California, deviated from the state bail system in 2012.⁹⁹ The county implemented a risk evaluation program to reduce the unnecessarily high jail population, which resulted in millions dollars of savings after choosing not to detain those who could not afford bail.¹⁰⁰ The cost per year to the county to provide the pretrial services is around \$7 million, but the savings from no longer detaining non-convicted defendants is around \$60 million.¹⁰¹ Of the defendants released in Santa Clara County, 95% make all court appearances and almost 99% are not rearrested as they await trial.¹⁰² The authors of SB 10 aim to bring the benefits of the Santa Clara County system to the statewide level.¹⁰³

III. SENATE BILL 10

Senate Bill (SB) 10 aims to completely overhaul the bail system in California by amending, repealing, or adding new text to 26 sections of the Penal Code.¹⁰⁴ Assembly Member Rob Bonta introduced AB 42, an identical bill to SB 10, that failed to make it out of the assembly.¹⁰⁵ With this legislation, Senator Hertzberg and coauthors attempt to reform California's bail system by safely reducing the number of pretrial detainees who are in jail merely because they cannot afford to post bail.¹⁰⁶ This bill eliminates county bail schedules and requires each county to create a pretrial service agency charged with providing the court recommendations, suggesting whether each defendant should be released or held in continued custody based off the pretrial risk assessment of the individual.¹⁰⁷ The legislature has attempted to fix the bail system before, but the bills either failed to make it to the governor's desk or failed to alleviate the specific problem

99. *Jails Exist For Punishment or Public Safety, Not For Locking People up Who Can't Afford Bail*, *supra* note 38.

100. *California's Bail System is Inequitable and Doesn't Make Us Safer*, S.F. CHRON. (Apr. 2, 2017), <http://www.sfchronicle.com/opinion/editorials/article/California-s-bail-system-is-inequitable-and-11044858.php> (on file with *The University of the Pacific Law Review*).

101. *Jails Exist For Punishment or Public Safety, Not For Locking People up Who Can't Afford Bail*, *supra* note 38.

102. Robert Hertzberg, *Assembly Standing Comm. on Pub. Safety Hearing of 07-11-2017*, DIGITAL DEMOCRACY (July 11, 2017), <https://ca.digitaldemocracy.org/hearing/54079?startTime=0&vid=58c84d9f8e2ec0d35c89bbe71640b4ee> [hereinafter *Public Safety Hearing*] (on file with *The University of the Pacific Law Review*).

103. *California's Bail System is Inequitable and Doesn't Make Us Safer*, *supra* note 100.

104. SB 10, 2017 Leg., 2017–2018 Sess. (Cal. 2017) (as amended on Sept. 6, 2017).

105. Jazmine Ulloa, *Legislation to Overhaul Bail Reform in California Hits a Hurdle in Assembly*, L.A. TIMES (June 1, 2017, 11:37 P.M.), <http://www.latimes.com/politics/essential/la-pol-ca-essential-politics-updates-legislation-to-overhaul-bail-reform-in-1496385464-htlmlstory.html> (on file with *The University of the Pacific Law Review*).

106. SB 10, 2017 Leg., 2017–2018 Sess. (Cal. 2017) (as amended on Sept. 6, 2017); SENATE COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF SB 10, at 2 (Apr. 4, 2017).

107. SB 10, 2017 Leg., 2017–2018 Sess. (Cal. 2017) (as amended on Sept. 6, 2017).

that SB 10 intends to solve.¹⁰⁸ Part A focuses on Sections 1275, 1275a, and 1275b, where the primary mechanics of the risk assessment are spelled out.¹⁰⁹ Part B focuses on other important repeals, amendments, and additions to the Penal Code that SB 10 implements.¹¹⁰

A. Section 1275, 1275a & 1275b of the Penal Code

This bill repeals Penal Code section 1275, and in its place creates a pretrial release hearing where the judge will assess the recommendation provided by the pretrial agency and decide whether to release the defendant based on a multitude of factors.¹¹¹ These factors include an individual's prior criminal history, the harm or threats to the victim, and the use of a deadly weapon during the crime.¹¹² However, the most important factors for the judge to consider are the safety of the public, the security of the victim, and the likelihood of the accused being a flight risk.¹¹³

Under Section 1275a, the court will receive the pretrial agency's recommendation and may agree with the agency's decision or decide otherwise.¹¹⁴ If the court uses its discretion and decides against the pretrial agency's assessment, they must provide their reasoning.¹¹⁵ After receiving the pretrial release report and evaluating the arguments from the parties, the judge may still set monetary bail if he or she opines that the defendant will not appear in court as required.¹¹⁶ When monetary bail is required, the judge must inquire about the defendant's capacity to pay.¹¹⁷ The judge must not set bail in an amount that causes the defendant's detention solely because of an inability to afford that amount.¹¹⁸ The absence of the pretrial service report at the time of the hearing does not automatically prohibit the individual's release.¹¹⁹

Under section 1275b, if the defendant is charged with a capital crime, a felony involving an act of violence, or a felony sexual assault, and there are evident facts or the presumption of guilt is great, the individual will be taken into custody before trial.¹²⁰ A prosecuting attorney may seek pretrial detention at any

108. SENATE COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF SB 10, at 2 (Apr. 4, 2017).

109. *Infra* Part III.A.

110. *Infra* Part III.B.

111. SB 10, 2017 Leg., 2017–2018 Sess. §§ 16, 17(a) (Cal. 2017) (as amended on Sep. 6, 2017).

112. *Id.* at § 17(a)(2).

113. *Id.* at § 17(a)(1).

114. *Id.* at § 18(b)(1).

115. *Id.*

116. *Id.* at § 18(c)(1).

117. *Id.* at § 18(c)(2).

118. *Id.*

119. *Id.* at 18(e).

120. *Id.* at § 19(g).

time by filing a motion with the court, even after the defendant has been released.¹²¹ The defendant will be permitted to present evidence, witnesses, and cross-examine witnesses at the hearing.¹²² To decide on pretrial detention, the court will consider the safety risk to the public and the victim, the nature of the crime, the defendant's criminal record, the weight of the evidence, the flight risk of the defendant, and the presumption of innocence.¹²³

B. Other Provisions

SB 10 repeals section 1269b of the Penal Code and adds new language stating that an individual who is arrested for an enumerated violent felony shall not be considered for release until the individual appears in court for a hearing before a judge.¹²⁴ The agency will not perform a pretrial risk evaluation unless the individual requests one.¹²⁵ This section also states that an individual may not be released until that person appears before a judge for a hearing, and the agency conducts an assessment and provides the court with a recommendation if that person is arrested for: a serious felony; intimidating a witness for a spousal rape, domestic violence, or stalking; domestic violence battery; violation of court order involving threats towards another party; or any felony committed while the individual was on pretrial release for a prior offense.¹²⁶ SB 10 aims to repeal Penal Code section 1289 and in its place, adds new text to allow courts to change the conditions of the pretrial status, including requiring the addition of bail as circumstances change.¹²⁷ The prosecution can motion that bail be set or increased as more facts become known.¹²⁸

The addition of new text in section 1318.1 states the requirements for the pretrial services agencies established in each county.¹²⁹ Agencies will be charged with gathering information on the newly arrested individuals, performing pretrial risk assessments, and providing recommendations to the court that are specifically tailored to each defendant.¹³⁰ Agencies are also tasked with providing pretrial services, as well as supervising any defendants on pretrial release.¹³¹ Section 1318.2 is a new addition to the Penal Code that charges the Judicial

121. *Id.* at § 19(a).

122. *Id.* at § 19(c).

123. *Id.* at § 19(f).

124. *Id.* at § 10(b).

125. *Id.*

126. SENATE COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF SB 10, at 4 (Apr. 4, 2017).

127. SB 10, 2017 Leg., 2017–2018 Sess. § 30(a) (Cal. 2017) (as amended on Sep. 6, 2017).

128. *Id.*

129. *Id.* at § 36.

130. *Id.* at § 36(a).

131. *Id.*

Council to provide rules to each county pretrial agency to develop and provide guidelines for the risk assessment tool used for each individual.¹³² Each county is required to share its factors and data from the risk assessment tool guidelines with the Judicial Council to best create a risk assessment tool based off of empirical data and evidenced based practices.¹³³ SB 10 reiterates that the intent of the legislation is to alleviate the disparate impacts on minorities and low-income communities in pretrial detention decision-making.¹³⁴

IV. ANALYSIS

Senate Bill 10 is a complete overhaul of California's current bail system.¹³⁵ By establishing pre-trial service agencies in each county to provide tailored recommendations to the court on detention or release based on safety and flight risks, SB 10 reforms the current system in which the people who remain detained are those who cannot afford bail.¹³⁶ This legislation does not completely remove the option of money bail, but its passing will undoubtedly upend the commercial bail industry in California.¹³⁷ The authors hope that SB 10 brings about the same changes found in Santa Clara County—a reduction in the jail population and millions of dollars saved for the county, all with no increased threat to public safety.¹³⁸ Part A of this section assesses whether SB 10 will accomplish the goals it sets out, looking at the jail population, public safety, and the fiscal impact of the bill.¹³⁹ Part B addresses the constitutional issues that SB 10 is intended to avoid, and Part C looks at other arguments and the reasons why SB 10 became a two-year bill.¹⁴⁰

A. *Will SB 10 Do What It Says It Will Do?*

The central argument made by the proponents of this legislation is that SB 10 will create a justice system that is fairer to the poor.¹⁴¹ SB 10 will lower jail

132. *Id.* at § 37(a).

133. *Id.* at §§ 38(b), (h).

134. *Id.* at §§ 2, 38(i).

135. SB 10, 2017 Leg., 2017–2018 Sess. (Cal. 2017) (as amended on Sep. 6, 2017).

136. SENATE COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF SB 10, at 2 (Apr. 4, 2017).

137. Jazmine Ulloa, 'Dog the Bounty Hunter' Joins Opponents of Bail Reform in California, L.A. TIMES (Apr. 18, 2017), <http://www.latimes.com/politics/essential/la-pol-ca-essential-politics-updates-poor-people-are-not-in-jail-for-being-1492541645-htmlstory.html> (on file with *The University of the Pacific Law Review*).

138. *California's Bail System is Inequitable and Doesn't Make Us Safer*, *supra* note 100.

139. *Infra* Part IV.A.

140. *Infra* Parts IV.B–IV.C.

141. Rob Bonta, *Assembly Standing Comm. on Pub. Safety Hearing of 07-11-2017*, DIGITAL DEMOCRACY (July 7, 2017), <https://ca.digitaldemocracy.org/hearing/54079?startTime=0&vid=58c84d9f8e2ec0d35c89bbe71640b4ee> (on file with *The University of the Pacific Law Review*).

populations and enhance public safety by focusing on risk assessments, rather than use of arbitrary bail schedules to determine a defendant's pretrial release.¹⁴² SB 10 will also save the state money by no longer unnecessarily housing defendants deemed safe to return to their communities.¹⁴³ Opponents acknowledge that county bail schedules are too high and that the system is unfair to the poor, but their biggest concern is their perception that the bill moves too far, too fast.¹⁴⁴

1. *Will SB 10 Lower Jail Populations?*

Proponents and opponents of this legislation both agree that SB 10 will lower jail populations—though this is a core problem with the bill, given the safety concerns.¹⁴⁵ The assurance of a reduced jail population can be predicted by looking at other states that have implemented similar legislation.¹⁴⁶ New Jersey is the most recent state to undergo bail reform and is a fitting comparison to California.¹⁴⁷ Also utilizing risk assessments in pretrial agencies, New Jersey has seen a 30% reduction in the jail population in the first months of the newly enacted legislation.¹⁴⁸ California can expect similar results if SB 10 passes in the coming year.¹⁴⁹

2. *Will SB 10 Enhance Public Safety?*

SB 10 is not a pilot program—it follows successful models that have been implemented around the country.¹⁵⁰ Kentucky has a similar system focusing on risk assessment that provides California with assuring guidance.¹⁵¹ In Kentucky, 89% of released defendants are present at all future court dates, and 92% of those on pretrial release are not rearrested.¹⁵² With similar results, Santa Clara County

142. *Id.*

143. *Id.*

144. Elizabeth Ratnoff, *Assembly Standing Comm. on Pub. Safety Hearing of 07-11-2017*, DIGITAL DEMOCRACY (July 7, 2017), <https://ca.digitaldemocracy.org/hearing/54079?startTime=0&vid=58c84d9f8e2ec0d35c89bbe71640b4ee> (on file with *The University of the Pacific Law Review*).

145. Ulloa, *supra* note 137.

146. #783: *New Jersey Bails Out*, *supra* note 97.

147. *Id.*

148. *Id.*

149. *Id.*

150. ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF SB 10, at 8 (July 11, 2017).

151. Samantha Young, *To Fix 'Unfair' Bail System, Will California Copy Kentucky?*, L.A. DAILY NEWS (Aug. 13, 2017), <http://www.dailynews.com/government-and-politics/20170813/to-fix-unfair-bail-system-will-california-copy-kentucky> (on file with *The University of the Pacific Law Review*).

152. ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF SB 10, at 8 (July 11, 2017).

has more than 95% of those released pretrial return to all court appearances.¹⁵³ And of those released pretrial in Santa Clara County, 99% are not rearrested when released.¹⁵⁴ This data helps show that the risk assessment tools are effective at ensuring trial appearances and preventing future crimes.¹⁵⁵ In states that do not use the pretrial systems the failure to appear rate is at least three times higher than the five percent failure to appear rate in Santa Clara County.¹⁵⁶

The link between length of detention and recidivism is another factor the proponents are using to convince lawmakers to support SB 10.¹⁵⁷ The majority of people arrested and brought to jail, convicted or otherwise, will at some point be released.¹⁵⁸ Therefore, any debate over public safety should address preventing future crimes.¹⁵⁹ Individuals detained for 8–14 days compared to those detained for no more than 24 hours are 51% more likely to commit a new crime and end up back in jail.¹⁶⁰ This suggests there is a strong link between time spent in jail and future crimes, which is persuasive evidence that we should try to minimize the amount of unnecessary pre-trial detention—especially because law enforcement occasionally arrests the wrong individuals.¹⁶¹

This data challenges those who feel criminals are coddled—according to Duane Chapman, “Dog the Bounty Hunter,” bail reform is a “hug-a-thug” program.¹⁶² The bail industry states that SB 10 requires that courts release misdemeanor defendants unless there is a finding that public safety is threatened or the defendant poses a flight risk.¹⁶³ Accordingly, they contend SB 10 endangers the security of the public by mandating the mandatory release of high-risk misdemeanor offenders without bail.¹⁶⁴ The actual outcomes of lowering jail populations are a real concern to victim advocates, district attorneys, and judges.¹⁶⁵ Acknowledging the inherent inequality in the current bail system,

153. *Public Safety Hearing*, *supra* note 102 (statement of Sen. Robert Hertzberg).

154. *Id.*

155. *Id.*

156. *Id.*

157. SENATE COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF SB 10, at 14 (Apr. 4, 2017).

158. *See NRRC Fact & Trends*, JUST. CTR., <https://csgjusticecenter.org/nrrc/facts-and-trends/> (last visited Aug. 2, 2017) (on file with *The University of the Pacific Law Review*) (“At least 95 percent of people incarcerated in state prisons will be released back to their communities at some point.”).

159. ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF SB 10, at 8 (July 11, 2017).

160. *Id.*,

161. SENATE COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF SB 10, at 14 (Apr. 4, 2017).

162. *Dog the Bounty Hunter Joins NJ Bail Reform Lawsuit*, YOUTUBE (Aug. 1, 2017), <https://www.youtube.com/watch?v=BoFWHu7eKz0> (transcript on file with *The University of the Pacific Law Review*).

163. SENATE COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF SB 10, at 14 (Apr. 4, 2017).

164. *Id.*

165. Alexei Koseff, *Ending Bail Worries California Judges*, SACRAMENTO BEE (July 11, 2017), <http://www.sacbee.com/news/politics-government/capitol-alert/article160636989.html> (on file with *The University of the Pacific Law Review*).

Sacramento County Superior Court Judge Steve White called an early version of SB 10 “a serious risk to public safety.”¹⁶⁶ The Judicial Council and Chief Justice Tani Cantil-Sakauye agreed with the goals of the bill in June 2017, but remained concerned with the balance of administration of justice and public safety.¹⁶⁷ Some opponents have argued that bail is a strong public safety tool because the family and friends of the defendant have a financial incentive to make sure the defendant attends his or her court dates.¹⁶⁸ But the argument that the current bail system is a strong public safety tool is not very accurate.¹⁶⁹ The bail bondsman’s main concern is protecting his or her investment—the defendant missing court is the main concern.¹⁷⁰ If the police arrest someone who commits a crime out on bail and returns him or her to jail, the investment is protected—defendants in jail do not miss court.¹⁷¹ Supporters of SB 10 argue the bail industry’s concern is not public safety, but rather losing a profitable \$2 billion dollar per year industry.¹⁷² This is despite the bail industry’s continued rhetoric of criminals going “free to roam our neighborhoods,” blatantly stoking the fears of the public.¹⁷³ The authors were convinced that the best step forward for public safety is to turn SB 10 into a two-year bill and continue to work with district attorneys and the Judicial Council.¹⁷⁴ Governor Jerry Brown and Chief Justice Cantil-Sakauye are now openly supporting SB 10, which improves California’s chances of seeing significant reforms to the bail system next year.¹⁷⁵

3. Will SB 10 Provide Costs or Savings?

An unidentified factor in this legislation is the bail overhaul’s fiscal impact on the state.¹⁷⁶ Taking into consideration the creation of the pretrial service

166. Young, *supra* note 151.

167. Taryn Luna, *No California Bail Reform This Year, Governor Announces*, SACRAMENTO BEE (Aug. 25, 2017), <http://www.sacbee.com/news/politics-government/capitol-alert/article169364312.html> (on file with *The University of the Pacific Law Review*).

168. SENATE COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF SB 10, at 14 (Apr. 4, 2017).

169. Joshua Page, *False Claims Stoke Fears About Reforming California’s Bail System*, SACRAMENTO BEE (May 18, 2017), <http://www.sacbee.com/opinion/op-ed/soapbox/article151392712.html> (on file with *The University of the Pacific Law Review*).

170. *Id.*

171. *Id.*

172. *Id.*; David Dayen, *If California’s So Liberal, Why Do We Still Have Money Bail?*, L.A. TIMES (Aug. 25, 2017), <http://www.latimes.com/opinion/op-ed/la-oe-dayen-money-bail-california-20170825-story.html> (on file with *The University of the Pacific Law Review*).

173. Page, *supra* note 169.

174. Marisa Lagos, *Bail Reform Gets Backing of Governor, Chief Justice But Is Put Off to 2018*, KQED NEWS (Aug. 25, 2017), <https://www.kqed.org/news/2017/08/25/bail-reform-gets-backing-of-governor-chief-justice-but-put-off-to-2018/> (on file with *The University of the Pacific Law Review*).

175. *Id.*

176. SENATE FLOOR, FLOOR ANALYSIS OF SB 10, at 8 (May 30, 2017).

agencies, compliance and monitoring of defendants, risk assessment tools, and any costs of appointing counsel, the costs are thought to be in the hundreds of millions of dollars annually.¹⁷⁷ The state will ultimately be required to reimburse the counties' annual costs of operating the pretrial service agencies.¹⁷⁸

Looking at Santa Clara County's program, the county's annual costs to provide the pretrial services are between \$6–7 million per year.¹⁷⁹ But the savings incurred from no longer jailing the non-convicted defendants are around \$60 million per year.¹⁸⁰ The proponents of this legislation argue that the same results can be brought to California at the statewide level.¹⁸¹ Some in the bail industry argue that the costs to the state would reach more than \$2 billion annually, although this figure seems hyperbolic, with no independent analysis reporting the number.¹⁸² A problem with extrapolating Santa Clara's data to California as a whole is that every county is different.¹⁸³ The costs in some counties will be low and others will see massive expenses.¹⁸⁴ Santa Clara County and Los Angeles County, for example, face different problems in pursuing justice.¹⁸⁵ Aware of this issue, the authors of the bill want to encourage the creation of effective pretrial service agencies, but the cost of this worthy ambition is unknown.¹⁸⁶ The status quo of using countywide bail schedules is easy and cost efficient, but is questionably unjust¹⁸⁷ It seems likely that the cost of creating and implementing the pretrial agencies will initially be high.¹⁸⁸ But as the counties begin to lower their jail populations by no longer housing low-risk defendants, the state might see considerable savings.¹⁸⁹ Even if it does cost more money, cost is not necessarily the determining factor in ascertaining the merit of the bill.¹⁹⁰ Arguable, to the extent we really are needlessly jailing people before trial, a more fair justice system could very well be worth the increased cost.¹⁹¹

177. *Id.*

178. SENATE COMMITTEE ON APPROPRIATIONS, COMMITTEE ANALYSIS OF SB 10, at 4 (May 15, 2017).

179. *Id.*

180. *Jails Exist For Punishment or Public Safety, Not For Locking People up Who Can't Afford Bail*, *supra* note 38.

181. *Id.*

182. Jazmine Ulloa, *Sweeping Reform of California's Bail System Would Come With a Hefty Price Tag, Says New Analysis*, L.A. TIMES (May 16, 2017), <http://www.latimes.com/politics/essential/la-pol-ca-essential-politics-updates-sweeping-bail-system-reform-in-1494960464-htmlstory.html> (on file with *The University of the Pacific Law Review*).

183. SENATE COMMITTEE ON APPROPRIATIONS, COMMITTEE ANALYSIS OF SB 10, at 4 (May 15, 2017).

184. *Id.*

185. *Id.*

186. *Id.*

187. Ulloa, *supra* note 30.

188. *Public Safety Hearing*, *supra* note 102 (statement of Sen. Robert Hertzberg).

189. *Id.*

190. Ulloa, *supra* note 30.

191. *Id.*

B. Impact on the Bail Industry and Moving Forward

The effect on the bail industry is another cost that should be factored into the analysis.¹⁹² Even though this legislation does not eliminate the option of money bail, it is likely that with the passage of SB 10, the bail industry in California will collapse, or at least be greatly reduced.¹⁹³ Opponents claim that this bill will eliminate 1,600 jobs in California's bail bond industry.¹⁹⁴ But even if jobs are eliminated, to the extent the state saves money and creates a more fair justice system, such a loss may well be worth it.¹⁹⁵ Keeping industry for the sake of keeping jobs around is not a great argument, especially if the industry exists off of higher crime rates.¹⁹⁶ Judges and district attorneys are concerned about unrealistic deadlines for decisions to be made for detainees.¹⁹⁷ District attorneys' tight deadlines to supply a motion from the time of the arrest could result in poor decision-making from the court.¹⁹⁸ Concerned about high levels of risk assessment, Senator Jeff Stone raised the issue of risk assessments actually increasing the number of those jailed via this legislation.¹⁹⁹ This claim, however, seems to lack merit because the results would likely mirror those found in the other states that use a risk assessment, which are lower jail populations.²⁰⁰ Senator Stone also questions what should happen to bail bonds companies that file for bankruptcy, or who returns the defendants that skip town.²⁰¹ These issues, though they should not be overlooked entirely, do not address the flaws in the current bail system, and do not appear to be significant enough to overcome the potential value of a more just system.²⁰²

C. Avoiding Constitutional Issues

Bail is guaranteed under the California Constitution.²⁰³ SB 10 section 127

192. *Public Safety Hearing*, *supra* note 102 (statement of Sen. Robert Hertzberg).

193. *Id.*

194. Katy Murphy, *California Bill to Eliminate Bail Clears Panel*, MERCURY NEWS (Apr. 6, 2017, 1:14 P.M.), <http://www.mercurynews.com/2017/04/04/california-bill-to-eliminate-money-bail-clears-first-hurdle/> (on file with *The University of the Pacific Law Review*).

195. *Id.*

196. *Id.*

197. ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF SB 10, at 13–14 (July 11, 2017).

198. *Id.* at 14.

199. Jeff Stone, *Stone on SB10–Bail; Pretrial Release*, YOUTUBE (Apr. 4, 2017), <https://www.youtube.com/watch?v=EKzi8UQ2M7Q> (transcript on file with *The University of the Pacific Law Review*).

200. #783: *New Jersey Bails Out*, *supra* note 97.

201. Stone, *supra* note 199.

202. ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF SB 10, at 14–15 (July 11, 2017).

203. CAL. CONST. art. I, § 12.

remains consistent with Article I, Section 12 of the California Constitution.²⁰⁴ The language mirrors the California Constitution with the offenses that are exempt from receiving bail.²⁰⁵ Capital crimes, felonies with violent acts or sexual assaults, as well as felonies with directed threats towards a victim will all be exempt from having the option of bail.²⁰⁶ This permits district attorneys and judges to use preventative detention for those who are deemed too dangerous to be released.²⁰⁷ The authors of this legislation want to be careful not to completely write out the option of money bail, so as to avoid any potential constitutional challenges.²⁰⁸ SB 10 also conserves judicial discretion; a judge may still elect to impose bail if he or she wishes.²⁰⁹

A continuing problem that has affected states across the country, including California, is overpopulation in prisons and jails.²¹⁰ SB 10 protects California from receiving lawsuits in regards to overpopulation.²¹¹ California's prisons were so over packed the Supreme Court determined them to be in violation of the Eighth Amendment²¹²—Governor Jerry Brown had to act to drastically lower the prison population.²¹³ This legislation will help California avoid any overcrowding problems.²¹⁴ A federal judge found the bail system in Harris County, Texas, to be in violation of the Constitution.²¹⁵ The county's policy was to “detain indigent misdemeanor defendants before trial, violating equal protection rights against wealth-based discrimination and violating due process protections against pretrial detention.”²¹⁶ A study found that 40% of people arrested on misdemeanor charges had been incarcerated the entire time it took their cases to resolve—meaning that many individuals spent months in jail and were later acquitted or

204. SB 10, 2017 Leg., 2017–2018 Sess. § 19(g) (Cal. 2017) (as amended on Sep. 6, 2017); CAL. CONST. art. I, § 12.

205. SB 10, 2017 Leg., 2017–2018 Sess. § 19(g) (Cal. 2017) (as amended on Sep. 6, 2017); CAL. CONST. art. I, § 12.

206. SB 10, 2017 Leg., 2017–2018 Sess. § 19(g) (Cal. 2017) (as amended on Sep. 6, 2017).

207. ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF SB 10, at 11 (July 11, 2017).

208. SB 10, 2017 Leg., 2017–2018 Sess. § 19(g) (Cal. 2017) (as amended on Sep. 6, 2017).

209. *Id.* at § 18(c)(1).

210. Nicole Flatow, *As California's Overcrowding Problem Bleeds Into Jails, Even Inmates Awaiting Trial Face Medical Neglect*, THINKPROGRESS (May 1, 2014), <https://thinkprogress.org/as-californias-overcrowding-problem-bleeds-into-jails-even-inmates-awaiting-trial-face-medical-19323dae324e/> (on file with *The University of the Pacific Law Review*).

211. SENATE COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF SB 10, at 14 (Apr. 1, 2017).

212. *Brown v. Plata*, 563 U.S. 493, 545 (2011).

213. Flatow, *supra* note 210.

214. SENATE COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF SB 10, at 14 (Apr. 1, 2017).

215. Eli Rosenberg, *Judge in Houston Strikes Down Harris County's Bail System*, N.Y. TIMES (Apr. 29, 2017), <https://www.nytimes.com/2017/04/29/us/judge-strikes-down-harris-county-bail-system.html?mcubz=1> (on file with *The University of the Pacific Law Review*).

216. *Id.*

their charges were dropped.²¹⁷ California's action on bail reform will likely prevent any future Constitutional challenges regarding pretrial detention, or Eighth Amendment excessive bail lawsuits.²¹⁸

For supporters of SB 10, the status quo punishes the poor for being poor.²¹⁹ Opponents view the proposed legislation as a “get-out-of-jail-free card.”²²⁰ But there is one thing both sides of the argument agree on:²²¹ the current system is unfair and does not work the way it should.²²² Even Dog the Bounty Hunter, an outspoken opponent of SB 10, acknowledges the California bail system needs modernization.²²³ The more sensible critics of this legislation won their time to try and work with the authors to better balance public safety and justice.²²⁴ Senator Hertzberg hoped to pass SB 10 in the 2017 legislative session, but with the support of the governor and the Chief Justice of the California Supreme Court, lawmakers can enact stronger bail reform legislation that is more thorough regarding the fiscal effects and public safety concerns.²²⁵

V. CONCLUSION

“[Bail] is hostile to the poor man, and favorable only to the rich. The poor man has not always a security to produce”

—Alexis de Tocqueville, *Democracy in America*, 1835²²⁶

With SB 10, Senator Hertzberg aims to alleviate the economic inequality of bail in California, which punishes the poor and disproportionately impacts people of color.²²⁷ Bail was intended to ensure the return of the defendant before the judge.²²⁸ But it is apparent there is an abundance of unintended negative consequences from the current bail system.²²⁹ Wealthy defendants charged with

217. *Id.*

218. Young, *supra* note 151.

219. Jim Crogan, *Defining Moment: Will California End Its Money Bail System?*, SALON (Apr. 21, 2017, 7:15 PM), http://www.salon.com/2017/04/21/defining-moment-will-california-end-its-money-bail-system_partner/ (on file with *The University of the Pacific Law Review*).

220. *California—Sign the Petition Today and Take Action to Stop SB-10 & AB-42 – Offenders “Get Out of Jail Free” Card!*, US BAIL REFORM NEWS (Apr. 9, 2017), <http://www.usbailreform.com/california-sign-petition-today-take-action-stop-sb-10-offenders-get-jail-free-card/> (on file with *The University of the Pacific Law Review*).

221. Ulloa, *supra* note 137.

222. *Id.*

223. *Id.*

224. *Public Safety Hearing*, *supra* note 144 (statement of Elizabeth Ratnoff).

225. Luna, *supra* note 167.

226. DE TOCQUEVILLE, *supra* note 70, at 63.

227. SB 10, 2017 Leg., 2017–2018 Sess. (Cal. 2017) (as amended on Sep. 6, 2017).

228. SINGER, *supra* note 46, at 11.

229. See Ulloa, *supra* note 30 (“People who don’t have the means to post bail can lose their employment

violent crimes, like murder, will be released on bail.²³⁰ Meanwhile, poor non-violent defendants sit in jail, waiting for trial, are likely to plead guilty just to get out.²³¹ Police arrested multi-millionaire real estate heir, Robert Durst, for the murder of his neighbor, Morris Black, in 2001.²³² Durst posted a \$250,000 bail and skipped town.²³³ Bragging about skipping town in an HBO documentary, Durst proclaimed, “[g]oodbye 250 thousand dollars, goodbye jail. I’m out!”²³⁴ Contrast this with the tragic story of Kalief Browder.²³⁵ The 16-year-old kid, who was wrongfully charged with robbing a man’s backpack, ended up spending more than 1,000 days in Rikers Island Correctional Center because his family could not afford the initial \$3,000 bail.²³⁶ The current system allows the wealthy to post bail and skip town, while the poor and a disproportionate number of minorities fall into the bail trap.²³⁷

SB 10 is a step towards alleviating this inequitable problem in California’s justice system.²³⁸ The uncertain costs of the implementation and use of the county pretrial service agencies remain a big concern.²³⁹ However, lawmakers on both sides of the aisle have voiced concern that a change is needed because the current status quo is not carrying out justice in our criminal justice system.²⁴⁰ The authors hope that this legislation brings the positive change to California that the reforms in Santa Clara brought for that county.²⁴¹ SB 10 is a complete overhaul of the bail system and a necessary step forward.²⁴² No longer will a pretrial defendant be waiting for trial in jail solely because of an inability to pay bail.²⁴³ Under SB 10, a presumed innocent defendant can continue to support his family,

or housing. Even three days in jail can result in loss of wages, jobs and family connections, leaving some defendants 40% more likely to commit a crime in the future.”)

230. Sam Levin, *Wealthy Murder Suspect Freed on Bail as Man Accused of Welfare Fraud Stuck in Jail*, THE GUARDIAN (Apr. 25, 2017), <https://www.theguardian.com/us-news/2017/apr/25/california-bail-system-tiffany-li-joseph-warren> (on file with *The University of the Pacific Law Review*).

231. *Id.*

232. Mosendz, *supra* note 31.

233. *Id.*

234. Last Week Tonight, *supra* note 58.

235. Gonnerman, *supra* note 1.

236. *Id.*

237. Robert Hertzberg, *Senate Floor Hearing of 05-31-2017*, DIGITAL DEMOCRACY (May 31, 2017), <https://ca.digitaldemocracy.org/hearing/52858?startTime=1599&vid=88f9db7b50bc3eff7abdfa443d0561f0> [hereinafter Senate Floor Hearing] (on file with *The University of the Pacific Law Review*); Pinto, *supra* note 45.

238. *Jails Exist For Punishment or Public Safety, Not For Locking People up Who Can’t Afford Bail*, *supra* note 38.

239. Ulloa, *supra* note 182.

240. *Senate Floor Hearing*, *supra* note 237 (statement of Sen. Joel Anderson).

241. *Public Safety Hearing*, *supra* note 102 (statement of Sen. Robert Hertzberg).

242. *Jails Exist For Punishment or Public Safety, Not For Locking People up Who Can’t Afford Bail*, *supra* note 38.

243. Hertzberg, *supra* note 48.

work a job, or keep the car or house.²⁴⁴ Innocent defendants who are arrested and held without bail will no longer be pressured to plead guilty to crimes they did not commit only to gain freedom.²⁴⁵ Senate Bill 10 is a considerable step towards making California's criminal justice system more just.²⁴⁶

244. *Id.*

245. *Id.*

246. *It's Time to do Away with California's Cash Bail System, supra* note 22.