



Digital Commons@
Loyola Marymount University
LMU Loyola Law School

Loyola of Los Angeles Law Review

Volume 53
Number 1 *Developments of the Law*

Article 6

Fall 11-1-2019

The Future of Bail in California: Analyzing SB 10 Through the Prism of Past Reforms

Adam Peterson

Follow this and additional works at: <https://digitalcommons.lmu.edu/llr>



Part of the [Criminal Law Commons](#), [Law and Society Commons](#), [Law Enforcement and Corrections Commons](#), [Legislation Commons](#), and the [State and Local Government Law Commons](#)

Recommended Citation

Adam Peterson, The Future of Bail in California: Analyzing SB 10 Through the Prism of Past Reforms, 53 Loy. L.A. L. Rev. 263 (2019).

This *Developments in the Law* is brought to you for free and open access by the Law Reviews at Digital Commons @ Loyola Marymount University and Loyola Law School. It has been accepted for inclusion in Loyola of Los Angeles Law Review by an authorized administrator of Digital Commons@Loyola Marymount University and Loyola Law School. For more information, please contact digitalcommons@lmu.edu.

THE FUTURE OF BAIL IN CALIFORNIA: ANALYZING SB 10 THROUGH THE PRISM OF PAST REFORMS

*Adam Peterson**

The cash bail system is the cause of numerous injustices. It favors the rich over the poor, it packs jails to the breaking point, and it forces those who have yet to be found guilty to sit in jail—often for weeks or months at a time. In 2018, the California legislature passed SB 10. The bill purported to abolish cash bail wholesale and replace it with a risk assessment program. While SB 10 is a step in the right direction, it faces many obstacles before it accomplishes its goal. This Note examines the bill in light of past attempts at criminal justice reform, suggests what a successful SB 10 might look like, and offers a solution for how to get there.

* J.D. Candidate, May 2020, Loyola Law School, Los Angeles; B.A., Theatre, University of Southern California, May 2012. Thanks to the editors and staff of the Loyola of Los Angeles Law Review for their diligence in editing this Note. In particular, Katherine Brosamle's patience and care were invaluable. I am also indebted to Professor Samuel Pillsbury, whose wisdom, perspective, thoughtfulness, and dedication to the topic made this Note possible. Finally, thanks to my parents, Jerry and Donna Peterson, for being unrelenting bastions of love and support.

TABLE OF CONTENTS

I. INTRODUCTION	265
II. CASH BAIL: A HISTORY OF FRUSTRATED REFORM EFFORTS.....	269
A. Cash Bail and Reform in the United States	269
B. History of Cash Bail in California: From the California Constitution to SB 10	275
C. SB 10 and the Third Wave of California Bail Reform ...	280
III. WHY DO CRIMINAL REFORMS FAIL AND WHAT CAN WE LEARN FROM THAT FAILURE?.....	283
IV. THE COURT SYSTEM: MOTIVATIONS AND INFLUENCES	287
A. Judges	288
B. Prosecutors.....	292
C. Corrections Officers.....	294
V. CURRENT BAIL REFORMS IN OTHER STATES: HOW HAVE COURT ACTOR MOTIVATIONS AFFECTED IMPLEMENTATION?.....	295
VI. SB 10: WHAT TO EXPECT, HOW TO FIX POTENTIAL PROBLEMS, AND WHAT SUCCESS MIGHT LOOK LIKE.....	298
VII. CONCLUSION	305

I. INTRODUCTION

On the night of November 2, 2015, 18-year-old Daniel Soto went to McDonald's with his friends.¹ While there, a man attacked him and his friends with a knife, slicing Daniel from his chest to his stomach.² Daniel's friends fought back, and the attacker ran.³ The attacker eventually found a police officer and reported that Daniel's group had accosted him.⁴ Daniel was arrested and brought to a hospital, where he was handcuffed to his hospital bed after doctors operated on him.⁵ He was then charged with felony assault.⁶ Daniel pleaded "not guilty," and a judge set his bail at \$30,000.⁷ Neither Daniel nor his family could pay, and no bail bondsman offered a payment plan that they could afford.⁸ As a result, Daniel stayed in jail for weeks.⁹ Finally, on December 17, Daniel had his preliminary hearing, where the same judge who set his bail found that there was no evidence he committed the crime and summarily dismissed the case.¹⁰ Though he was finally able to return home, Daniel had missed six weeks of school.¹¹ Having always been a slow learner, he was unable to catch up and ultimately dropped out of school.¹² This teenager's life was turned on its head simply because his family could not afford to bail him out.

Compare Daniel's story with that of Tiffany Li, a Northern California real estate heiress who was arrested for a far worse crime—directing two men to murder the father of her children.¹³ Despite the seriousness of the alleged crime and the fact that she had family in China, indicating that she was a potential flight risk, she was quickly released from jail because she and her friends were able to raise her

1. Nazish Dholakia, *Witness: Falsely Accused and Locked Up in California*, HUM. RTS. WATCH (Apr. 11, 2017, 3:00 AM), <https://www.hrw.org/news/2017/04/11/witness-falsely-accused-and-locked-california>.

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.*

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.*

13. Keith Green, *Hillsborough Woman Accused of Killing Father of Her Kids Out on Bail*, ABC7 (Apr. 6, 2017), <https://abc7news.com/news/bay-area-murder-suspect-released-after-posting-bail/1842656>.

\$35 million bail.¹⁴ The differences between Tiffany and Daniel's experiences illustrate the problems associated with cash bail, which disproportionately burdens the poor.¹⁵

The ills of the cash bail system in the United States have been well-chronicled. Sixty percent of those in jail in America have not been convicted of any crime; that's more than 450,000 people sitting in jail cells either because they cannot afford bail, are flight risks, or have been deemed a danger to public safety.¹⁶ Compared to the rest of the world, America's pretrial detention rates are staggering. Despite having only 4 percent of the world's population, the United States has nearly 20 percent of the world's pretrial jail population.¹⁷ These numbers come with equally staggering costs to American taxpayers. Taxpayers spend nearly \$38 million per day to house inmates in pretrial detention.¹⁸

The effects of pretrial detention on those detained are equally pernicious. Detainees are pressured to enter guilty pleas so that they can get out of jail and go home to their families.¹⁹ If they don't, they are subject to situations like Daniel's—sitting in jail for weeks (and sometimes months) on end, away from family, friends, and support.²⁰ Those who choose not to plead guilty may lose jobs, homes, and even custody of children.²¹

14. *Id.*

15. *See, e.g.,* Sam Levin, *Wealthy Murder Suspect Freed on Bail as Man Accused of Welfare Fraud Stuck in Jail*, *GUARDIAN* (Apr. 25, 2017, 5:00 AM), <https://perma.cc/5YHY-23ZS>.

16. TODD D. MINTON & ZHEN ZENG, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, *JAIL INMATES AT MIDYEAR 2014* 4 (2015), <http://www.bjs.gov/content/pub/pdf/jim14.pdf>; *see also* ROY WALMSLEY, *WORLD PRETRIAL/REMAND IMPRISONMENT LIST*, INST. FOR CRIM. POL'Y RES. (3d ed. 2016), https://www.prisonstudies.org/sites/default/files/resources/downloads/wptribl_3rd_edition.pdf (reporting that the number of people in pre-trial/remand imprisonment in the United States is 467,500).

17. Lorna Collier, *Incarceration Nation*, *AM. PSYCHOL. ASS'N* (Oct. 2014), www.apa.org/monitor/2014/10/incarceration ("While the United States has only 5 percent of the world's population, it has nearly 25 percent of its prisoners—about 2.2 million people.").

18. PRETRIAL JUSTICE INST., *PRETRIAL JUSTICE: HOW MUCH DOES IT COST?* 2 (2017), <https://university.pretrial.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=c2f50513-2f9d-2719-c990-a1e991a57303&forceDialog=0>.

19. *See* Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 *HARV. L. REV.* 2464, 2492–93 (2004).

20. Dholakia, *supra* note 1.

21. Paul Heaton et al., *The Downstream Consequences of Misdemeanor Pretrial Detention*, 69 *STAN. L. REV.* 711, 715 (2017).

The insidious effects of the cash bail system are felt nationwide.²² Certain states, however, exacerbate the problem with overly draconian bail systems. California is one of those states. California's detention rate and median bail are significantly higher than the national average.²³ Although California law mandates that judges analyze a variety of factors when setting bail, recent studies have shown that California courts tend to simply use the bail schedule alone, making the defendant's personal wealth the sole factor in determining release.²⁴ This, in part, has led to California's severe pretrial detention problem.²⁵ To wit, the nationwide pretrial detention rate for felony defendants is 32 percent; in California, that number is a staggering 59 percent.²⁶ Rates of pretrial misconduct are higher in California than they are elsewhere.²⁷ And the median bail in the state is five times higher than it is in the rest of the country.²⁸

To address the numerous problems of cash bail, Senator Robert Hertzberg (D-Van Nuys) introduced Senate Bill 10 ("SB 10") in December of 2016.²⁹ Initially, this proposal seemed like a step in the right direction. The bill provided for a broad presumption in favor of pretrial release, with very narrow exceptions based on public safety.³⁰ However, the version of SB 10 that ultimately passed disappointed reformers; the previously narrow public safety exceptions had been expanded, as had both judicial and prosecutorial discretion to detain. This final version, passed in August 2018, will be subject to the will

22. See Malcolm M. Feeley, *How to Think About Criminal Court Reform*, 98 B.U. L. REV. 673, 679 (2018).

23. Sonya Tafoya, *Pretrial Detention and Jail Capacity in California*, PUB. POL'Y INST. CAL. fig. 3 (July 2015), <https://perma.cc/E2U9-AEME>.

24. See generally Christine S. Scott-Hayward & Sarah Ottone, *Punishing Poverty: California's Unconstitutional Bail System*, STAN. L. REV. ONLINE (Apr. 2018), <https://www.stanfordlawreview.org/online/punishing-poverty/> (finding that judges in California rarely deviate from the bail schedule).

25. *Id.* at 172–73.

26. Tafoya, *supra* note 23.

27. SONYA TAFOYA ET AL., PUB. POL'Y INST. CAL., PRETRIAL RELEASE IN CALIFORNIA 5 (2017), https://www.ppic.org/content/pubs/report/R_0517STR.pdf.

28. *It's Time to Do Away with California's Cash Bail System*, SACRAMENTO BEE (Apr. 7, 2017, 8:00 AM), <https://www.sacbee.com/opinion/editorials/article143174454.html>.

29. S.B. 10, 2018 Leg., 2017–2018 Reg. Sess. (Cal. 2018).

30. See *Bail: Pretrial Release: Hearing on S.B. 10 Before the S. Comm. on Pub. Safety*, 2018 Leg., 2017–2018 Reg. Sess. (Cal. 2017).

of California voters, who will vote on whether the law takes effect in November 2020.³¹

Though reformers had high hopes for SB 10, California's history of criminal justice reform is littered with well-intentioned ideas that either failed outright or have unforeseen deleterious effects.³² Despite this troubled past, reformers continue to push for the same movements, ignoring the lessons of history.³³ Specifically, legislators and reformers have historically ignored that the implementation of reform measures is reliant on actors, such as judges and prosecutors, within the criminal justice system. These actors tend to have great incentive to maintain the status quo—or, in the face of pressure to initiate reform, perhaps even become more restrictive. Judges must cater to an electorate that might vote them out of office should they release an arrestee who then goes on to commit a major crime. Prosecutors, as elected officials, share a similar burden. Should judges be seen as overly forgiving of arrestees, they risk prosecutors exercising peremptory challenges, keeping lenient judges from ever seeing certain types of cases.³⁴ By contrast, there is almost no incentive to release arrestees. After all, the costs and injustices of overincarceration do not rebound directly to judges or prosecutors—the costs of being lenient do.

This Note seeks to: (1) examine the ultimate influence that criminal justice actors might wield on SB 10; and (2) how to expect and account for it. Specifically, it will examine trends, both modern and historical, that indicate reformers consistently fail to consider the dramatic effect criminal justice actors have on reforms. By seeking to understand the motivations of these parties, this Note attempts to set a reasonable expectation for what SB 10's success might look like and provide a roadmap for how to get there.

31. Michael McGough, *The Fate of California's Cash Bail Industry Will Now Be Decided on the 2020 Ballot*, SACRAMENTO BEE (Jan. 17, 2019, 11:58 AM), <https://www.sacbee.com/news/state/california/article224682595.html>.

32. Sacramento Bee & ProPublica, *A Brief History of California's Epic Journey Toward Prison Reform*, PAC. STANDARD (May 29, 2019), www.psmag.com/social-justice/a-brief-history-of-california-prison-reform.

33. *Id.*

34. See CAL. CIV. PROC. CODE § 170.6 (West 2011); see also SACRAMENTO CTY. PUB. L. LIBR., PEREMPTORY CHALLENGE OF A JUDGE: REMOVE THE JUDGE FROM YOUR CASE, <https://saclaw.org/wp-content/uploads/sbs-peremptory-challenge-of-a-judge.pdf> (“If . . . you believe you cannot get a fair and impartial hearing or trial from the judge . . . assigned to your case, California Code of Civil Procedure (CCP) § 170.6 gives you the right to disqualify him or her without having to show a reason.”).

Part II analyzes the history of cash bail and bail reform movements throughout both United States and California history. It also examines the introduction and development of SB 10. Part III seeks to answer why past reforms have so often failed and determine how reformers can learn from past failures. Part IV closely analyzes how judicial system actors have affected reforms throughout California’s history and how reformers now can expect courtroom players to exercise their discretion with regards to SB 10. Part V looks at current bail reform efforts and determines that judges and prosecutors—influenced by the factors described in Part IV—tend to use their discretionary powers to ultimately cancel out the intended effects of those reforms. Part VI asks what reformers can do in California to ensure that SB 10 does not fail in similar ways, and also seeks to determine what a successful SB 10 might look like. Part VII concludes that, while SB 10 might not achieve all the goals that its high-minded creators envisioned, it is not doomed to fail—so long as reformers temper their expectations and implement the bill with the competing interests of the court system in mind.

II. CASH BAIL: A HISTORY OF FRUSTRATED REFORM EFFORTS

A. *Cash Bail and Reform in the United States*

The American cash bail system, like most of the American legal system, has its roots in English law.³⁵ Early English law allowed sheriffs wide discretion to deny bail, but a series of reforms culminating in the Bill of Rights of 1689 limited the denial of bail and led to a presumption of granting bail for all noncapital cases.³⁶

The early American legal system adopted this presumption, and throughout the eighteenth and nineteenth centuries American courts considered denying bail in noncapital cases a violation of the presumption of innocence.³⁷ The Framers also included the common law prohibition against excessive bail in the Bill of Rights with the Eighth Amendment.³⁸ The purpose of bail in this early period of American history was to ensure that the defendant returned for trial,

35. John Logan Koepke & David G. Robinson, *Danger Ahead: Risk Assessment and the Future of Bail Reform*, 93 WASH. L. REV. 1725, 1733 (2018).

36. *Id.*

37. *Id.*

38. U.S. CONST. amend. VIII (“Excessive bail shall not be required . . .”).

not to keep the public safe by preventing additional crimes.³⁹ Rather than require bail, it was far more common for an accused to be released into a third party's custody.⁴⁰ This third party would ensure the accused's reappearance either by personally vouching for them or by putting up their own property as collateral; this was called a surety bond.⁴¹

The commercial bail bond industry began to supersede the surety system in the late nineteenth century, leading to a system that favored the rich over the poor. Now a defendant's personal wealth, rather than a voucher from his friends, could guarantee his pretrial freedom.⁴² In 1927, a study reported that the bail system in Chicago led to a higher proportion of arrestees who could not afford even small amounts of bail and so were forced to stay in jail.⁴³ Another study in the 1950s noted that many arrestees in Philadelphia were unable to afford their release and thus pleaded guilty in order to avoid jail time.⁴⁴ Outraged by the "plight of poor defendants in crowded jails," activists began pushing for bail reform in the early 1960s.⁴⁵

The most notable reform effort is the 1961 Manhattan Bail Project, started by a social worker, Herbert Sturz, and a wealthy philanthropist, Louis Schweitzer.⁴⁶ Sturz and Schweitzer were shocked by the squalid conditions of New York's pretrial detention facilities.⁴⁷ The two set up an experiment, staffed by volunteers, that interviewed and ran background checks on arrestees in an attempt to obviate the need for cash bail altogether.⁴⁸ If the volunteers found that the arrestee had sufficient ties to the community, they would recommend to the judge that the arrestee be released on his own recognizance: a promise that he would return for his court date.⁴⁹ The volunteers would then stay in touch with the arrestees to remind them

39. Shima Baradaran, *Restoring the Presumption of Innocence*, 72 OHIO ST. L.J. 723, 731 (2011); see also *Ex parte Milburn*, 34 U.S. 704, 710 (1835) (holding that the purpose of bail was to "compel[] the party to submit to the trial and punishment, which the law ordains for his offence").

40. Feeley, *supra* note 22, at 684.

41. See Koepke & Robinson, *supra* note 35, at 1733.

42. *Id.*

43. *Id.* at 1735.

44. *Id.*

45. *Id.*

46. Feeley, *supra* note 22, at 692.

47. *Id.* at 682-83.

48. *Id.* at 682.

49. *Id.*

of their upcoming court appearances.⁵⁰ After a year, the Project evaluated itself and found that out of 250 arrestees who had been released, only three failed to appear.⁵¹

The Manhattan Bail Project's success garnered the attention of Attorney General Robert F. Kennedy, who launched the 1964 National Conference on Bail and Criminal Justice to change the country's bail laws.⁵² The conference eventually led to Congress passing the Bail Reform Act of 1966, which was meant to "assure that all persons, regardless of their financial status, shall not needlessly be detained" pretrial.⁵³ In general, the act established that a defendant's financial status should not be a factor in denying release.⁵⁴ Also of importance, the act authorized a judge to consider a defendant's dangerousness as a reason to deny bail—the first time in American history this had explicitly been authorized.⁵⁵

This provision opened the door to an eventual about-face in the purpose of bail—from ensuring an arrestee's return for trial to ensuring the safety of the community. As crime rates rose in the late 1960s and early 1970s and the political winds shifted sharply, commentators opined that bail reform efforts ignored the crimes committed by those released pretrial, and that new reforms were required to ensure public safety.⁵⁶ These concerns were not unfounded; even today, arrestees who post bail and then commit another crime are all too common.⁵⁷ Richard Nixon was elected

50. *Id.*

51. *Id.*

52. *Id.*

53. 18 U.S.C. § 3146 (1970); *see also* Sarah Johnson, *Bail Reform*, BILL TRACK 50 (Oct. 6, 2017), <https://www.billtrack50.com/blog/social-issues/civil-rights/bail-reform/> ("[T]he purpose of this act is to ensure that all persons, regardless of their financial status, shall not needlessly be detained pending their charges . . . when detention serves neither the ends of justice nor the public interest.").

54. Koepke & Robinson, *supra* note 35, at 1736.

55. *Id.* at 1736–37.

56. Warren L. Miller, *The Bail Reform Act of 1966: Need for Reform in 1969*, 19 CATH. U. L. REV. 24, 32 (1969).

57. *See, e.g.*, Teri Figueroa, *When People on Bail Commit New Crimes, They're Often Linked to Drugs*, SAN DIEGO UNION-TRIB. (Sept. 30, 2018, 5:00 AM), <https://www.sandiegouniontribune.com/news/public-safety/sd-me-bail-crime-data-20180926-story.html> (describing how 4,149 people committed new felonies between October 2011 through August 2018 while released on bail, and how many of the new crimes were drug offenses); Kirsten Fiscus, *Out on Bond, Arrested Again: When Constitutional Rights Clash with Public Safety*, MONTGOMERY ADVERTISER (Aug. 31, 2018, 1:59 PM), <https://www.montgomeryadvertiser.com/story/news/crime/2018/08/31/out-bond-arrested-again-when-constitutional-rights-clash-public-safety-bail-violent-repeat-offender/945143002>

against the backdrop of rising panic over crime rates, and he made preventive pretrial detention a focus of his “War on Crime.”⁵⁸

Preventive detention was not popular just because it purportedly made the streets safer. It also was very popular amongst prosecutors and police because it helped the system function much more efficiently.⁵⁹ Prosecutors knew (and still know) that, once a defendant is forced to sit in jail, the defendant is more likely to plead guilty to get out of jail, even if he did not do the alleged crime; essentially, forcing a defendant to remain behind bars increases the number of convictions that prosecutors get.⁶⁰ Prosecutors also viewed preventive detention as a central part of their mission: to “reduce crime and protect society.”⁶¹

The push towards preventive detention reached its zenith when the Reagan Administration passed the Bail Reform Act of 1984, which required judges to predict the danger levels an arrestee presented to the community before releasing him.⁶² The Supreme Court found the act constitutional in *United States v. Salerno*,⁶³ explicitly sanctioning preventive detention based on an arrestee’s danger to society.⁶⁴ *Salerno* completed the reversal in the nation’s approach to bail reform. The idealistic reform movements of the mid-1960s, which sought to reduce pretrial detention based on poverty, ended up having very little

(discussing how, in Montgomery County, Alabama, four arrestees were released on bail despite being charged with murder, and then went on to reoffend); Paul Milo, *Bail Reform Again Criticized After Freed Newark Suspect Charged in Shooting*, NJ.COM (Mar. 9, 2017), https://www.nj.com/essex/2017/03/bail_reform_again_criticized_after_freed_newark_su.html (reporting a man released pursuant to New Jersey bail reform law charged with aggravated assault).

58. Koepke & Robinson, *supra* note 35, at 1739.

59. SHIMA BARADARAN BAUGHMAN, *THE BAIL BOOK: A COMPREHENSIVE LOOK AT BAIL IN AMERICA’S CRIMINAL JUSTICE SYSTEM* 19–20 (2018).

60. *Id.*; see also Jeffrey Thaler, *Punishing the Innocent: The Need for Due Process and the Presumption of Innocence Prior to Trial*, 1978 WIS. L. REV. 441, 456–57 (noting that only 1 percent to 10 percent of defendants who are detained pretrial make it to trial—most accept a plea bargain). Interestingly, this use of pretrial detention in the United States shares many similarities with its use in Latin America. The largest population of pretrial detainees in the world is found in Latin America, and detention is often used “frequently—and often arbitrarily.” This results in countries such as Bolivia having over 80 percent of their prison populations made up of pretrial detainees. Marguerite Cawley, *Mapping Latin America’s Pretrial Detention Populations*, INSIGHT CRIME (Sept. 29, 2014), <https://www.insightcrime.org/news/analysis/mapping-latin-americas-pretrial-detention-populations/>.

61. Marc Miller & Martin Guggenheim, *Pretrial Detention and Punishment*, 75 MINN. L. REV. 335, 340 (1990).

62. See BAUGHMAN, *supra* note 59, at 25.

63. 481 U.S. 739 (1987).

64. See *id.*

effect; in fact, the end result was a much more expansive system of pretrial detention.⁶⁵

Due to the preventive detention movement, courts began using money bail as a tool to detain based on pretrial crime risk.⁶⁶ As such, since 1990, pretrial detention rates⁶⁷ and courts' use of money bail have skyrocketed.⁶⁸ These trends have led to well-documented injustices. The most obvious is the inherent classism of a money-bail system. Many of those detained pretrial are held because they cannot afford their bail, a problem that obviously does not affect wealthy arrestees.⁶⁹ Racism is also a not-so-hidden evil of the system. Due to pervasive problems of race bias in the criminal justice system,⁷⁰ Hispanic and black defendants are more likely to be detained pretrial than similarly situated white defendants.⁷¹ Widespread pretrial detention also places crippling costs on both individuals and their communities. Studies have shown that contact with the criminal justice system, even for a short time, tends to have criminogenic consequences; as such, pretrial detention makes a person more likely

65. Koepke & Robinson, *supra* note 35, at 1743 (“[W]hat began in the mid-1960s as an effort to reduce poverty-based pretrial detention ended in the mid-1980s with a law that led to immediate—and lasting—increases in pretrial detention.”).

66. Shima Baradaran & Frank L. McIntyre, *Predicting Violence*, 90 TEX. L. REV. 497, 547 (2012) (noting that “judges are basing their [bail] decisions far more on predicted violence than on predicted flight”); Samuel R. Wiseman, *Fixing Bail*, 84 GEO. WASH. L. REV. 417, 434 (2016) (highlighting the “stiff, often successful resistance from the powerful bail bondsman lobby” that any effort to limit money bail has met).

67. Cf. DARRELL K. GILLIARD & ALLEN J. BECK, U.S. DEP’T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, PRISON AND JAIL INMATES AT MIDYEAR 1996, (1997), <http://www.bjs.gov/content/pub/pdf/pjimy96.pdf>; MINTON & ZENG, *supra* note 16, at 3 (estimating that there were approximately 467,500 people awaiting trial in local jails in 2014 on any given day).

68. THOMAS H. COHEN & BRIAN A. REAVES, U.S. DEP’T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, PRETRIAL RELEASE OF FELONY DEFENDANTS IN STATE COURTS 2 (2007), <http://www.bjs.gov/content/pub/pdf/prfdsc.pdf> (finding that between 1990 and 1994, 41 percent of pretrial releases were on recognizance compared to 24 percent by cash bail; in 2004, 23 percent of releases were on recognizance and 42 percent were by cash bail).

69. See Levin, *supra* note 15.

70. See Radley Balko, *There’s Overwhelming Evidence that the Criminal-Justice System is Racist. Here’s the Proof.*, WASH. POST (Sept. 18, 2018, 6:00 AM), https://www.washingtonpost.com/news/opinions/wp/2018/09/18/theres-overwhelming-evidence-that-the-criminal-justice-system-is-racist-heres-the-proof/?utm_term=.89499895294d.

71. Stephen Demuth & Darrell Steffensmeier, *The Impact of Gender and Race-Ethnicity in the Pretrial Release Process*, 51 SOC. PROBS. 222, 233–34 (2004). Black defendants are 1.5 times more likely to be detained pretrial than white defendants, while Hispanic defendants are 1.8 times more likely to be detained than white defendants. *Id.* This is mostly because racial minorities are far more likely to have to pay bail rather than be released on recognizance; black defendants are twice as likely as white defendants to be assigned bail, while Hispanics are 1.4 times as likely to be assigned bail. *Id.*

to commit a crime in the future.⁷² Because those detained pretrial tend to be those that can't afford bail, they also have less access to competent legal aid, making those detained more likely to be sentenced to jail than those released pretrial⁷³ and likelier to face longer sentences.⁷⁴ Detention also leads those who are innocent to accept plea offers simply so they can go home—the only other option being to sit in jail until trial.⁷⁵ Should they instead choose to stay in jail, they face the prospect of losing jobs, homes, and families.⁷⁶ Finally, pretrial detention presents an enormous cost to the community at large; taxpayers nationwide spend nearly \$38 million per day on detaining arrestees.⁷⁷

In response to these problems, there has been a recent “third-wave” of bail reforms to remedy the ills of cash bail.⁷⁸ Spurred by civil rights groups and national policy movements, several states have begun implementing legislation that seeks to reduce or end the use of money bail. For example, New Jersey’s Bail Reform and Speedy Trial Act purports to almost completely end the use of money bail in that state.⁷⁹ While the spread of state legislative bail reform is encouraging, there is not yet enough data to show whether the reforms have significantly addressed bail’s major problems.⁸⁰

These third-wave reforms generally seek to balance the dueling goals of the previous two: releasing as many defendants pre-trial as possible, while also preventively detaining those who are deemed to

72. See Heaton et al., *supra* note 21, at 718 (explaining that pretrial detainees are 30 percent more likely to commit a felony and 20 percent more likely to commit a misdemeanor within eighteen months of their detention than those similarly situated but released pretrial).

73. LAURA & JOHN ARNOLD FOUNDATION, PRETRIAL CRIMINAL JUSTICE RESEARCH 2 (2013), <https://csgjusticecenter.org/wp-content/uploads/2013/12/Pretrial-Criminal-Justice-Research.pdf> (“[D]efendants who were detained for the entire pretrial period were over four times more likely to be sentenced to jail and over three times more likely to be sentenced to prison than defendants who were released at some point pending trial.”).

74. *Id.* (finding that those detained pretrial were, on average, given sentences that were three times longer than those released).

75. Heaton et al., *supra* note 21, at 714–16.

76. See JUSTICE REVIEW COMM., SANTA CLARA CTY. HUMAN RELATIONS COMM’N, REPORT ON THE “PUBLIC FORUM FOR FAMILY AND FRIENDS OF INMATES” 36–37 (2016), https://www.sccgov.org/sites/hrcon/Documents/SCCHRCJailReportFINAL_04-26-16.pdf.

77. PRETRIAL JUSTICE INST., *supra* note 18.

78. Timothy R. Schnacke et al., *The Third Generation of Bail Reform*, DEN. L. REV. (Mar. 14, 2011), <https://www.denverlawreview.org/dlr-online-article/2011/3/14/the-third-generation-of-bail-reform.html?rq=schnacke>.

79. N.J. STAT. ANN. § 2A:162-15 (West 2019).

80. See, e.g., Megan Stevenson, *Assessing Risk Assessment in Action*, 103 MINN. L. REV. 303, 340 (2018).

be dangerous.⁸¹ Despite the hopes of more idealistic reformers, it will be impossible to implement bail reforms that release nearly all defendants; prosecutors, law enforcement officers, victims' rights groups, and bail bondsmen will all vigorously oppose any measure so broad.⁸² As a result, though some reform groups seek completely liberalized pretrial detention,⁸³ more realistic reforms will seek to balance the two competing interests. The criminal justice system must offer some measure of safety, and the public is unlikely to feel safe unless there is some form of preventive detention.⁸⁴

B. History of Cash Bail in California: From the California Constitution to SB 10

Pretrial release has been an element of California's legal system since the state was established. Both the 1849 and 1879 versions of the California Constitution included sections that were identical to the Eighth Amendment in forbidding the use of excessive bail.⁸⁵ However, those at the California Constitutional Convention felt it was important to add a second provision, specifically providing that "all persons shall beailable . . . unless for capital offences, when the proof is evident or the presumption great."⁸⁶ Without this clause, those

81. S.B. 10 § 1, 2018 Leg., 2017–2018 Reg. Sess. (Cal. 2018) ("It is the intent of the Legislature by enacting this measure to permit preventive detention of pretrial defendants only in a manner that is consistent with the United States Constitution . . . and only to the extent permitted by the California Constitution.")

82. See, e.g., *Bail: Pretrial Release: Hearing on S.B. 10 Before the S. Comm. on Pub. Safety*, *supra* note 30, at 14–15 ("SB 10 would endanger public safety by forcing release of . . . high risk misdemeanor defendants without bail. Bail is an important public safety tool because it is paid for by the defendants [sic] family and close friends who cosign the bail agreement vouch for the defendant. These cosigners now have a financial incentive to make sure defendant attends all of his or her court dates.")

83. See, e.g., HUMAN RIGHTS WATCH, "NOT IN IT FOR JUSTICE": HOW CALIFORNIA'S PRETRIAL DETENTION AND BAIL SYSTEM UNFAIRLY PUNISHES POOR PEOPLE 3 (2017), https://www.hrw.org/sites/default/files/report_pdf/usbail0417_web_0.pdf (arguing that California's bail system should be replaced by a citation system, whereby almost all defendants are booked and released immediately).

84. See, e.g., Marc Klaas, *California Bail Reform Bill May Be Trendy, but It Would Hurt Victims' Rights*, SACRAMENTO BEE (Mar. 28, 2018, 6:27 AM), <https://www.sacbee.com/opinion/california-forum/article207085264.html> (arguing that legislators should not follow the "current trend in criminal justice legislation that puts more value on the rights of accused criminals than it does on the health, safety, and welfare of crime victims or the greater public at large").

85. CAL. CONST. OF 1849, art. I, § 6; CAL. CONST. OF 1879, art. I, § 6 ("Excessive bail shall not be required . . .").

86. CAL. CONST. OF 1849, art. I, § 7.

at the convention feared “an innocent man may be kept in prison and refused bail.”⁸⁷

Even at this early point in California’s legal history, members of the convention were concerned about judges abusing their discretion—despite judicial discretion being limited to capital cases and requiring a finding that “proof [was] evident or the presumption great.”⁸⁸ One member refused to vote for the new clause, worried that, if “left to the courts to decide,” they may “decide it in their own way.”⁸⁹ Because the standard was so indefinite, he was concerned that its use might “lead to acts of injustice and partiality.”⁹⁰

Despite the lofty intentions of the California Constitutional Convention, problems in the bail system emerged rather quickly. A study of Alameda’s court system in the early period of California’s statehood demonstrated how the bail provisions of the California Constitution were actually implemented. Similar to courts around the country, California courts were not supposed to use bail to keep dangerous people behind bars.⁹¹ However, in practice, using bail to detain the dangerous was common.⁹² Furthermore, those that were granted bail typically could not afford it.⁹³ Between 1880 and 1910, an average of 80.4 percent of detainees did not make bail.⁹⁴ In a pattern that has repeated itself to the present day, those who made bail were much more likely to be acquitted or have their charges dismissed than those who did not.⁹⁵ Clearly, California’s early courts were not free from the inequities that still exist.

The problems were exacerbated by the introduction of a mandatory bail schedule for misdemeanor offenses in 1945.⁹⁶ Though

87. J. ROSS BROWNE, REPORT OF THE DEBATES OF THE CONVENTION OF CALIFORNIA, ON THE FORMATION OF THE STATE CONSTITUTION, IN SEPTEMBER AND OCTOBER, 1849 579 (1850), <https://cdn.loc.gov/service/gdc/calbk/196.pdf>.

88. *Id.*

89. *Id.*

90. *Id.*

91. LAWRENCE M. FRIEDMAN & ROBERT V. PERCIVAL, THE ROOTS OF JUSTICE: CRIME AND PUNISHMENT IN ALAMEDA COUNTY, CALIFORNIA 162 (Morris S. Arnold ed., 1981).

92. *Id.* (citing the case of Isabella Martin, who had attempted to dynamite the home of a superior court judge, an act of violence that so appalled the judge on her case that he set Martin’s bail at \$50,000, a large sum today that was enormous in the late nineteenth century to ensure that she remained in prison).

93. *Id.*

94. *Id.* at 163.

95. *Id.* at 165–66.

96. WAYNE H. THOMAS, JR., BAIL REFORM IN AMERICA 211–12 (1976) (citing CAL. PENAL CODE § 1269(b) (1970) (instituting mandatory bail schedules for felonies in 1973)).

the bail schedule was intended to help arrestees get out of jail before their first court appearance, it became a tool used by the courts to routinize the pretrial release hearing.⁹⁷ By using the offense underlying the arrest as a presumptive means of determining the bail amount, courts deprived arrestees of an individualized release determination.⁹⁸ This only worsened the bail system's unequal effects on the poor, since similarly charged people would have different chances of release based on their ability to afford bail.⁹⁹

By the 1960s, a large proportion of arrestees remained in jail prior to trial, despite the mandates of the California Constitution.¹⁰⁰ Scholars of the time decried California's "anachronistic system" of bail and proposed implementing systems that operated like the Manhattan Bail Project.¹⁰¹ Soon enough, idealists began attempting reform, both in the legislature and in the form of bail projects.¹⁰² In the late 1960s, California began the process of revising its constitution, recommending that article 1, section 6 be revised to include a provision for release on recognizance.¹⁰³ The electorate eventually adopted the proposed change, which became article 1, section 12.¹⁰⁴

Despite the legislature's emphasis on release on recognizance, practical reform efforts in California took a different tack. Perhaps because the commercial bond industry was founded in California, bondsmen were more powerful than in other states, and the idea of eliminating (or even drastically reducing) money bail was never seriously considered.¹⁰⁵ Because of this, the alternative release

97. Scott-Hayward & Ottone, *supra* note 24, at 172.

98. *Id.* at 167, 170.

99. John S. Goldkamp, *Danger and Detention: A Second Generation of Bail Reform*, 76 J. CRIM. L. & CRIMINOLOGY 1, 9 n.31 (1985).

100. See FORD FOUND. & CTY. OF ALAMEDA, PRE-TRIAL RELEASE IN OAKLAND, CALIFORNIA 28 (1967) (finding that 64 percent of felony arrestees and 39 percent of misdemeanor arrestees remained in jail until trial).

101. See, e.g., Dan Lang, *Beyond the Bail System: A Proposal for Pretrial Release in California*, 57 CALIF. L. REV. 1112, 1112 (1969).

102. *Id.* at 1125.

103. PRETRIAL DETENTION REFORM WORKGROUP, PRETRIAL DETENTION REFORM: RECOMMENDATIONS TO THE CHIEF JUSTICE 21 (2017), <https://www.courts.ca.gov/documents/PDRReport-20171023.pdf> [hereinafter PDR REPORT].

104. *Id.*; CAL. CONST. art. I, § 12 ("A person may be released on his or her own recognizance in the court's discretion.").

105. MALCOLM C. FEELEY, COURT REFORM ON TRIAL: WHY SIMPLE SOLUTIONS FAIL 40 (1983).

programs made popular in Manhattan and much of the rest of the country were generally small and poorly funded in California.¹⁰⁶

However, there was one exception. Oakland established a release-on-recognizance unit in 1964 that was well funded by the Ford Foundation.¹⁰⁷ Unfortunately, this increased funding did not lead to significant change. Although nonmonetary releases initially increased by a small amount, most of those released were people who would have been able to afford bail anyway.¹⁰⁸ The supervisors of the project were so scared of failure—of a rise in rates of failure to appear for trial or of crimes committed by those released—that they ended up treating arrestees more conservatively than the courts had.¹⁰⁹ Eventually, the grant from the Ford Foundation ran dry and the project had to be taken up by the court system. Under the auspices of the court's probation department, the project continued to reduce nonmonetary releases.¹¹⁰ The program's ultimate absorption by the court system led it to effect the exact opposite of the change it was hoping for; a program that was instituted to increase pretrial release ended up substantially reducing it.¹¹¹ Other less well-funded reform efforts around the state faced similar challenges and produced similar results.¹¹²

After a decade of reform attempts, not much had changed. Indeed, in 1979, more than a decade after the legislature revised the California Constitution to include an on-recognizance provision, Governor Jerry Brown (in his first incarnation) declared that further reform was necessary.¹¹³

However, in response to rapidly elevating crime rates, public opinion in California turned against the rights of pretrial defendants in

106. *Id.* at 41. In the late 1970s, Los Angeles County had a pretrial release budget that was equal to half of Brooklyn's, and San Francisco had a pretrial release budget of \$200,000—slightly more than Staten Island's. *Id.*

107. *Id.*

108. *Id.*

109. *Id.* at 43.

110. THOMAS, *supra* note 96, at 130.

111. *Id.*

112. *See id.* at 121–22 (noting that, despite initial successes, the San Francisco bail project needed to claw tooth and nail to stay funded); *see also* FEELEY, *supra* note 105, at 44 (describing how, though the San Francisco bail project survived, it “operated out of a cubbyhole” and “was a shoestring operation” that “kept its records on three-by-five cards filed in old shoeboxes,” but, nonetheless, produced similar results to the much better-funded Oakland project).

113. Governor Edmund G. Brown Jr., State of the State Address (Jan. 16, 1979).

the early 1980s.¹¹⁴ In 1982, voters passed two propositions— Proposition 4, which revised article 1, section 12 of the California Constitution to explicitly allow courts to consider public safety in setting bail,¹¹⁵ and Proposition 8, known as the “Victim’s Bill of Rights,” which proposed repealing section 12 completely, replacing it with a stricter system of bail and pretrial release.¹¹⁶ Though Proposition 8’s pretrial provisions did not ultimately go into effect, the fact that they were passed shows how public sentiment turned against pretrial defendants.¹¹⁷

California’s counter-reform movement had an even starker effect on pretrial detention rates than did the United States as a whole. California now detains 59 percent of felony defendants before trial, compared to a nationwide average rate of 32 percent.¹¹⁸ Increased detention has not led to productive results; rates of pretrial misconduct are generally higher in California than they are elsewhere.¹¹⁹ The issue is exacerbated in California by the mandatory use of bail schedules, which courts tend to use presumptively to set bail amounts in ways that might violate both the United States and California Constitutions.¹²⁰ As a result, the median bail in California is five times

114. See, e.g., David Yamamoto, *The Problems Facing California’s New Bail Standard*, 5 GLENDALE L. REV. 203, 203 (1983) (asserting that “a major concern in today’s society is the inadequacy of our traditional bail standard to deal realistically with the dangerous and violent crimes committed by persons released on bail”).

115. *People v. Standish*, 135 P.3d 32, 41–42 (Cal. 2006) (“[Proposition 4] permitted courts setting bail to consider other factors other than the probability that a defendant would appear at trial. . . . [T]he proponents of the measure made it clear they intended that public safety should be a consideration in bail decisions.”).

116. CAL. SEC’Y OF STATE, CALIFORNIA BALLOT PAMPHLET FOR 1982, PRIMARY 32–35 (1982), https://repository.uchastings.edu/cgi/viewcontent.cgi?article=1917&context=ca_ballot_props. Note that California was ahead of the curve in effecting counter-reform; the Bail Reform Act of 1984 was still two years away. See *supra* text accompanying note 62.

117. See *In re York*, 892 P.2d 804, 807 n.4 (Cal. 1995) (holding that, because Proposition 4 received more votes than Proposition 8, its provisions prevailed over Proposition 8’s). But see PDR REPORT, *supra* note 103, at 23 n.63. In spite of the holding in *In re York*, voters passed the Victims’ Bill of Rights Act of 2008, which, without repealing article 1, section 12, reinserted the previously defunct bail provisions of 1982’s Proposition 8. *Id.* As of yet, no California court has interpreted how these two provisions work together. *Id.*

118. Tafoya, *supra* note 23.

119. TAFOYA ET AL., *supra* note 27, at 15.

120. See Scott-Hayward & Ottone, *supra* note 24, at 173, 178 (based on an empirical survey of two California county court systems, finding that in both, “bail schedules are the main factor considered by judges at felony arraignments, . . . judges do not take into consideration an individual’s ability to pay, and . . . the schedules appear to operate presumptively, without any individualized determination”).

higher than it is in the rest of the country.¹²¹ A recent lawsuit filed on behalf of pretrial arrestees alleged that the California bail industry conspired to keep premiums high for defendants, thereby further worsening the problem.¹²² Over a two year period, California taxpayers spent \$37.5 million in just six counties to house defendants whose cases were never filed or were dismissed.¹²³ The numbers indicate that there is racial bias in judges' pretrial release decisions as well; almost 50 percent of whites are released pretrial, compared to only 38 percent of Latinos and 34 percent of African-Americans.¹²⁴ It is against this backdrop that California's own "third wave" of bail reform rose.

C. *SB 10 and the Third Wave of California Bail Reform*

The push for a new wave of bail reform in California has mirrored efforts in the rest of the country. Specifically, since 2012, California legislators and reformers have advocated for expanding pretrial release, whether that be through use of risk assessment algorithms or through an increase in book-and-release citations.¹²⁵

Though early-decade legislation was never able to make it through the legislature, the calls for bail reform caught the attention of Chief Justice Tani Cantil-Sakauye of the California Supreme Court. In her 2016 State of the Judiciary Address, she instructed legislators that they could not continue to ignore the problems caused by cash bail.¹²⁶ She then established the Pretrial Detention Reform Workgroup to evaluate the current bail system and make recommendations for improvement.¹²⁷ The workgroup's report found that "California's

121. *It's Time to Do Away with California's Cash Bail System*, *supra* note 28.

122. Jazmine Ulloa, *Bail Companies in California Have Conspired to Keep Premiums High, Lawsuit Alleges*, L.A. TIMES (Jan. 29, 2019, 1:40 PM), <https://www.latimes.com/politics/la-pol-ca-california-bail-surety-lawsuit-20190129-story.html>.

123. HUMAN RIGHTS WATCH, *supra* note 83, at 3.

124. TAFOYA ET AL., *supra* note 27, at 3 (noting that further study of these statistics is required, as the disparity might be caused by differences in offenses, booking status, and the month/county of booking).

125. *See* PDR REPORT, *supra* note 103, at 98–99 (Proposals to increase on-recognizance release based on risk assessment included Senate Bill 210 (Hancock, 2012), Senate Bill 1180 (Hancock, 2012), and Senate Bill 210 (Hancock, 2014); all three stalled in the legislature.); *see also* HUMAN RIGHTS WATCH, *supra* note 83, at 104 (arguing that California should adopt an expansive use of simple book-and-release with citations).

126. Tani G. Cantil-Sakauye, Chief Justice, Supreme Court of Cal., 2016 State of the Judiciary Address (Mar. 8, 2016).

127. PDR REPORT, *supra* note 103, at 5.

current pretrial release and detention system unnecessarily compromises victim and public safety because it bases a person's liberty on financial resources rather than the likelihood of future criminal behavior and exacerbates socioeconomic disparities and racial bias."¹²⁸ The workgroup then recommended widespread implementation of risk assessment procedures as a fix.¹²⁹

The legislature responded with SB 10, the California Money Bail Reform Act of 2017.¹³⁰ The bill, introduced by Senator Hertzberg and co-sponsored by the American Civil Liberties Union (ACLU), had the stated intent of "safely reducing the number of people detained pretrial, while addressing racial and economic disparities in the pretrial system."¹³¹ As originally written, the bill would create a presumption of release for most defendants, subject to a risk assessment¹³² conducted by a tool that would be implemented state-wide.¹³³ The only defendants that could be held were those who: (1) had committed capital crimes; and (2) had committed felony offenses for which the presumption of guilt was great *and* there was a substantial likelihood—as determined by either the risk assessment tool or the judge—that the persons' release would result in harm to another.¹³⁴

An outpouring of opposition came from law enforcement interests, bail bondsmen, and the Judicial Council.¹³⁵ Chief Justice

128. *Id.* at 1.

129. *Id.* at 2.

130. S. B. 10 § 2, 2018 Leg., 2017–2018 Reg. Sess. (Cal. 2018). There are also currently several cases pending before federal courts and the California Supreme Court regarding defendants' rights to pretrial release. *See In re Humphrey*, 228 Cal. Rptr. 3d 513 (Ct. App. 2018); Third Amended Class Action Complaint, *Buffin v. City & County of San Francisco*, No. 4:15-CV-04959 (N.D. Cal. May 27, 2016); Amended Class Action Complaint, *Welchen v. County of Sacramento*, 343 F. Supp. 3d 924 (E.D. Cal. 2018) (No. 2:16-CV-00185).

131. S.B. 10 § 2, 2018 Leg., 2017–2018 Reg. Sess. (Cal. 2018).

132. Risk assessment tools are computer programs that use historical data to predict how likely someone is to commit a crime or fail to appear at trial in the future. The prediction is generated by analyzing factors such as "age, gender, criminal record, employment status, education level, etc.," and then identifying how closely those factors have correlated to a defendant who commits crime or fails to appear. *See Stevenson, supra* note 80, at 304.

133. *Id.*

134. *Bail: Pretrial Release: Hearing on S.B. 10 Before the S. Comm. on Pub. Safety, supra* note 30, at 12–13.

135. *Id.* at 14–15 (centering opposition arguments around the risk to public safety that eliminating cash bail threatened); *see also* Taryn Luna, *No California Bail Reform This Year, Governor Announces*, SACRAMENTO BEE (Aug. 25, 2017, 11:03 AM), <https://www.sacbee.com/news/politics-government/capitol-alert/article169364312.html> (reporting stiff opposition to SB 10).

Cantil-Sakauye conceptually agreed with the bill but thought that it “[did] not establish a reasonable or realistic balance” between concern for public safety and administrative concerns.¹³⁶ She was particularly worried that the bill eliminated judicial discretion, placing too much power in the hands of the pretrial services agency that made the risk assessment.¹³⁷

After a year of negotiations, the legislature revealed a new version of the bill on August 20, 2018. Lawmakers had substantially revised the bill without the input of community representatives or advocacy groups and had widely expanded the preventive detention possibilities.¹³⁸ Gone was the intent to “safely reduce the number of people detained pretrial”; it had been replaced with an intent to “permit preventive detention of pretrial defendants.”¹³⁹ No longer was there a broad presumption in favor of pretrial release; judges now had wide discretion to detain.¹⁴⁰ There was an expansive list of enumerated offenses that precluded a defendant from pretrial release, and the revised bill allowed for local courts to create as many exceptions as they deemed necessary.¹⁴¹ The bill also allowed the local judiciary

136. Alexei Koseff, *Ending Bail Worries California Judges*, SACRAMENTO BEE (July 11, 2017, 6:00 AM), <https://www.sacbee.com/news/politics-government/capitol-alert/article160636989.html>.

137. *Id.*

138. Jasmine Tyler & John Raphling, *Human Rights Watch Urges Governor Brown of California to Veto Senate Bill 10, The California Bail Reform Act*, HUM. RTS. WATCH (Aug. 24, 2018, 12:16 PM), https://www.hrw.org/news/2018/08/24/human-rights-watch-urges-governor-brown-california-veto-senate-bill-10-california#_ftnref8.

139. S.B. 10 § 1, 2018 Leg., 2017–2018 Reg. Sess. (Cal. 2018).

140. See S.B. 10 § 1320.18(d), 2018 Leg., 2017–2018 Reg. Sess. (Cal. 2018) (“If the court determines there is a substantial likelihood that no nonmonetary condition or combination of conditions of pretrial supervision will reasonably assure the appearance of the defendant at the preventive detention hearing or reasonably assure public safety prior to the preventive detention hearing, the court may detain the defendant pending a preventive detention hearing, and shall state the reasons for detention on the record.”).

141. S.B. 10 § 1320.10, 2018 Leg., 2017–2018 Reg. Sess. (Cal. 2018) (defining offenses that automatically preclude pretrial release to include: (1) persons assessed as high risk by the risk assessment tool; (2) persons arrested for certain sex crimes; (3) persons arrested for domestic violence; (4) persons arrested for stalking; (5) persons arrested for violent felonies; (6) persons arrested for their third DUI in the last ten years; (7) persons who have violated any type of restraining order in the last five years; (8) persons who have three or more failures to appear in the last twelve months; (9) persons who already have a pending trial or sentencing for a misdemeanor or felony; (10) persons who are under any form of postconviction supervision other than informal court supervision; (11) persons who have intimidated a witness or victim of the current crime; (12) persons who have violated a condition of release within the last five years; and (13) persons who have been convicted of a violent or serious felony within the past five years); see also *id.* § 1320.11 (“The local rule may further expand the list of offenses and factors for which prearrestment release of persons assessed as medium risk is not permitted . . .”).

unfettered discretion in implementing risk assessment analysis, allowing them to expand the pool of those ineligible for release nearly at will.¹⁴² Though the revised bill was met with vociferous complaints from the human rights groups that had previously supported it,¹⁴³ Governor Brown quickly signed it into law on August 28, 2018.¹⁴⁴ SB 10 originally was to take effect in October 2019, but a concerted push from the bail industry gathered over 500,000 signatures—far more than the 200,000 required—in support of a voter referendum on the law.¹⁴⁵ As a result, the future of SB 10 lies with California voters, who will decide whether the law takes effect in November 2020.

III. WHY DO CRIMINAL REFORMS FAIL AND WHAT CAN WE LEARN FROM THAT FAILURE?

The pattern of criminal justice reform is similar to a scene from the movie *Bartleby*.¹⁴⁶ In that scene, an office manager in his boredom winds up a toy rabbit, which then jumps up and down.¹⁴⁷ The man is surprised, picks the rabbit back up, and winds it again.¹⁴⁸ Much to his shock, it once again jumps.¹⁴⁹ The pattern repeats itself over and over.¹⁵⁰ Criminal justice reformers are not so different from the bored office manager.¹⁵¹ They attempt the same—or substantially similar—reforms over and over again, expressing the same shock the office manager does when those reforms don't succeed as planned—or simply outright fail.¹⁵² Why is this? Why, despite repeated failure in the criminal reform process, can't reformers do any better?

142. *See id.* § 1320.24.

143. *See* Tyler & Raphling, *supra* note 138; *see also* Daisy Vieyra, *ACLU of California Statement: Governor Brown Signs Bail Reform Legislation Opposed by ACLU*, AM. C.L. UNION SO. CAL. (Aug. 28, 2018), <https://www.aclusocal.org/en/press-releases/aclu-california-statement-governor-brown-signs-bail-reform-legislation-opposed-aclu> (arguing against the new iteration of SB 10).

144. *Governor Brown Signs Legislation to Revamp California's Bail System, Protect Public Safety*, OFF. GOVERNOR EDMUND G. BROWN, JR. (Aug. 28, 2018), <https://www.ca.gov/archive/gov39/2018/08/28/governor-brown-signs-legislation-to-revamp-californias-bail-system-protect-public-safety/index.html>.

145. McGough, *supra* note 31.

146. Issa Kohler-Hausmann, *Jumping Bunnies and Legal Rules: The Organizational Sociologist and the Legal Scholar Should Be Friends*, in *THE NEW CRIMINAL JUSTICE THINKING* 246, 246 (Sharon Dolovich & Alexandra Napatoff eds. 2017).

147. *Id.*

148. *Id.*

149. *Id.*

150. *Id.*

151. *See id.*

152. *See id.*

The simple answer is that criminal reformers have traditionally ignored the lessons of history. Often high-minded idealists, reformers tend to approach their projects as if the problem and solution are unprecedented.¹⁵³ They operate as crisis thinkers, initiating bold crusades that purport to offer bold, simple solutions to complex problems.¹⁵⁴ Because reformers tend to oversimplify the problems they face, expectations are set too high.¹⁵⁵ Those high expectations are nearly always dashed, however, because idealistic reformers are not the only force at play in criminal reform. The history of criminal justice reform shows a pattern of competing forces, which often tend to be ignored by those idealists who hope to enact meaningful change.¹⁵⁶

The first force is that of the moral idealist, who posits an idea for reform based on her view of an ideal society and supports her idea with values of “rightness or goodness.”¹⁵⁷ The moral idealist will often sell her idea with broad, simple claims, since, practically, that is the only way to garner public support for the movement.¹⁵⁸ This initial force can be seen in every attempt at bail reform, throughout both the histories of the nation as a whole and California. Arthur Beeley, Caleb Foote, Herbert Sturz, and Louis Schweitzer all were appalled by the standard of pretrial detention in the early twentieth century and implemented crusades to fix it.¹⁵⁹ The Ford Foundation’s funding of the pretrial services agency in Oakland was similarly high-minded.¹⁶⁰

That call for reform is quickly met by the second force: those who represent society’s need for order.¹⁶¹ Whereas the idealist typically approaches her ideas with the welfare of the accused in mind, those who represent the need for order respond with society’s need to suppress crime.¹⁶² Indeed, a reform typically will not win general acceptance until it promises to more effectively punish criminals in a

153. See Feeley, *supra* note 22, at 677.

154. See *id.* at 683.

155. GREG BERMAN & AUBREY FOX, TRIAL AND ERROR IN CRIMINAL JUSTICE REFORM: LEARNING FROM FAILURE 115–16, 118 (2010).

156. Samuel Pillsbury, *Understanding Penal Reform: The Dynamic of Change*, 80 NW. U. J. CRIM. L. & CRIMINOLOGY 726, 728 (1989).

157. *Id.* at 726–27.

158. *Id.*

159. Feeley, *supra* note 22, at 682–83.

160. See FEELEY, *supra* note 105, at 41.

161. Pillsbury, *supra* note 156, at 727.

162. *Id.*

way that satisfies society's need for retribution.¹⁶³ While occasionally the two forces—idealist and reactionary—can work in harmony, with a new reform purporting to allow for both more justice and more order, the interests of the idealist tend to lose out once the reform is actually implemented.¹⁶⁴

The starkest example of this reactionary force in modern bail reform is the counter-reform movement of the 1970s and 1980s that culminated with the Bail Reform Act of 1984.¹⁶⁵ The public blamed rising crime rates on an overly liberal system of pretrial release, and tough-on-crime government actors responded by explicitly authorizing courts to preventively detain arrestees who were deemed unsafe.¹⁶⁶ At first, it seemed as if the two ideals might be able to coexist; *Salerno* instructed courts to treat pretrial release as the norm, with arrestees only detained if they truly were a public safety threat.¹⁶⁷ As seen above, however, the hopes of the idealists—to liberalize pretrial release such that far fewer arrestees were detained—were dashed, with the counter-reform resulting in skyrocketing detention rates that have endured to this day.¹⁶⁸

The third, final, and perhaps most powerful force is that of the criminal justice institution itself: the judges, prosecutors, defenders, and probation officers that must implement any new system of reform.¹⁶⁹ Above all, these actors are interested in efficiency. Since they are the ones ultimately responsible for implementing reforms, their interests tend to override all others, and they often end up “capturing” the reform for their own purposes.¹⁷⁰ The criminal justice system is also fragmented by design, with the actors that make up the system pitted against each other in an adversarial scheme.¹⁷¹ Because the system is so complex and disorganized, everyone has their own motivations and nobody has control.¹⁷² These differing motivations are fueled by conflicts in values; some judges believe that the purpose of imprisonment is to rehabilitate, while others believe it is to

163. *Id.*

164. *Id.*

165. *See supra*, Part II(A).

166. *Id.*

167. *United States v. Salerno*, 481 U.S. 739, 755 (1987).

168. *See supra*, Part II(A).

169. Pillsbury, *supra* note 156, at 727.

170. *Id.*

171. Feeley, *supra* note 22, at 703.

172. FRIEDMAN & PERCIVAL, *supra* note 91, at 324.

punish.¹⁷³ The criminal court system has been compared to a leaky hose: “You can turn the pressure up at one end, but this . . . does not pump out more water at the other. More pressure simply means more leaks.”¹⁷⁴

The history of bail reform is rife with examples of this third force’s influence as well. For example, one need only look at how pretrial detention rose immediately once the independently funded pretrial service in Oakland was absorbed by the local probation department.¹⁷⁵ Or at the way current California courts implement statutory instructions to individually determine every arrestee’s situation before setting bail.¹⁷⁶ In short, they completely ignore them.¹⁷⁷ California courts are not alone in this; as early as 1974, scholars were lamenting how courts nationwide completely ignored reform-based instructions to liberalize pretrial release.¹⁷⁸

SB 10, and California bail reform in general, is already being buffeted by the first two forces of reform. The first was represented on several fronts; human rights groups have been calling for a liberalization of bail for years.¹⁷⁹ In early 2018, a California Court of Appeal declared the standardized use of bail schedules unconstitutional and called on the legislature to implement reforms.¹⁸⁰ Chief Justice Cantil-Sakauye called for broad bail reform in her 2016 State of the Judiciary Address.¹⁸¹ The second force is represented by California’s law-and-order types. The most vehement representative of this front is the bail bond lobby, as they fight to protect both public safety and their imminent extinction should SB 10 be enacted.¹⁸² After SB 10 passed, the bail lobby flexed its muscle, quickly collecting

173. See generally JOHN HOGARTH, SENTENCING AS A HUMAN PROCESS 15 (1971) (describing this clash of values).

174. FRIEDMAN & PERCIVAL, *supra* note 91, at 324.

175. See *supra*, Part II(B).

176. See Scott-Hayward & Ottone, *supra* note 24, at 168.

177. *Id.*

178. PAUL B. WICE, FREEDOM FOR SALE: A NATIONAL STUDY OF PRETRIAL RELEASE 156 (1974) (“[S]tatutes clearly order judges to inquire as to the facts of the crime, the background of the defendant, his financial condition, his past record and additional questions considered relevant to the determination of bail. In courtroom after courtroom these statutory provisions were forgotten. In Chicago, which is controlled by the progressive and comprehensive Illinois Bail Reform Act, judges in the Holiday Court were found to be spending fifty-four seconds per defendant.”).

179. See HUMAN RIGHTS WATCH, *supra* note 83.

180. *In re Humphrey*, 228 Cal. Rptr. 3d 513, 545 (Ct. App. 2018).

181. Cantil-Sakauye, *supra* note 126.

182. Blanca Garcia, *Bail Industry Fights SB 10*, SANTA BARBARA INDEP. (Oct. 11, 2018, 12:00 AM), <https://www.independent.com/news/2018/oct/11/bail-industry-fights-sb-10>.

enough signatures to force a November 2020 voter referendum on SB 10.¹⁸³ A final powerful group fighting against SB 10 are victims' rights advocates, who, like the other retributive interests, fear that more liberalized pretrial release will lead to unsafe citizens and harm victims' interests in seeing those who have harmed them safely detained.¹⁸⁴

That leaves the third force; that of the criminal justice institutions. These interests have not been silent thus far. The Judicial Council was heavily involved in rewriting the relatively liberal original version of SB 10.¹⁸⁵ After the council's involvement, SB 10 allowed for a much larger use of judicial discretion and seemed to set the stage for potentially limitless preventive detentions.¹⁸⁶ The full effect of the changes is yet to be seen.

This Note seeks to: (1) examine the ultimate influence that criminal justice actors might wield on SB 10; and (2) how to expect and account for it. As seen above, criminal reforms suffer from an unfortunate pattern, one that involves failing to learn from past mistakes—and being unable to anticipate future failures. California has already seen the first and second forces—the idealists and the reactionaries—clash over bail reform. Should SB 10 pass the 2020 referendum, however, its ultimate fate lies with the court system. Therefore, by examining the motivations of criminal court actors, this Note hopes to head off some of the mistakes of the past by allowing reformers to anticipate the difficulties of implementation, understand the motivations of and influences on employees of the court system, and set a reasonable—if perhaps disappointingly tempered—standard for what a successful SB 10 looks like in the future.

IV. THE COURT SYSTEM: MOTIVATIONS AND INFLUENCES

At the outset, it is important to examine the motivations of the court system as a whole. There are certain aspects of the system that tend to discourage innovation.¹⁸⁷ First, because courts see a very high volume of cases, there is a need within the system for established

183. McGough, *supra* note 31.

184. Klaas, *supra* note 84.

185. *Supra*, Part II(C).

186. *Id.*

187. See JERALD HAGE & MICHAEL AIKEN, SOCIAL CHANGE IN COMPLEX ORGANIZATIONS 100 (1970).

routines and rules that support those routines.¹⁸⁸ Court actors become comfortable with those routines and rules and are hesitant (if not outright hostile) to changes.¹⁸⁹ Second, courts have many segmented pieces—judges, prosecutors, defense attorneys—which discourage system-wide innovative thinking. Because this segmentation is also inherently adversarial, court actors distrust each other and can often be antagonistic.¹⁹⁰ Finally, courts must emphasize efficiency in their operations so as not to collapse under the weight of their caseloads, which leads actors system-wide to stereotype cases and use informal practices to process cases as quickly as possible.¹⁹¹ Any change threatens to disrupt the typical, efficient manner of business, and thus is heavily resisted.¹⁹²

Understanding that courts tend to value efficiency and routine, however, does not entirely get to the root of the issue. It is also important to understand what motivates the different actors within the court system, and how that motivation influences their actions.

A. Judges

It only seems natural to begin by examining the interests of the central figures of the criminal court system: the judges. After all, it will be up to judges to implement and routinize the new pretrial services systems that SB 10 calls for. What has happened in the past when judges have been statutorily instructed to liberalize pretrial detention, sentencing, or parole? Why have judges reacted to those reforms in the way they did? By teasing these answers out, perhaps it is possible to predict with some accuracy how California judges might implement SB 10.

There are many examples in California's history of judges undercutting reforms and reducing their hoped-for effects. In 1878, the Goodwin Act purported to liberalize "good time" credit for prisoners, allowing prisoners to go free earlier than they previously had been able to.¹⁹³ In the years after the Goodwin Act was implemented, judges in Alameda County increased the average felony sentence by up to 30 percent, almost directly cancelling out the liberalizing effect the

188. *See id.*

189. *See id.*

190. *See id.*

191. *Id.*

192. *Id.*

193. FRIEDMAN & PERCIVAL, *supra* note 91, at 215.

legislature had hoped to enact.¹⁹⁴ California enacted parole in 1893, which resulted in judges doling out sentences that were two and a half years longer than they were before the parole law.¹⁹⁵ It seems that early California judges were compensating for the new laws to ensure that prisoners would serve the same amount of time as they had before.¹⁹⁶

Judges did not react any more favorably to the bail reforms of the 1960s. Though there is less evidence of the outright counterbalancing observed above, there is plenty of evidence of judges ignoring clear statutory instructions either due to personal bias or to promote efficiency.¹⁹⁷ As previously discussed, the bail reform efforts of the 1960s tried to promulgate pretrial release based on individualized factors for each defendant. Many bail reform statutes directly instructed judges to consider the individual situation of each defendant.¹⁹⁸ A 1974 study of judicial activity with regards to bail, however, found that judges often ignored these instructions due to large caseloads.¹⁹⁹ They also ignored them due to an apparent distrust, dislike, and cynicism towards arrestees who appeared in their courtrooms.²⁰⁰ Finally, judges viewed factors such as the seriousness of the offense and the arrestee's prior criminal history as far more dispositive for setting bail than such "ephemeral" elements as the arrestee's ties to the community or his ability to pay.²⁰¹

A final pertinent example comes from a study of San Diego area courts in the late 1970s. One finding that stood out was that judges were remarkably individualistic; they would not brook another judge interfering with their authority over their own courtrooms, even if it was the presiding judge.²⁰² This led to a type of "friendly anarchy" within the court, where each judge handled his courtroom in his own

194. *Id.* at 215–16.

195. *Id.*

196. *Id.* at 216.

197. FEELEY, *supra* note 105, at 125 ("A great many judges quite simply do not regard liberalized pretrial release as desirable.").

198. *See* WICE, *supra* note 178, at 156.

199. *Id.* at 30 ("[Judges] claim[ed] that they [were] barely able to go over the charges, glance at the rap sheet, and hear a word about the case from the arresting officer before being urged on to the next case by the clerk who apprehensively view[ed] the plethora of cases to be completed that day.").

200. *Id.* at 31 (describing how, in the words of one judge, defendants could not be trusted to give truthful responses to questions).

201. *Id.*

202. PAMELA J. UTZ, *SETTLING THE FACTS: DISCRETION AND NEGOTIATION IN CRIMINAL COURT* 78 (1978).

way.²⁰³ Any proposal to give the presiding judge more managing power, even a proposal that seemed likely to improve the court's efficiency, was met with immediate suspicion and usually rejected.²⁰⁴

Another element of interest from the San Diego court study was how judges were controlled by the use of peremptory challenges²⁰⁵ by prosecutors.²⁰⁶ The peremptory challenge is a procedural tool that may be used by any party if they are unhappy with the judge assigned to their case, and is usable "without any further act or proof."²⁰⁷ The district attorney in San Diego would use the peremptory as a weapon against judges who were too lenient in sentencing.²⁰⁸ One district attorney even found a way of ensuring that his cases were never heard (even initially) by a judge he found too liberal; he made clear that he was prepared to challenge this particular judge every time his case was assigned.²⁰⁹ The tactic worked, and the judge was assigned almost no criminal overflow work.²¹⁰

Modern studies provide further information on judicial motivations and demonstrate that these motivations have not seriously changed since the cited historical studies. Efficiency remains paramount—a study of bail proceedings in Southern California in 2018 found that bail hearings were short or nonexistent, with one judge describing the hearings as "Costco justice."²¹¹ Just as the 1970s study found, modern judges tend to err on the side of pretrial detention, directly contravening the text of state constitutions or statutes that

203. *Id.* at 79.

204. *Id.* The author of the San Diego court study also studied the Alameda court system during the 1970s. She found that, as in San Diego, judges in Alameda were fiercely independent. An apparent catch-phrase in Alameda at the time was, "[n]o one can tell another judge how to run his department . . . judges are autonomous . . . they can't be forced into some pattern of conduct." *Id.* at 122.

205. The peremptory challenge is codified as California Code of Civil Procedure section 170.6. "A judge . . . shall not try a civil or criminal action . . . of any kind or character" when a party makes a duly presented motion under penalty of perjury. Upon proper filing of the motion, that judge will be replaced "without any further act or proof." CAL. CIV. PROC. CODE § 170.6(4) (West 2019).

206. UTZ, *supra* note 202, at 84.

207. CIV. PROC. § 170.6(4).

208. UTZ, *supra* note 202, at 84.

209. *Id.*

210. *Id.*; see also Feeley, *supra* note 22, at 709. Another example of a judge being removed from criminal cases because of his liberal policies is the story of Judge Bruce Wright. *Id.* New York district attorneys campaigned against him for setting low bail for criminals, and in response the administrative judge transferred Wright from criminal court to civil court. *Id.*

211. Sarah Ottone & Christine Scott-Hayward, *Pretrial Detention and the Decision to Impose Bail in Southern California*, CRIMINOLOGY CRIM. JUST. L. & SOC'Y, Aug. 2018, at 24, 34.

require a presumption of release.²¹² This is because judges tend to be extremely wary of being blamed for crimes committed by those released pretrial; wrongful decisions to detain contain no such harmful possibilities for the judge.²¹³ This pressure is particularly powerful in states such as California where judges are subject to reelection after their initial appointment.²¹⁴

Of great interest for the purposes of SB 10 is that judges, even when presented with the possibility of relying on an actuarial risk tool to guide discretion, tend to detain far more defendants than is necessary to constrain dangerousness.²¹⁵ In fact, most judges seem to think that their assessments are more accurate than that of a risk assessment tool.²¹⁶ Studies suggest that, if that discretion was removed, a larger proportion of defendants would be released while pretrial violent crime rates would decrease.²¹⁷ However, because judges are not responsible for increased jail budgets and taxes that come along with increased rates of pretrial detention, they have no incentive to follow liberalized pretrial detention reforms—and, as described above, have every incentive to over-detain.²¹⁸

To summarize: judges, both in general and in California, tend to be wary of those who tread upon their discretion, whether it be a legislator or another judge. When legislatures enact reforms, judges

212. Wiseman, *supra* note 66, at 422.

213. Keith Swisher, *Pro-Prosecution Judges: “Tough on Crime,” Soft on Strategy, Ripe for Disqualification*, 52 ARIZ. L. REV. 317, 364 (2010) (“While it is impossible to predict who will commit a crime while released on bail, it is easy for politicians in hindsight to criticize a judge who granted bail to the defendant who reoffends while out on bail.”).

214. See Feeley, *supra* note 22, at 709 (“[M]any [judges] report that they try to transfer to civil divisions the year before their reelection so as to avoid any unwanted attention for their bail and sentencing decisions.”).

215. Baradaran & McIntyre, *supra* note 66, at 553–54.

216. Steven L. Chanenson & Jordan M. Hyatt, *The Use of Risk Assessment at Sentencing: Implications for Research and Policy* 10 (Villanova Univ. Charles Widger Sch. of Law, Working Paper No. 1040, 2016).

217. See *id.*

218. Eric A. Posner, *Law, Economics, and Inefficient Norms*, 144 U. PA. L. REV. 1697, 1703 (1996) (“Because judges enjoy more independence than do legislators, they feel less pressure than legislators to choose rules on the basis of their distributive effects.”); see also Andrew Chongseh Kim, *Beyond Finality: How Making Criminal Judgments Less Final Can Further the “Interests of Finality”*, 2013 UTAH L. REV. 561, 612–13 (“Because the judiciary does not internalize the costs of incarceration . . . judges may focus excessively on whether the defendant deserves a particular punishment without considering whether the benefit to society of the defendant’s incarceration is worth the financial cost of a lengthy sentence.”); Jeffrey Manns, *Liberty Takings: A Framework for Compensating Pretrial Detainees*, 26 CARDOZO L. REV. 1947, 1975 (2005) (“But . . . judges face little if any accountability for the costs of maintaining pretrial detention facilities and prisons.”).

tend to ignore any statutory requirements that encourage (or mandate) liberal policies, instead either staying with practices that they are comfortable with or making punishments more draconian, as seen in the Alameda County courts in the late nineteenth century. Judges also seem to be influenced by the possibility of public scorn and the prosecutorial Sword of Damocles that is the peremptory challenge; both of these factors tend to impel judges towards conservative detention practices. Finally, efficiency is paramount. If a reform threatens to clog a judge's courtroom even worse than it already is, the judge is likely to reject it.

B. Prosecutors

Judges are not the only powerful force within the court system. Prosecutors hold just as much (and, in some situations, more) sway as judges do.²¹⁹ Prosecutors play an outsized role in determining an arrestee's release pretrial, since they have relatively unchecked discretion to decide whether to charge an arrestee.²²⁰ Judges will typically defer to the bail recommendation that the prosecutor makes (even if it deviates from the schedule).²²¹ Under the current SB 10, this would most likely continue because there are several provisions that allow prosecutors to file a motion requesting that an arrestee be detained.²²² Because prosecutors will continue to have such an outsized role in determining whether an arrestee is detained pretrial, it is as important to examine their motivations and practices as it is to look at judges'.

As far back as the late nineteenth century, judges have tended to make bail decisions according to prosecutorial recommendations.²²³ By the 1970s, not much had changed; most public officials believed that prosecutors had a large role in determining how bail was set, with

219. See JOAN E. JACOBY & EDWARD C. RATLEDGE, *THE POWER OF THE PROSECUTOR: GATEKEEPERS OF THE CRIMINAL JUSTICE SYSTEM* 2 (2016).

220. *Id.*

221. *Unlocking the Black Box of Prosecution*, VERA (Sept. 6, 2019, 3:00 PM), <https://www.vera.org/unlocking-the-black-box-of-prosecution/for-prosecutors>.

222. See, e.g., S.B. 10 § 1320.14, 2018 Leg., 2017–2018 Reg. Sess. (Cal. 2018); *id.* § 1320.18; *id.* § 1320.21.

223. FRIEDMAN & PERCIVAL, *supra* note 91, at 119–20.

their recommendations having a strong—usually dispositive—
influence on the judge’s decision.²²⁴

As described above, prosecutors in California also can wield a large amount of influence by using their peremptory challenge on judges who they deem to be lenient setters of bail.²²⁵ They also can strategically overcharge, filing charges at the highest level that the facts will support in the anticipation that the defendant will plea down to a lesser charge.²²⁶ In many ways, they have nearly complete control of the initial aspects of the criminal case; it is no wonder they are considered “the sentr[ies] at the gate of the criminal court system.”²²⁷

Prosecutorial motivations are not overly complex. Like many judges, they are elected officials. Unlike judges, however, they are seen as the protectors of the public interest “in an aspect of human society that arouses people’s fear and outrage.”²²⁸ Though prosecutors have an interest in the efficiency of the court, their other interests outweigh it. As elected officials, they are hyper-aware of their image in the community, and therefore they tend to “attempt to accommodate the political demands of an electorate that tends to be vindictive toward the malefactor.”²²⁹

Prosecutors tend to have a certain professional ethic, one that embraces law enforcement values and requires a cultivated reputation of “utter credibility, inevitable truth, almost of invincibility.”²³⁰ As such, prosecutors are loath to demonstrate lenience, and often will charge accordingly.²³¹ Though the practice is not universal, studies have found that many prosecutors either overcharge or ask for high bail to ensure that a defendant will remain behind bars, since, as discussed above, a defendant who is detained pretrial is much more likely to plead guilty than one who is released.²³² The nearly limitless discretion granted to prosecutors means that often, whether implicitly

224. Paul B. Wice, *Bail Reform in American Cities*, 775 CRIM. L. BULL. (1973); *see also* Frederic Suffet, *Bail Setting: A Study of Courtroom Interaction*, 12 CRIME AND DELINQUENCY 318, 318–31 (1996) (noting prosecutorial power in the bail-setting process).

225. *Supra*, Part IV(A).

226. UTZ, *supra* note 202, at 23.

227. *Id.* at 20.

228. *Id.* at 18–19.

229. Arthur Rosett, *The Negotiated Guilty Plea*, 374 ANNALS AM. ACAD. POL. & SOC. SCI. 70, 78 (1967).

230. Jerome H. Skolnick, *Social Control in the Adversary System*, 11 J. CONFLICT RESOL. 52, 57 (1967).

231. UTZ, *supra* note 202, at 20.

232. BAUGHMAN, *supra* note 59, at 6–7.

or explicitly, their charging decisions are tinged with racial animus. A study of federal prosecutors recently found that they are twice as likely to charge black men with crimes that have a minimum sentence requirement as they are similarly situated white men, resulting in black men facing prison sentences that are 10 percent longer than similarly situated white men.²³³

In sum, prosecutors have an immense amount of power in the criminal justice system, and the discretion to use that power as they see fit. As described above, they tend to adhere to a professional ethic that discourages any showing of lenience. Furthermore, as elected officials, they typically have every incentive to keep arrestees behind bars and secure as many guilty pleas as possible; conversely, they have very little incentive to put people they view as dangerous back out on the street.

C. Corrections Officers

There are other actors within the criminal justice system that could affect SB 10's implementation. Most important amongst these (for our purposes) are probation officers, as probation departments will have a significant role in implementing SB 10's risk assessment programs. Though risk-assessment tools are intended to remove as much discretion as possible, that outcome depends on whether probation officers can reliably and consistently make correct arrestee classifications based on the tool's recommendation. Studies on the reliability of risk-assessment implementation are few, but one recent study suggests that probation officers can reliably analyze the results given to them by the risk assessment tool—alleviating concerns that lower-level officers might misclassify whether an arrestee is low, medium, or high risk.²³⁴

Close cases, however, will still require that a probation officer use his discretion to classify an arrestee. Studies show that probation officers (like other court actors) tend to err on the side of caution.²³⁵ Another study suggests that there may be racial disparities in whether probation officers use their discretion in a manner consistent with

233. Sonja B. Starr & M. Marit Rehani, *Racial Disparity in Federal Criminal Sentences*, 122 J. POL. ECON. 1320, 1344–45 (2014).

234. Patrick J. Kennedy, *Are Pretrial Services Officers Reliable in Rating Pretrial Risk Assessment Tools?*, FED. PROB., June 2018, at 35, 37.

235. Mark Jones & John Kerbs, *Probation and Parole Officers and Discretionary Decision-Making: Responses to Technical and Criminal Violations*, FED. PROB., June 2007, at 9.

public interest; white officers tended to believe that they utilized their discretion to serve public interest, whereas African-American and female officers believed that discretionary decisions were instead based on personal preference.²³⁶ The study also indicates that an officer's personal preference can be heavily influenced by social pressures both within and outside the agency: 43 percent of officers felt pressured to recommend incarceration or initiate formal judicial proceedings in situations where they might otherwise not do so.²³⁷ Thus, though it seems as if probation officers can reliably implement a risk-assessment tool, their discretionary judgment on close cases will still err towards recommending detention.

Despite the effects probation officers could have on SB 10, the true agents of cooption are most likely to be judges and prosecutors, the most powerful actors within the criminal justice system. Now that the incentives behind these institutional figures have been analyzed, Part V will apply these lessons and examine how they have affected the implementation of modern bail reforms.

V. CURRENT BAIL REFORMS IN OTHER STATES: HOW HAVE COURT ACTOR MOTIVATIONS AFFECTED IMPLEMENTATION?

Current bail reform efforts in other states might serve as guideposts for the future of SB 10. New Jersey and Kentucky have installed systems that mostly replace cash bail with risk assessment analysis as a way of releasing more defendants pretrial—as SB 10 purports to do—so it will be enlightening to analyze how system actors have reacted to these reforms. Have they followed the instructions of their legislatures, presuming that defendants should be released while detaining only the most dangerous? The answer, in short, is no.

New Jersey passed the Criminal Justice Reform Act in 2014, requiring that the courts replace cash bail with a pretrial risk assessment system.²³⁸ Much like SB 10, the purpose of the reform is to ensure that defendants did not remain behind bars solely because of their inability to pay; detention is to be based on danger to society or the risk that they might not reappear for trial.²³⁹ The court system is

236. *Id.* at 10–11.

237. *Id.* at 12.

238. N.J. STAT. ANN. § 2A:162-15 (West 2019).

239. PDR REPORT, *supra* note 103, at 83.

responsible for running the pretrial services program, as it most likely will be in California.²⁴⁰ The algorithm used by the pretrial services program is the Arnold Foundation's Pretrial Services Assessment (PSA), which has become the standard across the country.²⁴¹ The law went into effect in early 2017, and initial returns are promising.²⁴² The number of defendants sitting in jail before their trial dropped by 19 percent.²⁴³ However, the machinery that applies pressure to criminal justice reform has already begun to work.

Soon after the implementation of this new system, a number of people who had been arrested on gun charges were released before trial. One man murdered someone mere days after his release, while another killed his ex-girlfriend and himself.²⁴⁴ In response to the resulting public outcry, the Judiciary Committee changed the inputs of its risk assessment tool, making a gun charge grounds for automatic recommendation of pretrial detention.²⁴⁵ Though the ACLU and New Jersey Public Defender's Office opposed this, arguing that the change was an overreaction to anecdotal rather than empirical evidence, the courts were quick to follow the recommendation.²⁴⁶ It is not difficult to foresee the courts reacting to further high profile (but anecdotal) crime committed by those released before trial, thus reversing the positive gains made in the initial months of New Jersey's bail law.²⁴⁷ In fact, other states' experience with bail reform demonstrates that it is foolish to read too much significance into positive short-term trends that immediately follow reform. All too often, those trends normalize, and the levels of pretrial detention return to the pre-reform status-quo.

Kentucky's experience with bail reform is instructive here. In 2011, the state passed House Bill 463 (HB 463), which mandated that

240. *Id.* at 85.

241. Jon Schuppe, *Post Bail*, NBC NEWS (Aug. 22, 2017), <https://www.nbcnews.com/specials/bail-reform>; see also Tyler Bond, *John Arnold Meddling in California Politics*, NAT'L PUB. PENSION COALITION (Aug. 28, 2018), <https://protectpensions.org/2018/08/28/john-arnold-meddling-california-politics/> (explaining that John Arnold helped write the provisions of SB 10, making it likely that his company's risk assessment tool will be used in California).

242. PDR REPORT, *supra* note 103, at 85.

243. *Id.*

244. Schuppe, *supra* note 241.

245. *Id.*

246. Letter from Alexander Shalom, Senior Staff Att'y Gen., Am. Civil Liberties Union of N.J., to Judge Glenn A. Grant, Acting Admin. Dir. of N.J. Courts (Apr. 17, 2017), <https://www.documentcloud.org/documents/3676484-ACLU-s-letter-on-bail-reform.html>.

247. See Schuppe, *supra* note 241.

each judge consider the determination of a risk assessment tool before making their pretrial detention decision.²⁴⁸ The stated goal of the law, similar to SB 10, is to reduce incarceration rates while allowing for preventive detention of the dangerous.²⁴⁹ Like SB 10, it directed that all low risk defendants and most medium-risk defendants (as identified by the assessment) be released without cash bail; it also did not order judges to follow the recommendation all the time, just to consider it.²⁵⁰ The risk assessment tool used, as in New Jersey, was the PSA.²⁵¹ A study showed that, while there were promising initial results (as in New Jersey), those results quickly normalized. Six years after HB 463 was enacted, Kentucky’s pretrial release rates are lower than they were before the bill and lower than the national average.²⁵² It is believed that this has much to do with the discretion granted to judges in Kentucky law. According to a study, judges ignored the presumption of release and the recommendation of the tool in more than two-thirds of all cases.²⁵³ They exercised their discretion not to correct the risk assessment if it was wrong but to override it when it was correct.²⁵⁴

This is not to say that Kentucky’s experience forecasts doom for New Jersey, California, and other jurisdictions that attempt to make the switch from cash bail to risk assessment systems. Though the overall release rate decreased in Kentucky, judges did grant non-monetary release for low-risk defendants 63 percent more than they had before HB 463.²⁵⁵ Since one of the biggest injustices of the cash bail system is that low-risk defendants remain in jail for no reason other than that they cannot afford to get out, this represents a

248. KY. REV. STAT. ANN. § 431.066(2) (West 2019) (“In making [the pretrial release and bail determination], the court shall consider the pretrial risk assessment.”).

249. Sen. Tom Jensen & Rep. John Tilley, *HB 463—Statement from Sponsors*, ADVOCATE (June 2011), https://dpa.ky.gov/Public_Defender_Resources/The%20Advocate/AdvocateJune060311FINAL4PAGE.pdf.

250. KY. REV. STAT. ANN. § 431.066(3) (West 2012).

251. LAURA & JOHN ARNOLD FOUNDATION, *DEVELOPING A NATIONAL MODEL FOR PRETRIAL RISK ASSESSMENT 3* (2013), http://craftmediabucket.s3.amazonaws.com/uploads/PDFs/LJAF-research-summary_PSA-Court_4_1.pdf.

252. Stevenson, *supra* note 80, at 309.

253. *Id.* at 308.

254. Kentucky is not alone in this. Judges in Cook County departed from risk assessment recommendations 85 percent of the time. Frank Main, *Cook County Judges Not Following Bail Recommendations: Study*, CHI. SUN TIMES (July 3, 2016, 9:00 PM), <https://chicago.suntimes.com/news/cook-county-judges-not-following-bail-recommendations-study-find/>.

255. Stevenson, *supra* note 80, at 308–09.

significant improvement.²⁵⁶ In addition, though many fear that risk assessment tools will exacerbate racial disparities in pretrial detention decisions, the study shows that, according to initial returns, racial disparities remained the same.²⁵⁷ While the fact that the implementation of risk assessment in Kentucky did not reduce racial disparities might disappoint, it is encouraging that it did not make things worse. Finally, the court system in Kentucky has shown itself willing to examine the results of its system and tinker with it if necessary.²⁵⁸ In light of lowered release rates, the Kentucky Supreme Court ordered that all defendants rated low and medium risks and charged with low-level crimes are to be automatically released on bail—thus removing discretion from the equation.²⁵⁹ The order is too recent to determine the results, but the Kentucky judiciary's willingness to self-evaluate and liberalize when necessary is encouraging.

In sum, current third wave bail reform efforts show that, despite promising initial returns, bail reform laws very similar to SB 10 have not achieved all that reformers have hoped for. They tend to result in a brief change in pretrial release numbers, which then normalize over a period of years once judges begin exercising their discretion and returning to old practices.

VI. SB 10: WHAT TO EXPECT, HOW TO FIX POTENTIAL PROBLEMS, AND WHAT SUCCESS MIGHT LOOK LIKE

In light of all this, what can we expect of SB 10? Court actors have already influenced the bill to grant themselves more power and discretion.²⁶⁰ Chief Justice Cantil-Sakauye lobbied against the original version of the bill, arguing that it gave too much discretion to pretrial services agencies rather than judges, that the statute tried to dictate the factors for pretrial release when that should be the purview of judges, and that the statute imposed too much of a burden on judges who departed from the risk assessment recommendation.²⁶¹ As seen below, her concerns were reflected in the rewritten version of the bill.

256. *Id.* at 319.

257. *Id.* at 366.

258. *Id.* at 375–76.

259. *Id.* at 376.

260. *Supra* Part II(C).

261. Letter from Cory T. Jasperson, Dir. of Governmental Affairs, Judicial Council of Cal., to Hon. Reginald B. Jones-Sawyer, Sr., Chair, Assembly Pub. Safety Comm. (June 30, 2017),

The final version of SB 10 purports to set up a program much like other risk assessment systems. The Judicial Council will promulgate rules on how to organize the pretrial services agency and the risk assessment tool—including how to classify “low,” “medium,” or “high” risk arrestees.²⁶² The local court systems are entrusted with implementing the system.²⁶³ On the face of the bill’s text, it would appear that nearly all “low” and “medium” risk arrestees are likely to be released.²⁶⁴

However, a number of sections in the bill greatly expand judicial discretion. Other sections enumerate many types of arrestees who may not be released. None of these sections were present in the original bill.

First, the statute and suggested Judicial Council Rules of Court give wide discretion to local courts to expand the list of offenders classified as “medium-risk,” and thus subject to detention or harsher conditions of release.²⁶⁵ Though the bill warns that courts “shall not provide for the exclusion of release of all medium-risk defendants,” it still gives local courts nearly unfettered discretion to detain, so long as they do not detain “all medium-risk defendants.”²⁶⁶ The bill also allows wide judicial and prosecutorial discretion to detain even low-risk defendants.²⁶⁷ At any time, a prosecutor may file a motion to detain the arrestee so long as the arrestee is on any form of post-conviction supervision other than probation, is subject to a pending trial on another charge (no matter how minor), or—in a remarkably vague provision—“there is substantial reason to believe that no . . . condition . . . will reasonably assure protection of the public . . . or

<https://keepcaliforniasafe.com/wp-content/uploads/2017/07/SB-10-063017.pdf> [hereinafter Judicial Council Letter].

262. S.B. 10, § 1320.25(a), 2018 Leg., 2017–2018 Reg. Sess. (Cal. 2018).

263. *Id.* § 1320.11(a).

264. *Id.* § 1320.10(b)–(c) (“Pretrial Assessment Services . . . shall release a low-risk person on his or her own recognizance” and “shall order the release or detention of medium-risk persons in accordance with . . . standards set forth in the local rule of court.”).

265. S.B. 10, § 1320.11(a), 2018 Leg., 2017–2018 Reg. Sess. (Cal. 2018) (“The local rule may further expand the list of offenses and factors for which pre-arraignment release of persons assessed as medium risk is not permitted . . .”).

266. *Id.*; see also CAL. RULES OF COURT, prop. rule 4.40(d) (“Penal Code Section 1320.10(e) contains a comprehensive list of offenses and factors that make persons assessed as medium risk ineligible for release by Pretrial Assessment Services; a court is not required to expand this list. If a court chooses to add to the list of exclusionary offenses or factors, the court must not adopt a rule that includes exclusions that effectively exclude all or nearly all persons assessed as medium risk from pre-arraignment release.”).

267. S.B. 10, § 1320.18, 2018 Leg., 2017–2018 Reg. Sess. (Cal. 2018).

appearance of the defendant in court as required.”²⁶⁸ Once the prosecutor files this motion, the judge may detain so long as the reasons are stated on the record.²⁶⁹

SB 10, as passed in the legislature, looks remarkably similar to the current bail reform laws analyzed above. It has the same catch-all provision for prosecutors that New Jersey’s reform law has, allowing prosecutors to bypass the assessment recommendation and move for detention based on “substantial reasons” to believe that an arrestee might flee or pose a danger.²⁷⁰ It mandates that judges incorporate the recommendation of the risk assessment tool in to their decision, but then gives discretion to ignore it, as in Kentucky’s law.²⁷¹ New Jersey courts reacted swiftly to two high-profile crimes committed by those released on gun crimes; SB 10’s provision that allows local courts to add, without serious limits, offenses in to the “medium-risk” category seems to set up California courts to do the same.²⁷²

The Judicial Council’s influence on the rewritten bill sets courts up to repeat the patterns of past and current reforms. As discussed above, judges do not like having their traditional authority limited, be it by legislatures, other judges, or independent agencies.²⁷³ They trust their own judgment more than they trust algorithms.²⁷⁴ There can be a tendency, whether realized or not, to mistrust arrestees, assuming that anyone enmeshed in the criminal justice system deserves to be there.²⁷⁵ Prosecutors, because of their political and ethical mandates, will do all they can to keep arrestees behind bars.²⁷⁶ This is demonstrated by historical patterns, including recent history in both Kentucky and New Jersey.

Is there a solution? The short answer might be disappointing. There is probably not a solution that would fully satisfy idealistic reformers. However, this does not mean that California’s bail reform is destined to be a failure. It merely means that reformers should work with criminal court actors to try and implement SB 10 in a way that

268. *Id.*

269. *Id.*

270. *Id.*; N.J. STAT. ANN. § 2A:162-19a(7)(a)–(b) (West 2017).

271. *See* S.B. 10, § 1320.18, 2018 Leg., 2017–2018 Reg. Sess. (Cal. 2018); *see also* KY. REV. STAT. ANN. § 431.066(3) (West 2012).

272. S.B. 10, § 1320.11(a), 2018 Leg., 2017–2018 Reg. Sess. (Cal. 2018).

273. *Supra*, Part IV(A).

274. *Id.*

275. *Id.*

276. *Supra*, Part IV(B).

comports as closely as possible to the law’s spirit. The best-case scenario for criminal reformers is to focus on the “optimal, as opposed to the maximal, solution.”²⁷⁷ This means bridging the ideological divide and compromising with those who might oppose the reformers’ views. Despite decrying the rewritten (and ultimately passed) version of SB 10, the ACLU pledged to continue working with the bill’s sponsor, Senator Hertzberg, to work towards truly liberalized pretrial detention that also reduces racial biases. What might that legislation look like?

Several scholars have suggested that the only way a risk assessment-based system will truly work is if judicial discretion is severely limited. The study of the Kentucky pretrial system posited that, in light of how quickly Kentucky judges used their discretion to ignore the risk assessment’s recommendations, a risk assessment system would not work as intended unless the legislature severely restricted a judge’s ability to depart from the recommendation.²⁷⁸ Another scholar recommends that, in order to optimize the liberalizing effects of a risk assessment system, subjective discretion should be minimal.²⁷⁹ Yet another goes a step further, saying that judges should be subject to mandatory bail guidelines.²⁸⁰

The opposing viewpoint is that, as described below, risk assessment algorithms are far from perfect. In fact, if the algorithms are built with historical data (as they inevitably must be), they will be inherently biased against groups that have been over-incarcerated; primarily, minorities and the poor.²⁸¹ By allowing judges to retain most of their discretion, arrestees who may have fallen victim to a faulty risk analysis could be saved from detention by a lenient judge.

Either way, arguments for limiting judicial discretion are almost certainly moot; it is simply unrealistic to expect that the Judicial Council—or local judges—would accept such a restraint on their discretion. Indeed, the original draft of SB 10 recommended very limited controls on discretion (such as requiring judges to make written reports as to why they had departed from the risk assessment

277. Pillsbury, *supra* note 156, at 776.

278. See Stevenson, *supra* note 80, at 373–74.

279. BAUGHMAN, *supra* note 59, at 70.

280. Wiseman, *supra* note 66, at 462.

281. Jennifer L. Doleac & Megan Stevenson, *Are Criminal Risk Assessment Scores Racist?*, BROOKINGS INST. (Aug. 22, 2016), <https://www.brookings.edu/blog/up-front/2016/08/22/are-criminal-risk-assessment-scores-racist/>.

recommendation) which were resoundingly shot down by the Judicial Council.²⁸² Even if they had not, the history examined in this Note points to legislative controls over the judiciary not having very much practical effect; court actors would find a loophole to exploit.

With legislative controls over the judiciary out of the picture, perhaps the legislature could restrict prosecutorial power? For the same reasons described above, it is unlikely that the legislature would walk back SB 10's provision allowing prosecutors to file a motion for pretrial detention at will. However, perhaps reformers could encourage the legislature to look to New Jersey as inspiration for a different type of prosecutorial control; in order to better control sentencing in drug cases, the New Jersey Attorney General instituted the *Brimage* guidelines.²⁸³ In short, the guidelines provide a range of sentences a prosecutor can offer during the plea process, prompting her to pick a specific offense to charge, how many offenses to charge, and how many prior crimes to invoke.²⁸⁴ This prevents a prosecutor from threatening an arrestee with the mandatory maximum as leverage.²⁸⁵ Without this negotiating tool, perhaps prosecutors might be more reasonable in their charging patterns. Because one of the weightier factors in the risk assessment tool is the severity of the charged crime, this might result in fewer arrestees detained pretrial.

New Jersey instituted the *Brimage* guidelines, however, in response to a ruling by the New Jersey Supreme Court.²⁸⁶ Considering how politically driven and crime-control oriented prosecutors are, it seems doubtful that they would allow the legislature, as opposed to a court, to introduce this kind of discretionary control without a pitched battle. And seeing how the interests of court actors were able to so substantially influence the ultimate version of SB 10, it is eminently possible that they would win this battle as well.

So where does that leave California's current iteration of bail reform? It seems the likeliest avenues for compromise and success are two-fold. One is for reform-minded legislators to shift their focus to

282. Judicial Council Letter, *supra* note 261, at 3.

283. *Revised Attorney General Guidelines for Negotiating Cases under N.J.S.A. —Effective for Offenses Committed on or After September 15, 2004*, OFF. ATT'Y GEN., ST. N.J., <http://www.state.nj.us/lps/dcj/agguide/directives/brimagerevision.htm> (last visited Sept. 29, 2019).

284. JOHN F. PFAFF, LOCKED IN: THE TRUE CAUSES OF MASS INCARCERATION—AND HOW TO ACHIEVE REAL REFORM 148–50 (2017).

285. *See id.* at 149.

286. *See State v. Brimage*, 706 A.2d 1096 (N.J. 1998).

the risk assessment tool itself. Many scholars worry that risk assessment tools will exacerbate race-based detention disparities, since the data used to generate recommendations will necessarily be old data, tainted by the systemic racism baked into the criminal justice system.²⁸⁷ Worse, risk assessment tools tend to operate as a black box, with those subject to their recommendations unable to understand why the tool recommended as it did.²⁸⁸ A recent case in Wisconsin, where a plaintiff made a due process challenge to the state’s risk assessment tool, highlighted the problem.²⁸⁹ Though the court rejected the due process claim, a concurrence stated: “[T]his court’s lack of understanding of [the risk assessment tool] was a significant problem in the instant case. At oral argument, the court repeatedly questioned both the State’s and defendant’s counsel about how [the tool] works. Few answers were available.”²⁹⁰

Reformers in California should work to ensure that the risk assessment tool used does not operate as a black box that worsens pre-existing racial disparities. The ACLU has already committed itself to this task.²⁹¹ To succeed, it should ensure that, whichever risk assessment tool the Judicial Council opts to use, the public and press have the ability to analyze the tool for biased decision-making and problematic algorithms. Reformers should keep a close watch on this information and monitor it for warning signs. If the data shows that the risk assessment tool is failing to improve race-based detention disparities, reformers should work with the tool’s designers to remedy the problem. In that way, reformers could ensure that the tool, at the very least, is not making recommendations that will exacerbate the problems that money bail caused. Encouragingly, a bill sponsored by Senator Hertzberg that establishes “guidelines for data collection, transparency requirements, and regular validation of the tools” passed in the California Senate on April 25, 2019.

287. See generally Koepke & Robinson, *supra* note 35 (describing in detail how bail algorithms could worsen, rather than improve, racial disparities).

288. See Kelly Hannah-Moffatt, *Actuarial Sentencing: An “Unsettled” Proposition*, 30 JUST. Q. 270 (2013) (discussing transparency concerns with risk assessment); Melissa Hamilton, *Risk-Needs Assessment: Constitutional and Ethical Challenges*, 52 AM. CRIM. L. REV. 231, 267–71 (2015) (discussing legal issues related to transparency in risk assessment).

289. See *State v. Loomis*, 881 N.W.2d 749 (Wis. 2016).

290. *Id.* at 774 (Abrahamson, J., concurring).

291. *ACLU of California Statement: Governor Brown Signs Bail Reform Legislation Opposed by ACLU*, *supra* note 143 (“We will work with lawmakers and our community partners” to “ensure a significant reduction in incarceration and also provide due process and promote racial justice.”).

A second reasonable expectation for success would be to follow in Kentucky's footsteps. Although, as described above, the bail reform experiment there has not been everything that idealists could have hoped for, there are signs that it has been a moderate success. First, there has been a 63 percent increase in the release of low-level offenders since the enactment of Kentucky's bail reform law.²⁹² Second, there is evidence that the risk assessment tool did not exacerbate racial disparities (though it did not improve them either).²⁹³ Finally, the most important lesson to take from Kentucky's experience is that the state is taking steps to slowly but surely improve on the system. Studies of criminal justice reform explain that "failing to engage in self-reflection" is the number one mistake that reformers make, and that criminal justice officials "should constantly ask themselves what's working, what isn't, and why."²⁹⁴ Kentucky seems to be constantly evaluating the success of its own reform efforts, something that happens all too rarely in criminal reform.²⁹⁵ The fact that the Kentucky Supreme Court observed that pretrial release rates were too low post-reform, acknowledged this was a problem, and promulgated rules to try and fix the problem is encouraging.

SB 10 currently has a provision that provides for the Judicial Council to make reports to the California governor every year starting in 2021.²⁹⁶ Ensuring that this provision remains in the bill and is faithfully followed would be a good first step on the path to success. Reformers should also make sure to pressure the necessary actors so that the Judicial Council reacts appropriately to the data they receive, as the Kentucky Supreme Court did. If the Judicial Council and the legislature (with the help of activist reformers) continually monitor the new pretrial release program and revise it as necessary, SB 10 may well work to slowly improve California's pretrial detention system. Since Senator Hertzberg is working with the ACLU to ensure that the law is implemented justly, perhaps reformers could encourage him and his colleagues to create a checklist of goals to be met; reduction in detention rate for low-level criminals, reduction of racial disparities in pretrial detention, and transparency in implementation would be a

292. *Supra* Part V.

293. *Id.*

294. BERMAN & FOX, *supra* note 155, at 115–16.

295. *Supra* Part V (Kentucky Supreme Court, upon discovering that its pretrial release rates were too low following reform, implemented new rules to try to fix the problem).

296. S.B. 10 § 1320.24, 2018 Leg., 2017–2018 Reg. Sess. (Cal. 2018).

good start. Such a checklist would allow reformers a tangible way of ensuring that both legislators and the Judicial Council fulfill their end of the bail reform bargain—and an easy way to hold them accountable to the public if they do not.

Based on past patterns, it is clear that the idealists who push for bail reform are not going to get everything they wanted out of SB 10. In fact, if there is one thing reformers should not do, it is to press too hard for overly liberalized pretrial release, even if SB 10 is overturned by referendum in 2020. As discussed above, this type of aggressive reform will always be faced with vehement opposition from those who value order and safety, as well as from actors within the court systems. At best, such reforms would never be fully implemented (if they ever get implemented). At worst, they might result in a backlash that makes things worse than they are now—as demonstrated by the fact that pretrial detention rates skyrocketed a mere twenty years after the liberal bail reforms of the 1960s thanks to the war on crime.

With an eye towards compromising with institutional actors and those who seek to increase order in society, however, small steps can be taken towards progress. Transparency, self-evaluation, reduction in detention rates for low-level criminals (particularly those who would otherwise be stuck in jail due to inability to post bail), and a system that does not exacerbate racial disparities—while these are not the fix-all, utopian goals envisioned by pretrial detention reformers—are good, reasonable targets to work toward.

VII. CONCLUSION

History shows that when idealists expect too much of criminal justice reform, they are disappointed over and over again. This is in large part due to a failure to understand that actors within the court system have little incentive to implement liberalizing reforms, and every incentive to keep things the way they are. This does not mean that SB 10 is destined to fail; it just means that reformers should have reasonable expectations for its success. The problems created by judicial or prosecutorial discretion are unlikely to be eliminated. But, if reformers focus on ensuring that both the risk assessment tool and the court's methodologies are transparent, as well as making sure that the Judicial Council self-evaluates and promises to improve on failures, SB 10 could represent the first steps toward a fairer pretrial system.

