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No Luck for the Accused: How SB 262 Keeps the Presumption of Guilt for Many Arrestees

Ismael Perez

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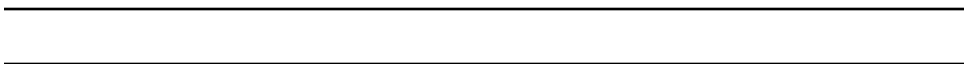
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UNIVERSITY OF THE PACIFIC LAW REVIEW



No Luck for the Accused: How SB 262 Keeps the Presumption of Guilt for Many Arrestees

Ismael Perez*

Code Sections Affected

Penal Code §§ 1269d, 1302.5 (new), § 1269b (amended).
SB 262 (Hertzberg); In Floor Process.

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I. INTRODUCTION

Kenneth Humphrey—a sixty-six-year-old San Francisco resident—spent almost an entire year in jail awaiting trial.¹ Mr. Humphrey’s neighbor accused Mr. Humphrey of stealing \$5 and a bottle of cologne and threatening him.² The judge used the bail schedule and Mr. Humphrey’s criminal history to set the bail amount at \$600,000.³ Mr. Humphrey contested the bail amount, and eventually the court lowered it to \$350,000, which he still could not afford.⁴ Unfortunately, Mr. Humphrey waited for his hearing in jail, like the numerous arrestees who cannot afford bail.⁵

County jails across California often hold arrestees in jail without a conviction or sentence solely because of their inability to post bail.⁶ The California bail system disproportionately holds poor and people of color without a conviction.⁷ California uses a cash bail system that requires an arrestee to pay a monetary amount out of

1. Nico Savidge, *Thrust into Spotlight of California’s Crusade Against Cash Bail, Kenneth Humphrey Hopes to Be an Example*, MERCURY NEWS (Nov. 28, 2020), <https://www.mercurynews.com/2020/11/28/thrust-into-spotlight-of-californias-crusade-against-cash-bail-kenneth-humphrey-hopes-to-be-an-example/> (on file with the *University of the Pacific Law Review*).

2. *Id.*

3. *Id.*; see also Lindsey Carlson, *Bail Schedules: A Violation of Judicial Discretion*, PRETRIAL JUST. INST. (Dec. 6, 2010), <https://university.pretrial.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=b646a57f-6399-2fe4-5683-021480c3634a> (on file with the *University of the Pacific Law Review*) (defining bail schedules as a procedural scheme made by local officials—or codified in state law—that assign standard bail amounts based on the offense).

4. See *In re Humphrey*, 11 Cal. 5th 135, 146 (2021) (providing that the court lowered the bail to \$350,000 because Mr. Humphrey was getting treatment without considering whether he can pay the new amount).

5. Savidge, *supra* note 1; see Thanithia Billings, *Private Interest, Public Sphere: Eliminating the Use of Commercial Bail Bondsmen in the Criminal Justice System*, 57 BOS. COLL. L. REV. 1337, 1339 (2016) (exposing that millions of prisoners in the United States are currently imprisoned due to their inability to pay bail).

6. See Lil Kalish, *California Will No Longer Jail People Just Because They’re Poor*, MOTHER JONES (Mar. 25, 2021), <https://www.motherjones.com/politics/2021/03/california-will-no-longer-jail-people-just-because-theyre-poor/> (on file with the *University of the Pacific Law Review*) (reporting that roughly 40,000 people are in California’s county jails awaiting their hearings).

7. See Wendy Sawyer, *How Race Impacts Who is Detained Pretrial*, PRISON POL’Y INITIATIVE (Oct. 9, 2019), https://www.prisonpolicy.org/blog/2019/10/09/pretrial_race/ (on file with the *University of the Pacific Law Review*) (proclaiming that the last nationwide study showed that nearly 7 in 10 detainees awaiting trial were people of color).

pocket or obtain a surety to cover the amount to secure their release.⁸ Under a cash bail system, courts set a fee that a detainee must pay to guarantee they will return to all future hearings.⁹ California has one of the largest populations of individuals in jail before trial or conviction in the nation.¹⁰ Unfortunately, the inability to post bail increases recidivism rates for prisoners because being detained for long periods of time pretrial correlates with new criminal activity.¹¹ By holding such a sizeable pretrial population in jails, the cash bail system only further exacerbates high incarceration rates and subsequent jail growth.¹²

California legislators proposed SB 262 to reform the cash bail system.¹³ SB 262 would have aimed to change California's pretrial laws requiring detainees to pay bail and court fees before a guilty conviction to secure their release.¹⁴ SB 262 would have been progressive for bail reform because it would have changed pretrial conditions for low-level offenders, but it would not have solved the bail problem for the exempt offenders.¹⁵ The Legislature should adopt rules to delegate some of the judge's discretion to the community and provide more guidance in adopting a statewide bail schedule to alleviate bail problems.¹⁶

8. See Evan Harris, *Opinion: Cash Bail Remains a Major Contributor to Mass Incarceration in California*, TIMES SAN DIEGO (May 15, 2021), <https://timesofsandiego.com/opinion/2021/05/15/cash-bail-remains-a-major-contributor-to-mass-incarceration-in-california/> (on file with the *University of the Pacific Law Review*) (explaining that California uses a cash bail system in its courts).

9. See *id.* (defining the cash bail system as a system that California courts use where they require a defendant to pay some amount of money as a guarantee they will return to future hearings).

10. See Kalish, *supra* note 6 (revealing that California has the second-highest pretrial detention rate in the country).

11. See Christopher T. Lowenkamp et al., *The Hidden Costs of Pretrial Detention* LAURA AND JOHN ARNOLD FOUND. 19 (2013), https://craftmediabucket.s3.amazonaws.com/uploads/PDFs/LJAF_Report_hidden-costs_FNL.pdf (on file with the *University of the Pacific Law Review*) (finding that people detained pretrial were "1.3 times more likely" to engage in new criminal activity twelve months after the court resolved their case than a person who the court released pretrial at some point).

12. See *Understanding and Confronting the Prison-Industrial Complex*, ARABELLA ADVISORS 10–11 (Oct. 2018), <https://www.arabellaadvisors.com/wp-content/uploads/2018/11/Understanding-and-Confronting-the-Prison-Industrial-Complex.pdf> (on file with the *University of the Pacific Law Review*) (explaining that bail bond agents are "egregious actors" who exploit their power to jail people and contribute to the prison-industrial complex); see also *What is a Bail Agent?*, CAL. BAIL AGENTS ASS'N, <https://cbaa.com/bail-agent-portal/> (last visited Aug. 10, 2021) (on file with the *University of the Pacific Law Review*) (defining a bail agent as "any person, agency or corporation that will act as a surety and pledge money or property as bail for the appearance of a defendant in court").

13. See SENATE COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF SB 262, at 5 (Mar. 23, 2021) (stating "[t]he reforms in SB262 will end unnecessary pretrial incarceration and eliminate the bail industry's unjust profiteering").

14. *Id.*

15. See Matthew J. Hegreiness, *America's Fundamental and Vanishing Right to Bail*, 55 ARIZ. L. REV. 909, 958 (2013) (describing the elimination of the right to bail); see also SENATE COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF SB 262, at 5 (Mar. 23, 2021) (detailing how reforming bail required changing the cash bail system).

16. See *Pretrial Release in California: Legal Parameters for Evidence-Based Practices*, NAT'L CTR. FOR STATE CTS. 1, 9–10 (Aug. 23, 2015), https://www.ncsc.org/_data/assets/pdf_file/0017/1583/23bpretriallegalbrief82315.ashx.pdf (on file with the *University of the Pacific Law Review*) (describing how California should adopt evidence-based pretrial rulings).

II. LEGAL BACKGROUND

Cash bail reform is a decades-long conversation in America.¹⁷ The need for reform grew as incarceration rates increased dramatically in America.¹⁸ Section A deliberates on the history and purpose of bail in America, and how California uses bail today.¹⁹ Section B looks at the issue of mass incarceration in California today.²⁰

A. History of Bail in the United States

Since the U.S. legal system's inception, it has used a cash bail system.²¹ Courts historically used bail to ensure the defendant appears in court.²² The first Congress established the right for a detainee to secure their release with bail, and prohibited excessive bail with the Judiciary Act of 1789 ("Judiciary Act").²³ Notably, courts do not allow bail for capital offenses when the presumption of guilt against the detainee is great.²⁴ The Judiciary Act provided a federal right to bail for almost 200 years in America until Congress revoked this right.²⁵ Subsection 1 explores how the federal government eliminated the right to bail.²⁶ Subsection 2 explains the contemporary California cash bail system and highlights its flaws.²⁷

1. How America Eliminated Detainees' Right to Bail

In the 1940s, judges functionally changed the purpose of bail when they began to analyze the detainee's risk of fleeing before their hearings when setting bail.²⁸ Congress then enacted The Bail Reform Act of 1966 that allowed courts to consider evidence against the detainee and their detainee's characteristics when

17. See Jade Gasek, Comment, *Community First: Why California's Elimination of Cash Bail May Have Missed the Mark*, 51 U. PAC. L. REV. 1, 6 (2019) (pointing to President Johnson's proclamation as the start of the legal battle against money bail in the 1960's).

18. See *Understanding and Confronting the Prison-Industrial Complex*, *supra* note 12, at 4 (recognizing that ending mass incarceration requires fundamentally reforming "sentencing policies and drug laws, as well as reforms of prosecutorial and policing practices that correlate with soaring prison populations.").

19. *Infra* Section II.A.

20. *Infra* Section II.B.

21. See Jordan Gross, *Devil Take the Hindmost: Reform Considerations for States with a Constitutional Right to Bail*, 52 AKRON L. REV. 1043, 1048 (2018) (emphasizing that America has had the same bail system since its inception because the system predated America's independence).

22. See Carlson, *supra* note 3 (explaining that the role of bail historically was to ensure that the defendant would return to trial).

23. Hegreness, *supra* note 15, at 947.

24. See *id.* at 924 (highlighting that the consensus right to bail clause in most states had proof element).

25. *Id.* at 914.

26. *Infra* Subsection II.A.1.

27. *Infra* Subsection II.A.2.

28. Gasek, *supra* note 17, at 6.

setting bail.²⁹ Congress continued to give justices greater discretion when setting bail amounts for detainees with the passing of The Bail Reform Act of 1966.³⁰ The California Supreme Court has provided guidance in changing the system this year.³¹

The Bail Reform Act of 1984 (“Bail Reform Act”) drastically changed America’s bail system.³² Prior to the Act, forty-eight states protected the right of a detainee to secure their release before trial with statutes or constitutional provisions.³³ The Bail Reform Act gave judges the authority to deliberate on a detainee’s potential danger to the community when setting a bail amount.³⁴ Congress wanted courts to weigh the competing interests of the detainee against the interests of public safety when setting bail.³⁵ Courts can set high bail amounts or deny bail outright to protect the public.³⁶ Congress also allowed courts to deny bail for detainees in noncapital cases for the first time.³⁷ Currently, courts may also deny bail in non-capital cases if they consider the detainee a flight risk or a danger to a person or the community.³⁸

In the United States Supreme Court case, *United States v. Salerno*, an arrestee challenged the Bail Reform Act’s constitutionality.³⁹ The federal district court denied bail altogether, ordering the jail to hold the detainees before trial with no means of securing their release.⁴⁰ The detainees challenged the Bail Reform Act’s on the grounds that denial of bail violated their right to a fair judicial process.⁴¹ The Supreme Court reversed the Court of Appeals order to vacate the ruling.⁴² The Court held there was a limited exception to pretrial detention, which was to protect the public.⁴³ Further, the Supreme Court held that the Bail Reform Act fell within

29. *Id.*; see also Hegreiness, *supra* note 15, at 957 (showing that federal government brought the change to § 46 of the Federal Rules of Civil Procedure with the Bail Reform Act of 1966).

30. Hegreiness, *supra* note 15, at 957.

31. See *In re Humphrey*, 11 Cal. 5th 135, 143 (2021) (holding that it is unconstitutional to detain a person solely because they cannot afford bail).

32. See Gasek, *supra* note 17, at 7 (emphasizing that the federal government embraced bail reform efforts in enacting this law).

33. Hegreiness, *supra* note 15, at 949.

34. See *id.* at 958 (providing that the Bail Reform Act was the first law in American history that allowed judges to consider the dangers to the community or another person).

35. *Id.* at 960.

36. See *id.* (“This is the first law in America—colonial, territorial, federal, or state—that allowed judges to consider ‘danger to the community or any other person’ as a reason for denying bail, albeit for the limited case of a defendant seeking release after conviction.”).

37. *Id.* at 959–960 .

38. *Id.* at 960.

39. See *United States v. Salerno*, 481 U.S. 739, 739 (1987) (discussing the defendant’s argument that the act violated the Fifth Amendment’s substantive due process by permitting excessive punishment pretrial).

40. *Id.*

41. *Id.* at 744; see also U.S. CONST. amend. V (setting forth that no person shall be “deprived of life, liberty, or property without due process of law”).

42. *Salerno*, 481 U.S. 739, 755 (1987).

43. *Id.*

this limited exception, and was therefore constitutional.⁴⁴ Since *United States v. Salerno*, neither the courts nor legislature have made significant changes to the federal bail system.⁴⁵

In 2021, the California Supreme Court held that it is unconstitutional when a jail holds a detainee solely because they cannot pay their bail amount.⁴⁶ Mr. Murphy was unable to pay bail and sat in jail waiting for his hearing.⁴⁷ The court found the District Court should have released Kenneth Murphy.⁴⁸ Additionally, the Court determined that bail amounts in the range of \$600,000 or even \$350,000 were unreasonably high.⁴⁹ The California Supreme Court held that district courts need to consider the defendant's financial means when setting a bail amount.⁵⁰ Further, bail must be set at a price that the defendant can reasonably afford.⁵¹ The California Supreme Court did not define what constitutes a reasonable amount in this opinion.⁵² The lower courts must now consider a detainee's financial situation when setting a bail amount since the California Supreme Court set the precedent.⁵³

2. California's High Bail and Disparities Based on Geographically Determined Bail Amounts

California uses a cash bail system in which courts set a monetary bail amount that a detainee must pay to ensure their release.⁵⁴ California most commonly uses a schedule to set a bail amount that the defendant must pay.⁵⁵ A bail schedule is a judicially drafted list of bail amounts set for each offense, and the schedule contributes to the high bail amounts.⁵⁶ Judges also contribute to California's high bail amounts by using their discretion to set the amount.⁵⁷ Subsection a describes

44. *Id.*; see also Hegreness, *supra* note 15, at 959 (revealing that Justice Rehnquist was the "right-hand man" as Assistant Attorney General to then Attorney General in Nixon's Department of Justice).

45. See Gasek, *supra* note 17, at 7 (finding that the United States has continued the status quo since the Bail Reform Act of 1984).

46. *In re Humphrey*, 11 Cal. 5th 135, 143 (2021).

47. *Id.* at 145–146.

48. *Id.* at 148–49.

49. See *id.* at 148 (explaining the court found that these sums were a substantial amount).

50. *Id.* at 153.

51. *Id.*

52. See *id.* at 156 (providing that courts must set an amount that is reasonable but omitting any definition of what is reasonable).

53. See *Precedent*, LEGAL INFO. INST (last updated May 2020), <https://www.law.cornell.edu/wex/precedent> (on file with the *University of the Pacific Law Review*) (explaining that a Supreme Court ruling sets an authority that the courts that precede it must follow).

54. See Harris, *supra* note 8 (explaining that California uses a cash bail system in their courts).

55. Pranita Amaty et al., *Bail Reform in California*, UCLA DEPT. PUB. POL'Y 16 (May 2017), <http://pretrialservicesca.org/wp-content/uploads/Bail-Reform-in-California-UCLA-2017.pdf> (on file with the *University of the Pacific Law Review*).

56. *Id.* at 5.

57. *Pretrial Release in California: Legal Parameters for Evidence-Based Practices*, *supra* note 16, at 10.

the purpose of and flaws inherent in county bail schedules.⁵⁸ Subsection b illuminates the disparities in county bail schedules.⁵⁹ Subsection c focuses on the judges' use of discretion to set high bail amounts.⁶⁰

a. Bail Schedules Contribute to California's High Bail Amounts and Punish Indigent Detainees

Multiple counties in California set bail at different amounts for similar offenses.⁶¹ Courts set bail by using a predetermined bail amount from a standardized schedule that judges must adopt and revise annually.⁶² Most counties in California use bail schedules during the bail hearing process.⁶³ California adopted bail schedules to streamline the bail process and set quick uniform amounts.⁶⁴

Criminal justice experts have found there are issues with using a streamlined process to set bail.⁶⁵ Courts use the bail schedule to set a bail amount based on the offense, often without regard to the arrestees' characteristics.⁶⁶ Overall, California has a median bail amount that at \$50,000 is five times higher than the rest of the country.⁶⁷ Bail schedules also use other factors, like criminal history, that increase the amount of bail.⁶⁸ Many offenders are unable to pay the high bail under a bail schedule, so they are held in jail before trial.⁶⁹ The courts holding detainees in jail pretrial correlates with the detainees committing new criminal activity after their case is resolved.⁷⁰ Courts often increase bail for indigent people based on their past crimes, especially when their inability to pay bail likely led to the new criminal

58. *Infra* Subsection II.A.2.a.

59. *Infra* Subsection II.A.2.b.

60. *Infra* Subsection II.A.2.c.

61. See Carlson, *supra* note 3 (stating that California Penal Code requires each court in California to make its own bail schedule and set bail amounts for offenses).

62. *Id.*

63. See *id.* (finding that 64% of the respondent counties in the United States use a bail schedule).

64. See Amatya et al., *supra* note 55, at 7 (showing that California adopted CAL. PEN. CODE § 1269b to streamline the bail process).

65. See generally Carlson, *supra* note 3 (discussing the issues with bail schedules in California).

66. *Id.*

67. "Not in it for Justice" How California's Pretrial Detention and Bail System Unfairly Punishes Poor People, HUM. RTS. WATCH 33-34 (2017), https://www.hrw.org/sites/default/files/report_pdf/usbail0417_web_0.pdf (on file with the *University of the Pacific Law Review*); see also Stephanie Wykstra, *Bail Reform, Which Could Save Millions of Unconvicted People from Jail Explained*, VOX (Oct. 17, 2018), <https://www.vox.com/future-perfect/2018/10/17/17955306/bail-reform-criminal-justice-inequality> (on file with the *University of the Pacific Law Review*) (revealing that the federal median bail amount is ten-thousand dollars and as low as two-thousand dollars, like in New York).

68. Amatya et al., *supra* note 55, at 27.

69. "Not in it for Justice" How California's Pretrial Detention and Bail System Unfairly Punishes Poor People, *supra* note 67, at 33-34.

70. Lowenkamp et al., *supra* note 11, at 19.

activity.⁷¹

b. Disparities in County Bail Schedules Based on Geographical Location

Bail schedules vary widely county by county for no discernible reason.⁷² There are fifty-eight bail schedules in California, as California requires each judge to create the schedule.⁷³ Bail amounts average anywhere from \$14,824 to \$63,781.⁷⁴ Judges must meet annually to revise the bail schedule, but judges only need to consider the dangerousness of the offense when setting the bail.⁷⁵ An unnamed judge from Contra Costa admitted that judges do not base their schedules on actual data.⁷⁶ The current schedule system results in disparate bail amounts, where the richest county—Contra Costa—sets the same bail amount as Del Norte—the poorest county.⁷⁷

c. Judges Have Used Their Discretion to Keep Detainees in Confinement

Judges make the final decision on a bail amount for detainees.⁷⁸ They have the authority to use the bail schedule or to deviate from it and set a higher bail amount.⁷⁹ Judges thus have the discretion to set bail as they would like.⁸⁰ Most judges believe that it is most safe to keep the detainee in custody.⁸¹ Some judges oppose releasing detainees because they fear that the detainee will commit more crimes before trial.⁸² Some judges will even set high bail amounts for the sole purpose of keeping the detainee in custody.⁸³ Most commonly, judges use the bail

71. See Amatya et al., *supra* note 55, at 27 (revealing that courts will increase bail amount if the arrestee has a criminal history); see also Lowenkamp et al., *supra* note 11, at 19 (finding that people detained for longer periods pretrial were more likely to commit crime than those released quickly).

72. See “Not in it for Justice” *How California’s Pretrial Detention and Bail System Unfairly Punishes Poor People*, *supra* note 67, at 33–34 (revealing that a judge admitted the bail schedule decisions had no basis in actual data).

73. Amatya et al., *supra* note 55, at 11.

74. Sonya M. Tafoya, *Assessing the Impact of Bail on California’s Jail Population*, PUB. POL’Y INST. CAL. 15 (June 2013), https://www.ppic.org/content/pubs/report/R_613STR.pdf (on file with the *University of the Pacific Law Review*).

75. “Not in it for Justice” *How California’s Pretrial Detention and Bail System Unfairly Punishes Poor People*, *supra* note 67, at 33.

76. *Id.* at 33–34.

77. Tafoya, *supra* note 74, at 16.

78. CAL. PEN. CODE § 1275 (West 2021).

79. *Id.*

80. See *Pretrial Release in California: Legal Parameters for Evidence-Based Practices*, *supra* note 16, at 10 (explaining that judges have wide discretion in setting bail despite having to act within constitutional and statutory parameters).

81. “Not in it for Justice” *How California’s Pretrial Detention and Bail System Unfairly Punishes Poor People*, *supra* note 67, at 59.

82. *Id.* at 60.

83. John Raphling, *California Court Orders Judges to Follow the Law on Bail*, HUM. RTS. WATCH (Feb. 8, 2018), <https://www.hrw.org/news/2018/02/08/california-court-orders-judges-follow-law-bail> (on file with the

schedule to set a quick bail amount.⁸⁴ The detainee can request a bail hearing, but the court usually conducts these hearings in haste.⁸⁵ County citizens elect Superior Court judges into their position as a judge.⁸⁶ Most judges oppose pretrial release resulting in more crime because they must answer to the public that elects them.⁸⁷

B. “Prison Industrial Complex” in California

Many companies are turning a profit under the current detention system in this era of mass incarceration.⁸⁸ America is detaining more of its own population than any other country in the world.⁸⁹ Therefore, many criminal justice experts named the current era the “Prison Industrial Complex.”⁹⁰ High incarceration rates turned the criminal justice system into a profitable tool for many industries.⁹¹ The bail bonds industry profits from mass incarceration in the detention system, earning billions a year.⁹² Subsection 1 explains the scope of the issue in California.⁹³ Subsection 2 discusses how California’s cash bail system feeds into the Prison Industrial Complex.⁹⁴

1. Mass Incarceration in California

Jails have grown, profits have grown, and jail populations have grown steadily over the last thirty years.⁹⁵ California jail populations have increased by 180%

University of the Pacific Law Review).

84. See Amatya et al., *supra* note 55, at 7 (showing that California adopted bail schedules to streamline the bail process).

85. “Not in it for Justice” *How California’s Pretrial Detention and Bail System Unfairly Punishes Poor People*, *supra* note 67, at 31.

86. See *Fact Sheet*, JUD. COUNCIL CAL. 3 (Oct. 2020), https://www.courts.ca.gov/documents/California_Judicial_Branch.pdf (on file with the *University of the Pacific Law Review*) (explaining how county voters elect Superior Court judges).

87. “Not in it for Justice” *How California’s Pretrial Detention and Bail System Unfairly Punishes Poor People*, *supra* note 67, at 60; see also *Fact Sheet*, *supra* note 86, at 3 (providing election details on justices in California).

88. See *Understanding and Confronting the Prison-Industrial Complex*, *supra* note 12, at 4 (indicating a network of companies profit from American prisons, thus creating a “prison industrial complex”).

89. See *id.* at 5 (detailing how America has approximately 2.3 million people under correctional supervision).

90. *Id.* at 4.

91. *Id.* at 5.

92. See *id.* at 11 (describing how bail bond agents exploit the detention system to make two billion dollars of profit annually).

93. *Infra* Subsection II.B.1.

94. *Infra* Subsection II.B.2.

95. See Kara Gotsch & Vinay Basti, *Capitalizing on Mass Incarceration: U.S. Growth in Private Prisons*, SENT’G PROJ. (Aug. 2, 2018), <https://www.sentencingproject.org/publications/capitalizing-on-mass-incarceration-u-s-growth-in-private-prisons/> (on file with the *University of the Pacific Law Review*) (detailing the exponential growth in private prisons and their populations).

since 1970.⁹⁶ Drug convictions account for most of the penal population explosion.⁹⁷ Drug arrests more than tripled during this time, as police conducted a record number of drug sweeps and suspicionless stops and searches that primarily affected people of color.⁹⁸ Mass incarceration has devastating effects on communities of color because of the economic distress it can cause, like the loss of a job.⁹⁹ Further, communities of color can have broken families because detention leads to the loss of children.¹⁰⁰

Courts also charge the detainee fees that perpetuate a cycle of poverty and incarceration.¹⁰¹ Sixty percent of detainees have an annual income of under \$12,000 prior to arrest.¹⁰² Courts can charge the detainee fees to pay to the probation department or the court.¹⁰³ Courts can also charge detainees for drug tests or other treatments as conditions of their parole.¹⁰⁴ Courts can modify the arrestee's sentence or garnish their wages for being unable to pay their fees.¹⁰⁵

Further, a cash bail system results in more convictions because many detainees will accept plea deals so they may go home.¹⁰⁶ A majority of the felony convictions today are the result of plea bargains.¹⁰⁷ Many detainees face minor charges that would not require jail time, but they cannot secure their release because of their inability to pay bail.¹⁰⁸ These low-level offenders eventually take a plea deal that gets them released, but under the condition that they have a record and are on probation.¹⁰⁹ The offender is now likely to face jail time in the future for a

96. *Incarceration Trends in California*, VERA INST. JUST. (2019), <https://www.vera.org/downloads/pdfdownloads/state-incarceration-trends-california.pdf> (on file with the *University of the Pacific Law Review*).

97. MARC MAUER, *RACE TO INCARCERATE* 33 (The New Press, rev. ed. 2006).

98. MICHELLE ALEXANDER, *THE NEW JIM CROW MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 91 (The New Press, 10th ed. 2020); *see also* "Not in it for Justice" *How California's Pretrial Detention and Bail System Unfairly Punishes Poor People*, *supra* note 67, at 98 (remarking that New York's "Stop-and-Frisk" policy mostly affected people of color, with 80% of the individuals affected being people of color).

99. *See Understanding and Confronting the Prison-Industrial Complex*, *supra* note 12, at 5 ("Those convicted of felony offenses—primarily blacks and Latinxs—suffer profound, long-term collateral consequences, including, but not limited to, lost voting and civil rights and legalized discrimination in employment, housing, and access to public benefits.").

100. *See id.* (detailing the devastation to communities caused by mass incarceration).

101. ALEXANDER, *supra* note 98, at 193.

102. *Id.* at 194.

103. *Id.* at 193.

104. *Id.*

105. *Id.*

106. Emily Yoffe, *Innocence Is Irrelevant*, ATLANTIC (2017), <https://www.theatlantic.com/magazine/archive/2017/09/innocence-is-irrelevant/534171/> (on file with the *University of Pacific Law Review*).

107. *See id.* (revealing that 97% of convictions at the state level are the result of plea bargains).

108. *Id.*

109. *Id.*

probation violation.¹¹⁰ Cash bail fuels the growth of pretrial and convicted prison populations.¹¹¹

2. California's Cash Bail System Allows Pretrial Detainment of Many Individuals

The bail bond industry profits off the California detention system.¹¹² Bail bond agents have a unique position in our detention system because they can imprison debtors, seize a home, and make a profit from detainees.¹¹³ Bail bond agents can also choose to charge people lower fees.¹¹⁴ They usually base their decision on a detainee's access to finances or collateral.¹¹⁵ The agents collect some of the largest premiums from California detainees because of the percentage they charge and the high median bail amount.¹¹⁶

California's incarceration rate stands out nationally because it ranks higher than entire countries like France and Italy.¹¹⁷ California's pretrial cash bail policies drive the growth of jails since there are more individuals held pretrial than there are individuals convicted.¹¹⁸ California jails steadily grew to account for the high number of pretrial detainees.¹¹⁹ Further, private jails have become more prominent in California as the prisoner population grows.¹²⁰

110. See *id.* (providing an example of how an individual who took a plea deal was later charged with violating his probation).

111. See *Incarceration Trends in California*, *supra* note 96 (showing statistics that there has been a jail population increase).

112. *Understanding and Confronting the Prison-Industrial Complex*, *supra* note 12, at 10–11.

113. See *The Devil in the Details: Bail Bond Contracts in California*, UCLA CRIM. JUST. REFORM CLINIC 1 (May 2017), https://static.prisonpolicy.org/scans/UCLA_Devil%20in_the_Details.pdf (on file with the *University of the Pacific Law Review*) (detailing legal contract terms that give the bail bond agent the ability to charge extra fees or seize a home).

114. See *id.* at 12 (reporting that bail bond agents can offer lower premium charges based on the detainee's wealth).

115. See *id.* at 1 (explaining that a bail agent will charge a detainee a lower premium if they hire a private attorney, belong to a union, or have more collateral).

116. See SENATE COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF SB 262, at 9 (Mar. 23, 2021) (explaining the need for the bill because bail agents charge 10% of the bail amount); see also "Not in it for Justice" *How California's Pretrial Detention and Bail System Unfairly Punishes Poor People*, *supra* note 67, at 33–34 (revealing that California's median bail amount is five times the federal median).

117. See *California Profile*, PRISON POL'Y INITIATIVE, <https://www.prisonpolicy.org/profiles/CA.html> (last visited July 12, 2021) (on file with the *University of the Pacific*) (reporting that California's incarceration rate—individuals incarcerated per 100,000 population—of 581 is higher than all founding NATO countries).

118. See *id.* (shedding light on a chart that shows the pretrial jail population is about fourteen-thousand individuals greater than the convicted population).

119. See *Incarceration Trends in California*, *supra* note 96 (showing the growth of pretrial population in California since 1970).

120. *Id.*

III. SB 262

SB 262—or the Safe and Resilient Communities Act—strived to set zero-dollar bail by exempting all misdemeanors and most felony offenses from having bail.¹²¹ Senator Hertzberg, SB 262’s author, moved the bill to the inactive file after a murder occurred because he believed the killing hurt the bill’s chance of passing.¹²² He stated he intends to reintroduce the bill in the next session, turning SB 262 into a two-year bill.¹²³ SB 262 would have added more exempt offenses to the list that disqualify defendants from zero-dollar bail.¹²⁴ SB 262 would have required courts to consider whether setting zero-dollar bail for exempt offenses will protect the public while ensuring the defendants return to trial.¹²⁵ Furthermore, if courts find bail necessary, SB 262 would have required them to set bail at a level the arrestee has the present ability to pay.¹²⁶

Additionally, SB 262 would have ended all county-wide bail schedules and instead implements a statewide bail schedule.¹²⁷ SB 262 set forth that the Judicial Council of California shall prepare the new statewide bail schedule.¹²⁸ The Judicial Council consists of a Chief Justice and fourteen judges, and they will annually revise the new bail schedule.¹²⁹ SB 262 would have required all county courts to adhere to one statewide bail schedule.¹³⁰

SB 262 also would have made alterations to detainees paying premiums to bail bond agents.¹³¹ SB 262 would have required bail bond agents to return the detainee’s premium if the detainee makes all necessary court appearances.¹³² Also, the bail bond agent must return the premium if the court does not convict the

121. See SENATE COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF SB 262, at 1 (Mar. 23, 2021) (putting forth that all misdemeanors and felonies must have zero-dollar bail except serious and violent felonies); see also CAL. PEN. CODE § 1192.7 (West 2012) (listing forty-two offenses as serious felonies).

122. See Evan Symon, *Bail Reform Bill Dies in Assembly Following High-Profile Crimes Linked to No-Bail Releases*, CAL. GLOBE (Sept. 10, 2021), <https://californiaglobe.com/articles/bail-reform-bill-dies-in-assembly-following-high-profile-crimes-linked-to-no-bail-releases/> (on file with the *University of the Pacific Law Review*) (detailing how the bill died after a man released on zero-dollar bail murdered a woman and her dog shortly after his release).

123. *Id.*

124. See SENATE COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF SB 262, at 1 (Mar. 23, 2021) (amending existing law to include the following offenses that cannot have bail set to zero dollars: interference with a person’s exercising of civil rights, hate crimes, human trafficking, willful harm to a child, corporal punishment upon a child, crimes against an elder or dependent adult, and assault with a deadly weapon).

125. *Hearing on SB 262 Before the S. Comm. on Pub. Safety*, 2021 Leg., 2021–2022 Sess. (Cal. 2021) [hereinafter *262 Pub. Safety Hearing*] (on file with the *University of the Pacific Law Review*).

126. SB 262, 2021 Leg. 2021–2022 Sess. (Cal. 2021) (as amended on May 20, 2021, but not enacted).

127. *262 Pub. Safety Hearing*, *supra* note 123.

128. *Id.*

129. *Id.*; see, e.g., *Judicial Council*, STATE BAR CAL., <http://www.calbar.ca.gov/About-Us/Who-We-Are/Committees/Overview-of-Volunteer-Opportunities/Judicial-Council> (last visited Aug. 10, 2021) (on file with the *University of Pacific Law Review*) (providing the general information on the California Judicial Council).

130. *262 Pub. Safety Hearing*, *supra* note 123.

131. See *id.* (adding CAL. PEN. CODE § 1302.5).

132. *Id.*

detainee or dismisses the case.¹³³ Further, SB 262 would have limited the amount of the nonrefundable premium paid to the bail bondsmen to no more than five percent.¹³⁴

IV. ANALYSIS

SB 262 was California's attempt to reform a cash bail system that detains people solely because they cannot pay bail.¹³⁵ The California Legislature would have allowed many courts to release low-level offenders quickly on zero-dollar bail.¹³⁶ Subsection A discusses how SB 262 was the right step to address bail reform as it allows courts to release low-level offenders quickly.¹³⁷ Subsection B explains why SB 262 would not have alleviated all problems with cash bail.¹³⁸ Subsection C focuses on other potential solutions to California's bail issue, like delegating some of the judge's discretion or providing guidance in making the statewide bail schedule.¹³⁹

A. SB 262 is a Progressive Step for Bail Reform in California

SB 262 would have been beneficial to solving the bail problem because courts will release many offenders before trial, regulate bail agents, and a statewide bail schedule will resolve disparities.¹⁴⁰ Subsection 1 illustrates how a zero-dollar bail would have led to quick pretrial releases of California defendants.¹⁴¹ Subsection 2 discusses the benefits of what would have been the new limits on bail bond agents.¹⁴² Subsection 3 argues that a statewide bail schedule would have alleviated the disparities in bail amounts across California.¹⁴³

1. Detainees Would Have Been Released Quickly with Zero-Dollar Bail Thus Lowering the Prison Population

133. *See id.* (adding that the bail agent must return the premium paid by the detainee also if the court dismisses the action).

134. *Id.*; see Paul Heaton et al., *The Downstream Consequences of Misdemeanor Pretrial Detention*, 69 STAN. L. REV. 711, 721 (2017) (finding that the bail bond premium is usually set at 10% and nonrefundable).

135. *See* 262 *Pub. Safety Hearing*, *supra* note 123 (citing *In re Humphrey*'s holding that courts must have financial considerations for bail determinations).

136. *See id.* (requiring the court to dismiss bail if various conditions are met).

137. *Infra* Section IV.A.

138. *Infra* Section IV.B.

139. *Infra* Section IV.C.

140. *See* 262 *Pub. Safety Hearing*, *supra* note 123 (providing the requirements for courts to release low-level offenders, order bail agents to return premiums, and adopt a statewide bail schedule).

141. *Infra* Subsection IV.A.1.

142. *Infra* Subsection IV.A.2.

143. *Infra* Subsection IV.A.3.

SB 262 would have eliminated a large portion of the pretrial detention population in California because courts would not require offenders to pay any money to ensure their release.¹⁴⁴ Over 825,000 arrestees in California would have qualified for immediate release after booking because they are misdemeanor arrests.¹⁴⁵ These offenders would have gone home instantly because SB 262 would have required courts to release them without the need for a hearing.¹⁴⁶ It is essential for bail reform to release low-level offenders quickly because this would allow the detainee to go home where they can build their defense.¹⁴⁷

Further, this helps the mass incarceration problem in California because it would have lowered jail populations.¹⁴⁸ Zero-dollar bail would have reduced California's penal population because detainees who cannot afford bail will not feel forced to take on a plea deal.¹⁴⁹ This reduction in penal population will then lower convictions because the court will not put the offender on probation.¹⁵⁰ Releasing low-level offenders quickly gives detainees the opportunity to build a defense from home and ignore plea deals.¹⁵¹

2. Detainees Would Have Benefited from California's Regulations on Bail Bond Agents

SB 262 would have allowed the bail bond agent to charge a premium worth five percent of the bail amount, rather than the industry standard of ten percent.¹⁵² Detainees would have benefited from SB 262 because they would have been more likely to secure a surety to ensure their release since there would have been lower premiums they would have to pay.¹⁵³ Further, SB 262 would have required the

144. SENATE COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF SB 262, at 1 (Mar. 23, 2021).

145. See *California's Criminal Justice System: A Primer*, LEGIS. ANALYST OFF. (Jan. 17, 2013), <https://lao.ca.gov/reports/2013/crim/criminal-justice-primer/criminal-justice-primer-011713.aspx> (on file with the *University of the Pacific Law Review*) (providing the statistics of misdemeanor arrests in California).

146. 262 *Pub. Safety Hearing*, *supra* note 123; see also Kristi Leigh, *Zero Dollar Bail Explained after COVID-19 Positive Man Released from Jail*, FOX (Apr. 15, 2020), <https://kmpfh.com/news/local/fresno-county-health-officials-wont-identify-covid-19-positive-man-released-from-jail> (on file with the *University of the Pacific Law Review*) (explaining that courts adopted zero-dollar bail because the courts could not conduct the hearings).

147. See Yoffe, *supra* note 106 (explaining offenders out on cash bail would have more time and resources for their case and be less likely take a plea deal so the court releases them).

148. See *generally California's Criminal Justice System: A Primer*, *supra* note 147 (listing 741,122 adult and 84,333 juvenile arrests for misdemeanors in 2011 alone).

149. See Yoffe, *supra* note 106 (noting that many defendants facing minor charges that would not require further incarceration "feel compelled to take whatever deal the prosecutor offers, even if they are innocent").

150. See *id.* (detailing how the arrestees detained pretrial would take deals that gives them a record and puts them on probation so they can go home).

151. See *id.* (explaining that a benefit of releasing detainees pretrial is that they can go home and work on their case more effectively without taking a deal).

152. See 262 *Pub. Safety Hearing*, *supra* note 123 (noting the need to limit the premium a bail bond agent can charge); see also Paul Heaton et al., *supra* note 136, at 721 (finding that the bail bond premium is usually set at 10%).

153. 262 *Pub. Safety Hearing*, *supra* note 123.

premium to be refundable when it is usually not.¹⁵⁴ Refunds are preferable for detainees because they would have the opportunity to pay a lower premium knowing that the government may return the premium if they are innocent.¹⁵⁵ Ultimately, refunds will lower the profit the bail bond industry makes under the current detention system.¹⁵⁶ Lowering the bail bond industry's profit would have benefited the detention system because it would have diminished their leverage in California's politics.¹⁵⁷ This would have allowed for further advancements in bail reform in the future without the influence of an industry that profits off of indigent detainees.¹⁵⁸

3. A Statewide Bail Schedule Would Have Eliminated the Disparate Bail Amounts in California Counties

A statewide bail schedule would have set consistent bail amounts for every offense that every county's court must follow.¹⁵⁹ The practice of using county bail schedules is unjust because county judges often set bail amounts in their counties with no basis in data.¹⁶⁰ Detainees all over California would have benefited from a statewide bail schedule because the fifty-eight counties will no longer have a wide variance in amounts.¹⁶¹ With a statewide bail schedule, detainees would have no longer encountered higher bail amounts solely because of their location.¹⁶²

B. SB 262 Would not Have Alleviated the Problem of Poor Offenders Detained Pretrial in Some Instances

154. *Id.*; see also Paul Heaton et al., *supra* note 136, at 721 (finding that the bail bond premium is usually nonrefundable).

155. See SENATE COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF SB 262, at 1 (Mar. 23, 2021) (setting forth the requirement that fees be returned to the arrestee).

156. See *Understanding and Confronting the Prison-Industrial Complex*, *supra* note 12, at 11 (citing the high premiums and exploitation of poor detainees as the reason the bail bond industry profits in America's detention system).

157. Maria Dinzeo, *Bid to End Cash System Fails in California*, COURTHOUSE NEWS SERV. (Nov. 4, 2020), <https://www.courthousenews.com/bid-to-end-cash-bail-system-fails-in-california/> (on file with the *University of the Pacific Law Review*).

158. See generally *Understanding and Confronting the Prison-Industrial Complex*, *supra* note 12, at 10–11 (explaining how some for-profit companies “financially exploit those within the criminal justice system [and] cut corners in ways that threaten safety and wellbeing”).

159. 262 *Pub. Safety Hearing*, *supra* note 123.

160. “*Not in it for Justice*” *How California's Pretrial Detention and Bail System Unfairly Punishes Poor People*, *supra* note 67, at 33–34 (revealing that a judge admitted the bail schedule decisions had no basis in actual data).

161. See 262 *Pub. Safety Hearing*, *supra* note 123 (proposing a statewide bail schedule); see also Tafoya, *supra* note 74, at 15 (revealing the wide variance of bail amounts across California counties); see also Amatya et al., *supra* note 55, at 16 (reporting that there are fifty-eight bail schedules in California).

162. See Tafoya, *supra* note 74, at 16 (reporting the disparate bail amounts by county in California).

SB 262 would not have solved all of the bail system's problems.¹⁶³ SB 262 would not have eliminated the unfair cash bail practices for everyone because some offenders would have not qualified for zero-dollar bail.¹⁶⁴ Further, the bill would not change pretrial practices when the prosecutor alleges the detainee committed a felony.¹⁶⁵ Subsection 1 explains how many poor offenders will remain in jail when they do not qualify for zero-dollar bail.¹⁶⁶ Subsection 2 discusses how SB 262 would have not changed the level of discretion judges have.¹⁶⁷

1. Poor Offenders Would Have Remained Incarcerated When They did not Qualify for Zero-Dollar Bail.

Arrestees who would not qualify for zero-dollar bail would have likely had to pay bail because SB 262 would not eliminate the bail requirement for most felonies.¹⁶⁸ SB 262 cited many offenses that are exempt from receiving zero-dollar bail, one of which is the broadly defined "serious" or "violent" felony offense.¹⁶⁹ The penal code defines a serious or violent felony as including another forty-two offenses such as carjacking, murder, and rape.¹⁷⁰ SB 262 would have not changed the reality for an indigent detainee because they would have still had to remain in jail due to their inability to pay bail or secure a surety.¹⁷¹

SB 262 would have offered some help to the detainee because of the new regulations on the bail bond industry, but it would not be enough.¹⁷² SB 262 would have not regulated the agents amply because a detainee would still have to pay a premium of 5%, which would still be too high for an indigent person.¹⁷³ It would have been too high because a premium of five percent on the average bail amount of \$50,000 would be \$2,500.¹⁷⁴ This premium would have been high for the

163. See 262 Pub. Safety Hearing, *supra* note 123 (providing that the bill sets forth exempt offenses and only requires courts to consider nonfinancial means when setting bail).

164. See *id.* (citing a total of thirteen offenses on the list of offenses that do not qualify for zero-dollar bail).

165. See *id.* (providing that the bill does not set zero-dollar bail for all offenses).

166. *Infra* Subsection IV.B.1.

167. *Infra* Subsection IV.B.2

168. 262 Pub. Safety Hearing, *supra* note 123.

169. *Id.*

170. See CAL. PEN. CODE. § 1192.7 (West 2021) (providing the list of all forty-two serious offenses); see also *id.* § 667.5 (West 2019) (providing the definition for violent offenses but the defenses overlap with § 1192.7).

171. See Kalish, *supra* note 6 (reporting that there are roughly 40,000 people in county jails, and about half are there because they are unable to post bail).

172. See 262 Pub. Safety Hearing, *supra* note 123 (limiting the premium a bail bond agent can charge to 5% of the bail amount).

173. See SENATE COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF SB 262, at 9 (Mar. 23, 2021) (explaining how the bill would allow bail bond agents to keep 5% of the premium).

174. See "Not in it for Justice" *How California's Pretrial Detention and Bail System Unfairly Punishes Poor People*, *supra* note at 67, at 33–34 (explaining the impact of high premiums and that California's median bail amount is high compared to the rest of the country at \$50,000).

average offender because two-thirds of detainees report an income under \$12,000, and a \$2,500 premium would be 21% of that income.¹⁷⁵

The detainee may get a refund of their premium, but the requirements to get the refund are limited.¹⁷⁶ Not all detainees would have received the refund because a court would have to dismiss the case to allow it, and courts dismiss only a scant percent of cases.¹⁷⁷ The detainee could have still secured the refund if they made all of their trial appearances, but missing one hearing would have forfeited the premium to the bail bond agent.¹⁷⁸ This system would have maintained the presumption of guilt for alleged felony offenders because they would have remained detained if they would have not been able to pay bail without any guilty conviction.¹⁷⁹

2. SB 262 Would Have Left All Discretionary Power to the Judges Which Has Led to High Bail Amounts in the Past

California's Penal Code gives judges the discretion to set bail with many considerations after the right to bail diminished in the 1980s.¹⁸⁰ SB 262 would have added another factor to the Penal Code for the judge to consider: the detainee's finances.¹⁸¹ This requirement would have not changed our bail system meaningfully because judges could have still set high bail after considering the detainee's finances.¹⁸² SB 262's requirement that a judge consider new factors when setting bail would not have changed the potential abuse of discretion judges use to set high bail amounts.¹⁸³

Under SB 262, the legislature would have required the court to deliberate on the detainee's ability to pay, just like the superior court did in Kenneth Murphy's case.¹⁸⁴ The superior court did just what SB 262 would have required—considering

175. See ALEXANDER, *supra* note 98, at 194 (revealing that two-thirds of detainees "report annual incomes under \$12,000).

176. SENATE COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF SB 262, at 9 (Mar. 23, 2021).

177. See SENATE COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF SB 262, at 9 (Mar. 23, 2021) (providing the requirements to receive a refund of the premium paid to the bail agent); see also *Statewide Caseload Trends*, JUD. COUNCIL CAL. 1, 55 (2020), courts.ca.gov/documents/2020-Court-Statistics-Report.pdf (on file with the *University of the Pacific Law Review*) (reporting 17% of felonies disposed before trial were dismissals, acquittals, or transfers).

178. *262 Pub. Safety Hearing*, *supra* note 123.

179. See Hegreness, *supra* note 15, at 952 (defining the change in our bail system as a switch from presumption of innocence to presumption of guilt).

180. CAL. PEN. CODE § 1275 (West 2021); see also *supra* Subsection II.A.1 (detailing the history of the right to bail).

181. See *262 Pub. Safety Hearing*, *supra* note 123 (providing that judges must consider new things such as the detainee's finances).

182. See CAL. PEN. CODE. § 1275(a) (West 2021) (providing discretion to judges after considering required factors); *Pretrial Release in California: Legal Parameters for Evidence-Based Practices*, *supra* note 16, at 10.

183. See Raphling, *supra* note 83 (revealing that justices typically set a high bail to keep people who they should release in jail).

184. *262 Pub. Safety Hearing*, *supra* note 123; see also *In re Humphrey*, 11 Cal. 5th 135, 145 (2021)

the detainee's ability to pay—and still set bail at a high amount.¹⁸⁵ SB 262 would not have changed the outcome of Mr. Murphy's case, even if the judge decided his case after the bill's enactment.¹⁸⁶ That is because requiring a court to deliberate on a factor does not limit a judge's discretion in ignoring that information.¹⁸⁷ SB 262 requiring judges to consider a detainee's finances would not have changed the judge's ability to impose bail despite an arrestee's financial hardship.¹⁸⁸

C. The Legislature can Fix These Issues by Delegating Some Judicial Authority and Providing More Guidance with Bail Schedules

The Legislature can adopt new proposals that can further solve the cash bail problem in California.¹⁸⁹ Subsection 1 explains the possibility of fixing high bail amounts by delegating some discretion to the community or agencies.¹⁹⁰ Subsection 2 focuses on how providing more guidance for the judicial council in creating bail schedules can lower the high bail amounts in California.¹⁹¹

1. Delegating the Judge's Discretion Will Benefit Detainees Because Community Members Will Assist with Bail Order

In California, judges use their authority to set high bail amounts or deny bail altogether using their discretion.¹⁹² SB 262 would not have changed this because there is no variation to the powers of judges to delegate their authority.¹⁹³ The California Penal Code codifies the requirement for the judge or magistrate to issue the final ruling on bail.¹⁹⁴ Courts have interpreted this as not allowing any other party or agency to make a ruling on a detainee's bail.¹⁹⁵

(discussing the superior court's ruling in Kenneth Murphy's bail hearing).

185. 262 *Pub. Safety Hearing*, *supra* note 123; see *In re Humphrey*, 11 Cal. 5th 135, 145 (2021) (discussing the superior court's ruling in Kenneth Murphy's bail hearing).

186. See 262 *Pub. Safety Hearing*, *supra* note 123 (requiring the court to consider the detainee's ability to pay); see also *In re Humphrey*, 11 Cal. 5th 135, 145 (2021) (discussing how the superior court did not substantially change the bail amount after considering the defendant's ability to pay).

187. See generally *In re Humphrey*, 11 Cal. 5th 135, 145 (2021) (discussing how the superior court did not substantially change the bail amount after considering the defendant's ability to pay).

188. See 262 *Pub. Safety Hearing*, *supra* note 123 (requiring only that the judge "consider" the factors).

189. See *id.* (showing the current bill legislators proposed).

190. *Infra* Subsection IV.C.1.

191. *Infra* Subsection IV.C.2.

192. See *Pretrial Release in California: Legal Parameters for Evidence-Based Practices*, *supra* note 16, at 10 (detailing how law gives judges total discretion in making bail decisions).

193. See generally 262 *Pub. Safety Hearing*, *supra* note 123 (omitting any new rules changing the amount of authority a judge has in making bail decisions).

194. CAL. PEN. CODE § 1275 (West 2021).

195. See *Pretrial Release in California: Legal Parameters for Evidence-Based Practices*, *supra* note 16, at 10 (providing that courts have recognized the judge shall make the final determination on bail); see also Avery Oaks, *ALEC Fights for Cash Bail Leading Defendants to Jail*, 3 SOC. JUST. EQUITY L.J. 84, 120 (2019) (describing PSAs as agencies that collect information on detainees and make recommendations for release).

The California legislature can invite more input from the community or Pretrial Services Agency (“PSA”) by changing the language in California Penal Code.¹⁹⁶ The Legislature can change the law from forbidding the judge delegating authority to a new law that invites more input from others.¹⁹⁷ This change would benefit detainees because parties from the community will work with the judge to make a ruling that is beneficial for the detainee and the public.¹⁹⁸ The legislature can also require judges to consider the recommendation on bail from the community and reflect on the record why they would deviate from the recommendation.¹⁹⁹ This change would benefit detainees because it allows community members to change a ruling that directly affects their livelihood.²⁰⁰

2. Legislative Guidance on Forming a Statewide Bail Schedule can Help Lower California’s Bail Amounts

Bail schedules contribute to high bail, so it would benefit the system if the Legislature provides more guidance on making the statewide schedule.²⁰¹ Currently, the only guidance given on schedule structure is to consider the seriousness of the charge.²⁰² The Legislature should add new factors for the judicial council to consider that directly coincide with the finances of offenders.²⁰³ Indigent detainees would benefit if the Legislature added median income by offense to schedules because judges would realize that a high bail amount means the detainee would remain in custody.²⁰⁴ This benefits detainees because it would make the formation of bail schedules less arbitrary.²⁰⁵

196. See *Pretrial Release in California: Legal Parameters for Evidence-Based Practices*, *supra* note 16, at 10 (highlighting that a limitation on evidence-based pretrial programs are statutes that give judges all of the authority).

197. See *generally id.* (explaining the delegation of authority judges maintain).

198. See *Oaks*, *supra* note 197, at 120 (illuminating the benefits of using PSAs in other jurisdictions).

199. See CAL. PEN. CODE § 1270.1(a) (West 2021) (requiring the judge to reflect on the record why zero-dollar bail is unfit for the detainee, a process that can be extended to community recommendations).

200. See *Oaks*, *supra* note 197, at 120 (using Washington D.C. as an example of beneficial results when the courts use agencies).

201. “*Not in it for Justice*” *How California’s Pretrial Detention and Bail System Unfairly Punishes Poor People*, *supra* note 67, at 33.

202. *Id.*

203. See 262 *Pub. Safety Hearing*, *supra* note 123 (setting forth the requirement for judges to consider finances during the bail hearing, but omitting any further guidance on bail schedules).

204. See *generally* “*Not in it for Justice*” *How California’s Pretrial Detention and Bail System Unfairly Punishes Poor People*, *supra* note 67, at 33 (stating that the judges do not put much consideration into the bail amounts).

205. See *id.* (revealing how judges had no guidance in making the schedule, thus the process was arbitrary).

V. CONCLUSION

California's cash bail system contributes to mass incarceration in America.²⁰⁶ SB 262 was the legislature's attempt to eliminate the unfair practices of cash bail for all non-exempted misdemeanor and felony offenses.²⁰⁷ The cash bail system effectively requires indigent detainees to sit in jail and wait for trial solely because they are too poor.²⁰⁸ Cash bail gives bail bond agents the authority to make a profit while exploiting the system.²⁰⁹ SB 262 would have attempted to solve these issues by setting zero-dollar bail for most low-level offenders, and by regulating the bail bond industry practices.²¹⁰

However, SB 262 would not have alleviated all issues with the bail system since several offenders would continue to sit in jail when they do not qualify for zero-dollar bail.²¹¹ Further, SB 262 would have not changed the amount of discretion judges have in setting high bail amounts.²¹² The California legislature can diminish these problems by passing bills that allow judges to delegate some of their discretion to members of the community or the PSA.²¹³ Also, they can provide guidance for the Judicial Council when they make the bail schedules to lower the bail amounts that remain.²¹⁴ The Legislature would have been making progress with this bail reform, but there would have been more work necessary to fully alleviate the social problems that California's cash bail system perpetuates.²¹⁵

206. Gotsch & Basti, *supra* note 95.

207. 262 *Pub. Safety Hearing*, *supra* note 123; *see also* SENATE COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF SB 262, at 5 (Mar. 23, 2021) (revealing that “thousands of Californians accused of crimes end up paying a fee to stay out of jail, before even being found guilty”).

208. Kalish, *supra* note 6.

209. *See generally* *The Devil in the Details: Bail Bond Contracts in California*, *supra* note 113, at 1 (exposing how bail bondsmen have a uniquely powerful position in the system because they have complete discretion in setting premiums arrestees pay and can arrest delinquent debtors).

210. 262 *Pub. Safety Hearing*, *supra* note 123.

211. *Id.*

212. *See generally* Hegreness, *supra* note 15, at 957 (explaining that introducing new factors for the judge to consider does not limit the discretion the judge has in setting bail).

213. *But see* *Pretrial Release in California: Legal Parameters for Evidence-Based Practices*, *supra* note 16, at 10 (observing the notion is arguably inconsistent with the California Constitution and Penal Code granting discretion to the court).

214. “Not in it for Justice” *How California’s Pretrial Detention and Bail System Unfairly Punishes Poor People*, *supra* note 67, at 33.

215. *See generally* *Understanding and Confronting the Prison-Industrial Complex*, *supra* note 12, at 10–11 (framing the bail bond industry’s high premiums as exploiting the poor in America’s detention system).

