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## Community First: Why California's Elimination of Cash Bail May Have Missed the Mark

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**Community First: Why California’s Elimination of Cash Bail May Have Missed the Mark**

*Jade Gasek\**

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I. INTRODUCTION

Imagine a scenario where the police arrest and charge two women with a string of connected robberies.<sup>1</sup> Both women are twenty years-old and have very little money and no criminal record.<sup>2</sup> Despite this lack of criminal history and money, the judge orders detention until trial unless each one can pay the \$150,000 bail set by that same judge.<sup>3</sup> Ultimately, one woman secures release from jail.<sup>4</sup> She manages to reduce her charges from felony robbery to a lesser offense of simple theft with the possibility of dismissal within a year upon the completion of probation and community service.<sup>5</sup>

The other woman, in a situation identical to the first, remains in jail.<sup>6</sup> Under the taxing conditions of the jail—poor sanitation, bad food, little chance for recreation or fresh air—she accepts the prosecutor’s plea deal.<sup>7</sup> While the deal allows her to return to her son, it also burdens her with two felony counts of robbery, five years of probation, and a seven-year suspended sentence—any misstep with the criminal justice system will send her directly to prison.<sup>8</sup>

This disparity caused only by the ability to pay bail portrays the real-life experience of Daria Morrison, Sarah Jackson, and others like them.<sup>9</sup> The first woman, Daria, had financial support from her family and secured release from jail with the help of a bail bondsmen.<sup>10</sup> Free from pretrial detention, Daria defended her case with an attorney’s help, which led to the revelation that neither woman had actively participated in the robberies.<sup>11</sup> This revelation led to Daria’s

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1. John Raphling, *California Ended Cash Bail—But May Have Replaced It with Something Worse: Racist Algorithms and Unlimited Judicial Discretion Threaten to Increase Pretrial Incarceration in California*, HUM. RTS. WATCH (Sept. 24, 2018), <https://www.hrw.org/news/2018/09/24/california-ended-cash-bail-may-have-replaced-it-something-even-worse> (on file with *The University of the Pacific Law Review*).

2. HUM. RTS. WATCH, “NOT IN IT FOR JUSTICE”: HOW CALIFORNIA’S PRETRIAL DETENTION AND BAIL SYSTEM UNFAIRLY PUNISHES POOR PEOPLE 68 (2017), <https://www.hrw.org/report/2017/04/11/not-it-justice/how-californias-pretrial-detention-and-bail-system-unfairly> (on file with *The University of the Pacific Law Review*).

3. Raphling, *supra* note 1.

4. HUM. RTS. WATCH, *supra* note 2.

5. *Id.*

6. *Id.*

7. Raphling, *supra* note 1.

8. HUM. RTS. WATCH, *supra* note 2.

9. *See, e.g.*, Nick Pinto, *The Bail Trap*, N.Y. TIMES (Aug. 13, 2015), <https://www.nytimes.com/2015/08/16/magazine/the-bail-trap.html> (on file with *The University of the Pacific Law School*) (“In June [2015], Sandra Bland was found dead in her cell in Texas after failing to come up with \$500 for her release”).

10. HUM. RTS. WATCH, *supra* note 2.

11. *Id.*

reduced charges and allowed her to return to her waitressing job.<sup>12</sup> She can now continue her hopes of becoming a lawyer.<sup>13</sup>

Sarah, however, remained incarcerated for three months without a resolution of her case and finally accepted a guilty plea for a time-served sentence under which she could leave immediately.<sup>14</sup> She did so because she could not afford to pay her \$150,000 bail, which the judge set so high in part due to the prosecutor's argument that she was too dangerous to release pretrial.<sup>15</sup> Choosing a different option would cause Sarah to lose her job resulting in myriad collateral consequences—the worst of which would be separation from her child.<sup>16</sup> Although the deal allowed her to reunite with her son, it also left her with two felony counts of robbery—both of which constitute a “strike” under California's “three strikes” law.<sup>17</sup>

Sarah and Daria's case is hardly unique.<sup>18</sup> Many other stories demonstrate the life-altering impacts of pretrial detention for those who are unable to afford the bail amount the judge, prosecutor, or bail schedule determine is appropriate.<sup>19</sup> Jurisdictions across the country have experimented with bail reform since the 1960s, but those reforms produced mixed results and occurred in scattered jurisdictions.<sup>20</sup> To address the root cause of a broken bail system, California Governor Jerry Brown signed the Money Bail Reform Act (“SB 10”) in August 2018, effectively ending the state's reliance on cash bail.<sup>21</sup> This move followed efforts in a number of other states to reduce their reliance on cash bail, but California became the first to completely foreclose its use.<sup>22</sup>

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12. Ralphling, *supra* note 1.

13. *Id.*

14. HUM. RTS. WATCH, *supra* note 2.

15. Ralphling, *supra* note 1.

16. *Id.*

17. *Id.*; THE JUDICIAL BRANCH OF CALIFORNIA, CALIFORNIA'S THREE STRIKES SENTENCING LAW 3 (2019), available at <https://www.courts.ca.gov/20142.htm> (on file with *The University of the Pacific Law Review*) (“The essence of the Three Strikes law was to require a defendant convicted of any new felony, having suffered one prior conviction of a serious felony to be sentenced to state prison for twice the term otherwise provided for the crime”).

18. See Eyder Peralta, *Kalief Browder, Jailed for Years Without Trial, Kills Himself*, NPR (June 2015) <https://www.npr.org/sections/thetwo-way/2015/06/08/412842780/kalief-browder-jailed-for-years-at-rikers-island-without-trial-commits-suicide> (on file with *The University of the Pacific Law Review*) (“Kalief Browder, the young man who was held for years in a New York jail without a trial, killed himself on Saturday. . . . Because his family was unable to raise his \$10,000 bail [for allegedly stealing a backpack], Browder languished at Rikers Island for three years awaiting trial”).

19. See HUM. RTS. WATCH, *supra* note 2 (highlighting the ramifications of pretrial detention that are common to many detainees).

20. 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*).

21. Alexei Koseff, *Jerry Brown Signs Bill Eliminating Money Bail in California*, SACRAMENTO BEE (Aug. 28, 2018), <https://www.sacbee.com/news/politics-government/capitol-alert/article217461380.html> (on file with *The University of the Pacific Law Review*).

22. See GEORGIA STATE UNIVERSITY COLLEGE OF LAW CENTER FOR ACCESS TO JUSTICE,

SB 10's supporters hope that the law will reduce unnecessary detainments before trial in the state and also alleviate the harsh effects felt by the groups the current bail regime disproportionately victimizes.<sup>23</sup> However, civil rights activists, victims' rights advocates, and the bail industry have launched an attack on the law.<sup>24</sup> Critics argue that the passage of SB 10 was too hasty and will have unintended consequences.<sup>25</sup>

While the groups differ markedly on their concerns with the law, most in opposition can agree—albeit for different reasons—that the risk assessment systems (“RAS”) on which the law relies should not be the foundation of bail reform in California or across the nation.<sup>26</sup> In fact, under such a system, a chance exists that the court would release neither Sarah or Daria.<sup>27</sup> Instead, an RAS likely would have detained them pretrial without bail due to a combination of factors including their charge, age, and where they lived.<sup>28</sup>

Because supporters of the bail bonds industry collected enough signatures to put a referendum on the 2020 ballot seeking to prevent the implementation of SB 10, only time will tell whether the law will materialize.<sup>29</sup> It is heartening that California can use other jurisdictions' responses to the problems associated with cash bail as examples,<sup>30</sup> but California's unique political and social landscape will make the implementation of a system that goes farther quite difficult.<sup>31</sup> As

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MISDEMEANOR BAIL REFORM AND LITIGATION: AN OVERVIEW 1–10 (Sept. 2017), <https://university.pretrial.org/HigherLogic/System/DownloadDocumentFile.aspx?DocumentFileKey=d935d1e1-80a-3314-bf2a-bbefde49285f&forceDialog=0> (on file with *The University of the Pacific Law Review*) (providing an overview of the most recent bail reform movements across the United States and the measures those jurisdictions have taken to reduce reliance on cash bail).

23. Bob Egelko, *Gov. Jerry Brown Signs Bill Eliminating California's Cash-Bail System*, SFGATE (Aug. 29, 2018), <https://www.sfgate.com/crime/article/Gov-Jerry-Brown-signs-bill-eliminating-13188659.php> (on file with *The University of the Pacific Law Review*).

24. Meagan Flynn, *California Abolishes Money Bail With a Landmark Law. But some Reformers Think It Creates New Problems*, WASH. POST (Aug. 29, 2018), [https://www.washingtonpost.com/news/morning-mix/wp/2018/08/29/c...reformers-think-it-creates-new-problems/?utm\\_term=.8d3a0ea5423c](https://www.washingtonpost.com/news/morning-mix/wp/2018/08/29/c...reformers-think-it-creates-new-problems/?utm_term=.8d3a0ea5423c) (on file with *The University of the Pacific Law School*); Sheyanne Romero, *Human Rights Advocates, Bail Industry Leaders Fight to Stop No Cash Bail Law*, VISALIA TIMES DELTA (Dec. 28, 2018), <https://www.visaliatimesdelta.com/story/news/2018/12/28/human-rights-advocates-bail-industry-leaders-fight-overturn-sb-10/2415570002/> (on file with *The University of the Pacific Law Review*).

25. Romero, *supra* note 24.

26. See generally John Logan Koepke & David G. Robinson, *Danger Ahead: Risk Assessment and the Future of Bail Reform*, 93 WASH. L. EV. 1727 (Dec. 2018) (highlighting the main underlying challenges with risk assessment systems leading to the conclusion that they should be hesitantly embraced).

27. Ralphling, *supra* note 1.

28. *Id.*

29. Jazmine Ulloa, *California's Historic Overhaul of Cash Bail is Now on Hold, Pending a 2020 Referendum*, L.A. TIMES (Jan. 16, 2019), <https://www.latimes.com/politics/la-pol-ca-bail-overhaul-referendum-20190116-story.html> (on file with *The University of the Pacific Law Review*).

30. Youngjin Choi, *Lessons From California and New Jersey Bail Reform Legislation*, N.Y. L.J. (Dec. 07, 2018), <https://www.law.com/newyorklawjournal/2018/12/07/lessons-from-california-and-new-jersey-bail-reform-legislation/> (on file with *The University of the Pacific Law Review*).

31. See George Skelton, *Why We Need Bail Reform: California Shouldn't Be Requiring a Payment for Freedom*, L.A. TIMES (Feb. 26, 2018), <https://www.latimes.com/politics/la-pol-sac-skelton-bail-reform-20180226-story.html> (on file with *The University of the Pacific Law Review*) (demonstrating that California has

such, the passage of SB 10 should be the beginning, rather than the end, of the conversation surrounding what works best for California in terms of bail reform.<sup>32</sup>

This comment argues that regardless of a jurisdiction's given bail method, the law should mandate consultation and cooperation with community-based organizations regarding the appropriate procedures for pretrial detention if those states choose to eliminate cash bail.<sup>33</sup> Part II provides a brief background surrounding the history and purpose of bail and its subsequent effects.<sup>34</sup> Part III then demonstrates that the signed version of SB 10 does not accomplish the goals of reducing flight risk and promoting public safety and fails to safeguard defendants' rights.<sup>35</sup> Part IV argues that community-based organizations are essential to garner substantive change with lasting effect.<sup>36</sup> Part V concludes that, to restore integrity to California's bail reform movement, the legislature should require input from the voices of community-based and grassroots organizations—many of which the drafters of SB 10 ultimately excluded—to ensure the success of SB 10's goals.<sup>37</sup>

## II. CASH BAIL AND A BRIEF HISTORY OF REFORM IN THE UNITED STATES

Understanding the current problems associated with bail reform requires an understanding of how the function and use of bail has changed throughout the history of the United States.<sup>38</sup> Section A explains the history and purpose of cash bail in the United States.<sup>39</sup> Part B then explains the negative repercussions of cash bail and the pretrial detention that occurs when a defendant cannot pay that bail.<sup>40</sup>

### *A. What is the History and Purpose of Cash Bail?*

Bail, in general, refers to the practice of releasing defendants pretrial and has existed in Anglo-Saxon legal systems for hundreds of years.<sup>41</sup> Bail's original intent was to ensure the appearance of the defendant at trial.<sup>42</sup> Courts placed little

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been struggling to enact meaningful bail reform since Governor Brown's 1979 State of the State address).

32. *Infra* Part VII.

33. *Infra* Part VI.

34. *Infra* Part II.

35. *Infra* Part III.

36. *Infra* Part IV.

37. *Infra* Part V.

38. See Wykstra, *supra* note 20 (providing a brief history of bail in order demonstrating how that history prompted and informs the current bail reform movement).

39. *Infra* Section II.A.

40. *Infra* Section II.B.

41. SHIMA BARADARAN BAUGHMAN, *THE BAIL BOOK: A COMPREHENSIVE LOOK AT BAIL IN AMERICA'S CRIMINAL JUSTICE SYSTEM* 18 (Cambridge Univ. Press, 2017) (ebook).

42. Lauren Kelleher, *Out on Bail: What New York Can Learn from D.C. About Solving a Money Bail*

focus on the accused's guilt or the likelihood that he would commit a crime before trial while released.<sup>43</sup>

Although defendants may obtain bail through a number of methods, jurisdictions across the country have increasingly employed the use of money bail.<sup>44</sup> Under the money bail regime, a judge sets bail at an amount that is “reasonably calculated” to ensure the appearance of the defendant at trial.<sup>45</sup> At the outset of the country's criminal justice system, only those accused of a capital offense could not receive bail and the courts presumed release for all others.<sup>46</sup>

Starting in the 1940s, the presumption of release's original intention as the norm under the bail system began to erode as judges unofficially started to weigh flight risk and other substantive evidence with no connection to that risk.<sup>47</sup> Congress codified this change in policy with Federal Rule of Criminal Procedure 46.<sup>48</sup> The change allowed the courts to consider the “weight of the evidence against [the defendant]” as well as the “characteristics of the [defendant]” when determining bail.<sup>49</sup> The policy gave judges substantial discretion and resulted in an increase in the number of pretrial detentions in the United States.<sup>50</sup> In many cases, pretrial detention resulted not because of a defendant's objective danger to the community or his high probability of flight risk, but because a judge set bail at an amount higher than the defendant could afford, sometimes based on the judge's own subjective motivations.<sup>51</sup>

As early as the 1960s, political leaders understood the consequences of money bail in practice.<sup>52</sup> For example, President Johnson proclaimed that the poor defendant “languishes in jail weeks, months, and perhaps even years. . . not because he is guilty. . . [but] because he is poor.”<sup>53</sup> In a nationwide effort to reduce pretrial incarceration related to the imperfect bail system, Congress enacted the Bail Reform Act of 1966.<sup>54</sup> To reduce the disproportionate effect money bail had on poor communities, the law allowed a judge to exercise discretion to detain a defendant if release would not “reasonably assure the

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*Problem*, 55 AM. CRIM. L. REV. 799, 802 (2016).

43. *Id.*

44. JUST. POL'Y INST., BAIL FAIL: WHY THE U.S. SHOULD END THE PRACTICE OF USING MONEY FOR BAIL (Sept. 2012), *available at* [www.justicepolicy.org/uploads/justicepolicy/documents/bailfail\\_executive\\_summary.pdf](http://www.justicepolicy.org/uploads/justicepolicy/documents/bailfail_executive_summary.pdf) (on file with *The University of the Pacific Law Review*).

45. *Stack v. Boyle*, 342 U.S. 1, 8 (1951) (Jackson, J., concurring).

46. BAUGHMAN, *supra* note 41.

47. *Id.* at 19.

48. *Id.* at 21.

49. 18 U.S.C. § 3142 (2017).

50. BAUGHMAN, *supra* note 41 at 21–22.

51. Wykstra, *supra* note 20.

52. Rachel Smith, *Condemned to Repeat History? Why the Last Movement for Bail Reform Failed, and How This One Can Succeed*, 25 GEO. J. POVERTY LAW & POL'Y 451, 454451 (2018).

53. *Id.* at 451.

54. BAUGHMAN, *supra* note 41 at 23.

appearance of the person as required.”<sup>55</sup> The idea was that judges would consider alternatives to detention when deciding whether to incarcerate someone pretrial.<sup>56</sup>

Although the law did not explicitly authorize judges to consider risk when determining bail, it allowed judges to weigh the evidence against the defendant pretrial to determine whether to grant bail and at what amount.<sup>57</sup> The Court did not perceive the practice of weighing evidence of guilt pretrial as punishment.<sup>58</sup> Instead, its acceptance of the practice framed pretrial detention as serving the legitimate and compelling government interest of protecting the public.<sup>59</sup> Ultimately, the law counteracted the positive effects it could have had on the increasing pretrial detention levels which it sought to reduce.<sup>60</sup>

The Bail Reform Act of 1984 embraced the practices that emerged through previous bail reform efforts.<sup>61</sup> The law authorized courts to “preventively detain defendants pretrial where they found bail would not ‘reasonably assure [a defendant’s] appearance . . . or [would] endanger the safety of any other person or the community.’”<sup>62</sup> The Supreme Court affirmed the constitutionality of the law in *United States v. Salerno*, holding that pretrial detention is not necessarily punishment under the Eighth Amendment of the Constitution.<sup>63</sup> Furthermore, the Court held that the government’s interest in community safety can, under some circumstances, outweigh an individual’s liberty interest.<sup>64</sup> According to the Court, the Act provided sufficient procedural safeguards for a judge to accurately determine the future dangerousness of a defendant to satisfy Due Process under the Constitution.<sup>65</sup>

The Bail Reform Act of 1984 allowed judges to consider the potential dangerousness of a defendant.<sup>66</sup> Despite variations in how judges make bail decisions, the Bail Reform Act was the last landmark piece of national bail reform legislation in the United States and continues as the status quo.<sup>67</sup> Consequently, bail determinations, even in the absence of cash bail, continue to disproportionately affect the poor, people of color, and the communities to which those people belong.<sup>68</sup>

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55. § 3142).

56. BAUGHMAN, *supra* note 41 at 24.

57. *Id.*

58. *United States v. Salerno*, 481 U.S. 739, 748 (1987).

59. *Id.* at 749.

60. BAUGHMAN, *supra* note 41 at 27.

61. Wykstra, *supra* note 20.

62. Kelleher, *supra* note 42 at 804.

63. *Salerno*, 481 U.S. at 748.

64. *Id.* at 740.

65. *Id.*

66. Wykstra, *supra* note 20.

67. *Id.*

68. HUM. RTS. WATCH, *supra* note 2 at 2.



*B. Cash Bail, Pretrial Detention, and Their Negative Impact on Families and Communities*

Understanding why laws such as SB 10 that promise reductions in unnecessary pretrial detention, but do not deliver requires comprehending the cash bail system's negative consequences and how they arise.<sup>69</sup> Additionally, an understanding of these issues demonstrates why Congress and society in general should embrace other methods of addressing these drawbacks.<sup>70</sup> Proponents of the cash bail system argue that it leads to greater pretrial accountability and creates incentives for a person to appear at trial.<sup>71</sup> However, the evidence presents a much more complex reality.<sup>72</sup> Under this reality, the cash bail system has increased pretrial detention rates because various factors adversely affect outcomes in cases of those who cannot afford bail.<sup>73</sup>

Between 1999 and 2014, the number of people held in pretrial detention accounted for 99% of the jail population growth.<sup>74</sup> Additionally, on any day, 60% of the jail population is awaiting trial.<sup>75</sup> As of 2017, local jails across the country hold around 465,000 people awaiting trial.<sup>76</sup> Of those detained, the median bail amount is around \$10,000 with states such as California imposing average bail amounts of around \$50,000.<sup>77</sup> Further, even smaller bail amounts become prohibitively expensive when, as of 2015, the average inmate earned only \$15,109 prior to incarceration, and the median bail amount equals eight months income for the average detained defendant.<sup>78</sup> As a result, the U.S. criminal justice system detains hundreds of thousands of people without regard to their guilt or

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69. *Infra* Section III.C.

70. *Infra* Part VI.

71. Jazmine Ulloa, *Bail Bond Industry Moves to Block Sweeping California Law, Submitting Signatures for a 2020 Ballot Referendum*, N.Y. TIMES (Nov. 20, 2018), <https://www.latimes.com/politics/la-pol-ca-bail-referendum-signatures-20181120-story.html> (on file with *The University of the Pacific Law Review*).

72. Shima Baradaran Baughman, *Costs of Pretrial Detention*, 97 B.U. L. REV. 1, 5–7 (Apr. 2016).

73. Paul Heaton, Sandra Mayson, & Megan Stevenson, *The Downstream Consequences of Misdemeanor Pretrial Detention*, 69 STAN. L. REV. 711, 722 (Mar. 2017) (identifying factors that create poor outcomes for bailees including increased incentives to plead guilty, inability to prepare a defense, reduced financial resources available for defense, no ability to demonstrate positive behavior, inability to obstruct the prosecution, and a lack of the advantage of long delay).

74. Peter Wagner, *Jails Matter. But Who Is Listening?*, PRISON POL'Y INITIATIVE (Aug. 14, 2015), <https://prisonpolicy.org/blog/2015/08/14/jailsmatter/> (on file with *The University of the Pacific Law Review*).

75. JUST. POL'Y INST., *supra* note 44.

76. Wendy Sawyer, *How Does Unaffordable Money Bail Affect Families?*, PRISON POL'Y INITIATIVE (Aug. 15, 2018), <https://www.prisonpolicy.org/blog/2018/08/15/pretrial/> (on file with *The University of the Pacific Law Review*).

77. HUM. RTS. WATCH, "NOT IN IT FOR JUSTICE": HOW CALIFORNIA'S PRETRIAL DETENTION AND BAIL SYSTEM UNFAIRLY PUNISHES POOR PEOPLE 34 (2017), available at [https://hrw.org/sites/default/files/report\\_pdf/usabail0417\\_web\\_0.pdf](https://hrw.org/sites/default/files/report_pdf/usabail0417_web_0.pdf) (on file with *The University of the Pacific Law Review*).

78. Bernadette Rabuy & Daniel Kopf, *Detaining the Poor: How Money Bail Perpetuates an Endless Cycle of Poverty and Jail Time*, PRISON POL'Y INITIATIVE 2 (May 10, 2016), <https://www.prisonpolicy.org/reports/incomejails.html> (on file with *The University of the Pacific Law Review*).

innocence.<sup>79</sup>

Progressive reformers across the nation agree both that cash bail does not work<sup>80</sup> and that pretrial detention serves to disadvantage those communities comprising poor people and people of color.<sup>81</sup> Additionally, reformers also agree—perhaps differing as to what degree—that the use of pretrial detention directly drives mass incarceration by depriving communities of valuable resources they need to succeed.<sup>82</sup> A 2015 report from the Ella Baker Center for Human Rights found that pretrial incarceration generates economic instability and a lack of mobility for inmates and their families by saddling them with fees, fines, and debts that accrue during incarceration.<sup>83</sup> Adding to that financial hardship, incarceration eliminates a wage earner and makes it impossible to satisfy basic needs while attending to the accumulating costs of defending one’s innocence.<sup>84</sup> With the average debt-load associated with court fees and fines amounting to over \$13,000,<sup>85</sup> some released defendants and their families turn to crime to make ends meet; interestingly, over 40% of all crimes are directly attributable to poverty and 80% of inmates are low-income.<sup>86</sup>

In addition to the financial strain that pretrial incarceration places on inmates and their families, such detention has detrimental effects on the mental health and general well-being of those families.<sup>87</sup> First, pretrial detention generally places a majority of the familial responsibility on the spouses, partners, and other family members of the detained person.<sup>88</sup> They become responsible not only for providing for themselves and the family, but also for ensuring the release of the defendant.<sup>89</sup> Additionally, the high cost of phone calls and visits, especially for those who do not live near their loved one’s place of incarceration, make the maintenance of a meaningfully sustaining emotional relationship prohibitively

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79. *Id.* at 1.

80. Sandra G. Mayson, *Dangerous Defendants*, 127 *YALE L.J.* 490, 492 (2018).

81. Essie Justice Group, *Open Letter to the Bail Industry* (Aug. 14, 2018), <http://essiejusticegroup.org/2018/08/open-letter-to-the-bail-industry> (on file with *The University of the Pacific Law Review*) (statement signed by 28 grassroots organizations opposing California’s bail reform legislation) (“‘Good bail reform’ leads to less incarceration. . . reduces racial disparities in the criminal justice system. . . [and] has no direct cost to individuals and families. . .”).

82. *Id.*

83. SANETA DEVUONO-POWELL, CHRIS SCHWEIDLER, ALICIA WALTERS, & AZADEH ZOHRABI, WHO PAYS? THE TRUE COST OF INCARCERATION ON FAMILIES 7 (2015), <http://whopaysreport.org/wp-content/uploads/2015/09/Who-Pays-FINAL.pdf> (on file with *The University of the Pacific Law Review*).

84. *Id.*

85. *Id.* at 9.

86. *Id.*

87. *Id.* at 11.

88. *See generally* MEGAN COMFORT, *DOING TIME TOGETHER: LOVE AND FAMILY IN THE SHADOW OF PRISON* 9–11 (2009) <http://ebookcentral.proquest.com/lib/uopacific/detail.action?docID=432206> (detailing her interactions with the female partners of male inmates and identifying the way in which “secondary prisonization” affects those women even though they themselves are not incarcerated); DEVUONO-POWELL, *supra* note 83 at 11.

89. *Id.* at 9.

expensive.<sup>90</sup>

### III. CALIFORNIA'S RESPONSE AND POTENTIAL PROBLEMS

In 2016, Chief Justice of the California Supreme Court, Tani Cantil-Sakauye, established a working group to study California's bail system to generate recommendations for California's legislature to ameliorate the state's bail system.<sup>91</sup> The report found that California's 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."<sup>92</sup>

The report highlighted several aforementioned problems and recognized that the bail system could affect many aspects of a person's life including, employment, housing, childcare, and healthcare.<sup>93</sup> Furthermore, the report emphasized the fact that whether a person can pay bail affects the outcome of the case and the sentence.<sup>94</sup> As a result, many defendants, regardless of guilt, plead guilty in order to obtain release and avoid the collateral consequences of their arrest.<sup>95</sup>

Chief Justice Cantil-Sakauye and the working group recommended that the legislature replace the use of cash bail with RAS.<sup>96</sup> Such systems utilize algorithms to determine whether a defendant is too dangerous for release from detention.<sup>97</sup> The authors of SB 10 heeded this recommendation and made RAS the foundation of SB 10, leading many to wonder whether the law would serve to address the cash bail system's problems.<sup>98</sup> Part A provides a brief overview of SB 10.<sup>99</sup> Parts B and C then show that, despite the potential for some benefit, the law's reliance on RAS serves to replicate the effects that occurred under the cash bail system, but perhaps with even greater alleged legitimacy.<sup>100</sup>

#### A. Overview of SB 10

Signed into law August 28, 2018 and originally slated to take effect on

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90. *Id.* at 7.

91. PRETRIAL DETENTION REFORM WORKGROUP, PRETRIAL DETENTION REFORM—RECOMMENDATIONS TO THE CHIEF JUSTICE I (2017) (on file with *The University of the Pacific Law Review*).

92. *Id.*

93. *Id.* at 13.

94. *Id.* at 13–14.

95. *Id.* at 14.

96. *Id.* at 51.

97. *Id.* at 53.

98. Jeremy B. White, *California Ended Cash Bail. Why Are so Many Reformers Unhappy About It?*, POLITICO (Aug. 29, 2018), <https://www.politico.com/magazine/story/2018/08/29/california-abolish-cash-bail-reformers-unhappy-219618> (on file with *The University of the Pacific Law Review*).

99. *Infra* Section III.A.

100. *Infra* Sections III.B–C.

October 1, 2019, SB 10 set out to eliminate the cash bail system in California.<sup>101</sup> Under the law, the California pretrial release system moves from a money-based system to a risk-based release and detention system with the goal of releasing a defendant with “the least restrictive nonmonetary condition or combination of conditions that will reasonably assure public safety and the defendant’s return to court.”<sup>102</sup> To determine whether a court can release a defendant in a manner that will “reasonably assure public safety,” SB 10 mandates the implementation of risk assessment systems across California.<sup>103</sup>

Although many California counties already use RAS to set bail amounts, sentencing, and make other decisions,<sup>104</sup> under SB 10, those systems would determine if a person is considered low, medium, or high risk and, therefore, whether conditions exist to reasonably release him into the public.<sup>105</sup> Critics of the law’s language argue that it results in an unconstitutional presumption of detention for individuals deemed high-risk and it potentially allows the detention of virtually anyone pretrial.<sup>106</sup>

In addition, these opposition groups criticize the lack of standards the law creates for determining what qualifies as low, medium, or high risk.<sup>107</sup> Furthermore, because of the nature of RAS, it is difficult to monitor whether the system accounts for implicit bias because of empirical limitations and inconsistencies among counties.<sup>108</sup> The fact that the pretrial assessment services will not be independent from probation services compounds this problem.<sup>109</sup>

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101. S.B. 10, 2017–2018 Leg., Reg. Sess. (Cal. 2018) (enacted) (codified at CAL. GOV’T CODE § 27771).

102. *Id.*

103. CAL. PENAL CODE § 1320.7 (enacted by Chapter 1.5) (West).

104. Erwin Chemerinsky, *Improve SB 10, Don’t Eliminate It*, SACRAMENTO BEE (Jan. 27, 2019), <https://www.sacbee.com/opinion/california-forum/article225032170> (on file with *The University of the Pacific Law Review*); see also Erin Collins, *Punishing Risk*, 107 GEO. L.J. 57, 71–72 (Oct. 2018) (on file with *The University of the Pacific Law School*) (highlighting the California Rules of Court that have “allowed courts to consider risk assessment information in determining the length and conditions of an individual’s period of mandatory supervision”).

105. S.B. 10, *supra* note 101.

106. Jeff Adachi, *Proposed California Money Bail Bill Will Set Back Reform Effort*, S.F. CHRON. (Aug. 14, 2018), <https://www.sfchronicle.com/opinion/openforum/article/Proposed-California-money-bail-bill-will-set-back-13156297.php> (on file with *The University of the Pacific Law Review*); Eric Westervelt, *California’s Bail Overhaul May Do More Harm Than Good, Reformers Say*, NPR (Oct. 2, 2018), <https://www.npr.org/2018/10/02/651959950/californias-bail-overhaul-may-do-more-harm-than-good-reformers-say> (on file with *The University of the Pacific Law Review*) (“Under SB 10, now prosecutors can see detention for virtually any crime. . . . Regardless of whether it’s violent or involves weapons or whether the person accused has a prior history. Under this law prosecutors have the discretion to seek pre-emptive detention of a person with no criminal record charged with a low-level misdemeanor”).

107. John Raphling, *Human Rights Watch Comments on California Judicial Council Bail Reform Rules*, HUM. RTS. WATCH (Dec. 10, 2018), <https://www.hrw.org/news/2018/12/10/human-rights-watch-comments-california-judicial-council-bail-reform-rules> (on file with *The University of the Pacific Law Review*).

108. Note, *S.B. 10, 2017–2018 Leg., Reg. Sess. (Cal. 2018): California Replaces Money-Bail System with Pretrial Detention System*, 132 HARV. L. REV. 2103–04 (2019).

109. SV De-Bug, *Silicon Valley De-Bug’s Letter of Opposition to California’s False Bail Reform Bill (SB10)*, DE-BUG (Aug. 14, 2018), <https://siliconvalleydebug.org/stories/silicon-valley-de-bug-s-letter-of-opposition-to-california-s-false-bail-reform-bill-sb10> (on file with *The University of the Pacific Law Review*);

Although the Judicial Council proposed a rule that would suggest that pretrial services consult with community organizations as “appropriate,” the language provides no definition for what constitutes as “appropriate” and makes the course of action discretionary instead of mandatory.<sup>110</sup> The combination of these effects leads the opponents of SB 10 to believe that it will not produce its intended results.<sup>111</sup>

### B. Referendum

Article II, Section 9, of the California Constitution provides for a referendum process whereby electors have the power to approve or reject legislation that state representatives have passed.<sup>112</sup> In order to qualify to appear on a future ballot, those seeking a referendum must receive signatures in a number equal to five percent of the ballots cast for Governor in the last gubernatorial race.<sup>113</sup> They must also file the necessary petitions with county election officials.<sup>114</sup>

In January of 2019, supporters of the bail industry did just that and qualified a referendum to appear on the November 3, 2020 General Election ballot.<sup>115</sup> Accordingly, SB 10 will not take effect in October of 2019 until voters decide whether to adopt the law.<sup>116</sup> Furthermore, California will not adopt the rules SB 10 requires the Judicial Council of California to produce to aid in the implementation of SB 10 until after the referendum process.<sup>117</sup>

In a state with over 3000 bail bondsmen, the referendum's proponents had no problem achieving well over the 365,880 required signatures to postpone and possibly defeat the law's implementation.<sup>118</sup> These people argue that the law would decimate the two billion dollar national bail industry and lead to the release of violent offenders who could harm the public.<sup>119</sup> The industry managed to gather these signatures as well as over three million dollars in only two months—no small feat—which suggests that cash bail supporters could pose a

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*Statement of Opposition to Senate Bill 10*, ESSIE JUSTICE GROUP (Aug. 14, 2018), <http://essiejusticegroup.org/2018/08/essie-justice-group-withdraws-support-for-sb-10/> (on file with *The University of the Pacific Law Review*).

110. Ralphling, *supra* note 107.

111. ESSIE JUSTICE GROUP, *supra* note 109; SV De-Bug, *supra* note 109; Ralphling, *supra* note 107.

112. CAL. CONST. art. II, § 9.

113. *Referendum*, CALIFORNIA SECRETARY OF STATE, <https://sos.ca.gov/selections/ballot-measures/referendum/> (last visited Mar. 1, 2019).

114. *Id.*

115. Ulloa, *supra* note 29.

116. Michael McGough, *The Fate of California's Cash Bail Industry Will Now Be Decided on the 2020 Ballot*, SACRAMENTO BEE (Jan. 17, 2019), <https://www.sacbee.com/news/state/california/article224682595.html> (available online at *The University of the Pacific Law Review*).

117. Ulloa, *supra* note 29.

118. McGough, *supra* note 116.

119. Ulloa, *supra* note 29.

formidable opposition to SB 10.<sup>120</sup>

*C. Risk Assessment Systems and Implicit Bias*

Although SB 10's author is confident it will become the "law of the land,"<sup>121</sup> the bail bonds industry is not the only group opposed to SB 10 as Governor Brown signed it into law.<sup>122</sup> Civil rights groups and other organizations, such as the American Civil Liberties Union, support overhauling the bail system, but they do not support the bill's presumption of preventive detention.<sup>123</sup> Critics argue that the RAS that SB 10 utilizes reinforces various societal biases—based on race, economics, and gender—that the systems inevitably reproduce.<sup>124</sup> Although SB 10's author introduced a subsequent proposition that would require counties to gather data regarding how they implement SB 10,<sup>125</sup> many believe the system's users cannot account for the implicit bias inherent in the systems, especially when judges rely solely on these assessments as they can under SB 10.<sup>126</sup>

The nationwide trend has generally been employing RAS instead of cash bail to determine who presents a high enough risk where the system can reasonably detain people before trial without offending notions of due process or equal protection.<sup>127</sup> However, because the use of RAS is relatively new, much speculation and relatively little data has arisen concerning the merits of such systems.<sup>128</sup> Reviewing the data from states that have relied heavily on RAS, such states as New Jersey and Kentucky, may offer insight into the efficacy and desirability of RAS.<sup>129</sup>

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120. *Id.*

121. *Id.*

122. *Infra* Part V.

123. Daisy Vieyra, *ACLU of California Changes Position to Oppose Bail Reform Regulation*, ACLU S. CAL. (Aug. 20, 2018), <https://www.aclusocal.org/en/press-releases/aclu-california-changes-position-oppose-bail-reform-legislation> (on file with *The University of the Pacific Law Review*).

124. Ulloa, *supra* note 29.

125. S.B. 36, 2018 Leg., 2018–2019 Sess. (Cal. 2019).

126. Sam Levin, *Imprisoned by Algorithms: The Dark Side of California Ending Cash Bail*, *GUARDIAN* (Sept. 7, 2018), <https://www.theguardian.com/us-news/2018/sep/07/imprisoned-by-algorithms-the-dark-side-of-california-ending-cash-bail> (on file with *The University of the Pacific Law School*) ("There is no evidence suggesting that these kinds of algorithms have produced positive changes when implemented, said Megan T. Stevenson, a George Mason University Professor who studied risk assessment. . . ."); *but see* Erwin Chemerinsky, *Improve SB 10, Don't Eliminate It*, *SACRAMENTO BEE* (Jan. 27, 2019), <https://www.sacbee.com/opinion/california-forum/article225032170.html> (on file with *The University of the Pacific Law Review*) ("No matter the fate of SB 10, SB 36 is important in seeking to improve outcomes and transparency in pretrial risk assessment tools and practices").

127. *See* Glen Dalakian, *Open the Jail Doors, Hal: A Guarded Embrace of Pretrial Risk Assessment Instruments*, 87 *FORDHAM L. REV.* 325, 350 (Oct. 2018) (arguing that "policymakers should experiment with risk assessment instruments as a component of their bail reform efforts, but only if appropriate safeguards are in place").

128. *Id.* at 328.

129. *See generally* CRIMINAL JUSTICE POLICY PROGRAM HARVARD LAW SCHOOL, *BAIL REFORM: A*

Groups that oppose using RAS, or at least complete dependence on RAS, argue that these systems will generate the same racial and wealth biases that current bail systems create because those algorithms already reflect those biases.<sup>130</sup> Although the inability to pay bail would not prevent a court from releasing a person, a court can consider several factors including age, crime charged, neighborhood, and prior criminal history without regard to any other mitigating circumstances depending on how the court utilizes its RAS.<sup>131</sup> As jurisdictions around the country increase their reliance on RAS and move toward eliminating cash bail, concerns arise that these systems often neglect to sufficiently consider the rights of the defendant as a matter of both law and policy.<sup>132</sup> Although these concerns likely prevent grassroots organizations and other civil rights groups from supporting SB 10, they almost certainly will not join the bail industry to preserve the status quo: using cash bail and pretrial detention.<sup>133</sup> Instead, these groups will likely focus efforts on other methods of bail reform that generate more tangible and immediate results.<sup>134</sup>

#### IV. COMMUNITY-BASED DEFENSE

In conversations concerning criminal justice reform, political commentators and reformers emphasize the middle and back ends of the system.<sup>135</sup> That is, reformers stress providing services for incarcerated and newly-released inmates.<sup>136</sup> Many jurisdictions across the country have implemented such reforms like providing incentives for early release to individuals presently incarcerated.<sup>137</sup> However, jurisdictions do not focus nearly as much energy on the front end of

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GUIDE FOR STATE AND LOCAL POLICY MAKERS 39, 44 (Feb. 2019), *available at* [cjpp.law.harvard.edu/assets/BailReform\\_WEB.pdf](http://cjpp.law.harvard.edu/assets/BailReform_WEB.pdf) (on file with *The University of the Pacific Law Review*) (discussing the principles of reform necessary to generate positive bail reform including a careful approach to risk assessment systems).

130. Alexis Wilson Briggs, *Human Rights Watch Advises Against Using Profile-Based Risk Assessment in Bail Reform*, HUM. RTS. WATCH (July 17, 2017), <https://www.hrw.org/news/2017/07/17/human-rights-watch-advises-against-using-profile-based-risk-assessment-bail-reform#> (on file with *The University of the Pacific Law Review*).

131. CRIMINAL JUSTICE POLICY PROGRAM HARVARD LAW SCHOOL, *supra* note 129 at 34.

132. Koepke, *supra* note 26 at 1806.

133. ACLU of Northern California Statement on Referendum to Repeal Bail Reform Legislation, ACLU of Northern California (Nov. 20, 2018), <https://www.aclunc.org/news/aclu-northern-california-statement-referendum-repeal-bail-reform-legislation> (on file with *The University of the Pacific Law Review*).

134. *Infra* Part VI.

135. See German Lopez, *The First Step Act, Congress's Criminal Justice Reform Bill, Explained*, VOX (Dec. 11, 2018), <https://www.vox.com/future-perfect/2018/12/3/18122392/first-step-act-criminal-justice-reform-bill-congress> (on file with *The University of the Pacific Law Review*) (highlighting the main features of the most recent criminal justice reform bill, which focuses primarily on sentencing reform).

136. German Lopez, *Congress's Prison Reform Bill, Explained*, VOX (May 22, 2018), <https://www.vox.com/policy-and-politics/2018/5/22/17377324/first-step-act-prison-reform-congress> (on file with *The University of the Pacific Law Review*).

137. *Id.*

the system where people first engage with the criminal justice system.<sup>138</sup>

Part A of this section highlights the rise of innovative bail reform tactics in the early 1990s.<sup>139</sup> Parts B and C focus on community-based defense and community-based organizations and highlight the positive effects such approaches to bail reform have on the community and on the public.<sup>140</sup>

#### *A. A Shift in Bail Reform*

The most recent efforts in bail reform have emphasized offering direct community services to the accused and their families prior to trial.<sup>141</sup> Probation and Pretrial services, the community corrections arm of the federal judiciary, often provides these services.<sup>142</sup> However, the existence of such services outside of the control of law enforcement is necessary for those services' continued success.<sup>143</sup> But, independence is difficult because taxpayers are less willing to pay for pre-conviction social services than for law enforcement under which services after release are generally included.<sup>144</sup> Due to these limitations, community-based reform has emerged as a viable method of addressing the bail systems in the United States.<sup>145</sup> Because of their flexibility, adaptability, and willingness to address the root causes of mass incarceration and the failures of our criminal justice systems, these community-based organizations represent the

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138. Eli Hager & Bill Keller, *Everything You Know About Mass Incarceration is Wrong: Or At Least Misleading, Says this Contrarian Scholar. Here's Why It Matters.*, THE MARSHALL PROJECT (Feb. 09, 2017), <https://www.themarshallproject.org/2017/02/09/everything-you-think-you-know-about-mass-incarceration-is-wrong> (on file with *The University of the Pacific Law Review*) ("Most reform efforts focus on getting people out of prison by shortening or abolishing minimum sentences, hastening the work of parole boards, awarding 'earned time' for good behavior, and the like").

139. *Infra* Section IV.A.

140. *Infra* Sections IV.B–C.

141. See, e.g., Zach Despart, *Proposed Bail Lawsuit Settlement Includes Child Care, Phones, Rides for Poor Defendants*, HOUSTON CHRON. (Apr. 12, 2019), <https://www.houstonchronicle.com/news/houston-texas/houston/article/Proposed-bail-lawsuit-settlement-includes-child-13764225.php> (on file with *The University of the Pacific Law Review*) (highlighting the settlement in a court case that required the county to provide various pretrial services to assist defendants in appearing).

142. US COURTS, PROBATION & PRETRIAL SERVICES—MISSION, <https://www.uscourts.gov/services-forms/probation-and-pretrial-services/probation-and-pretrial-services-mission> (last visited Dec. 15, 2018).

143. NAT'L INST. OF CORRECTIONS, A FRAMEWORK FOR PRETRIAL JUSTICE: ESSENTIAL ELEMENTS OF EFFECTIVE PRETRIAL SYST. & AGENCY 32 (Feb. 2017), available at [http://www.courts.ca.gov/partners/documents/pdr-nat-research-a-framework-for-pretrial-justice\\_essential\\_elements\\_of\\_an\\_effective\\_pretrial\\_system\\_and\\_agency.pdf](http://www.courts.ca.gov/partners/documents/pdr-nat-research-a-framework-for-pretrial-justice_essential_elements_of_an_effective_pretrial_system_and_agency.pdf) (on file with *The University of the Pacific Law Review*).

144. See, e.g., Jacob Ogles, *Study Predicts High Costs for Pre-Trial Release*, FLAPOL (Mar. 24, 2019), <https://floridapolitics.com/archives/291696-university-tampa-pre-trial-release291696> (on file with *The University of the Pacific Law Review*) (demonstrating the fear that some people have regarding the elimination of the bail bonds industry and the possibility of taxpayers having to pay for pretrial services).

145. See Matt Sledge, *Community Bail Fund for Poor Defendants To Launch In Brooklyn*, HUFFPOST (Mar. 23, 2015), available at [https://www.huffpost.com/entry/brooklyn-community-bail-fund\\_n\\_6886836](https://www.huffpost.com/entry/brooklyn-community-bail-fund_n_6886836) (on file with *The University of the Pacific Law Review*) (describing the launch of the Brooklyn Community Bail Fund, a nonprofit working in conjunction with the Brooklyn Defender Services to assist the pretrial process).



most assured way to implement lasting changes in bail reform.<sup>146</sup>

In the mid-1980s, when bail's purpose moved from preventing flight risk to preventing a defendant from committing further crimes, the Vera Institute identified the issue that low-income individuals were unlikely to satisfy the criteria necessary to demonstrate community ties to attain release and also were unlikely to afford bail no matter the amount.<sup>147</sup> In response, Vera "sought to create a pretrial supervision program so good that it [could] compete with jail—one that [could] virtually guarantee that defendants under supervision [would] neither abscond nor commit new crimes."<sup>148</sup>

Although the approach raised concerns about the equivalence of pretrial detention and intensive supervised release, it also afforded medium and high-risk defendants the ability to avoid incarceration and its negative repercussions by ensuring judges that—with proper treatment and training for the defendant—jail time is unnecessary.<sup>149</sup> Furthermore, it utilized government funds in an innovative way: shifting the spending to front-end prevention rather than to back-end remedies.<sup>150</sup> Ultimately, Vera changed functions as other advocacy groups launched different projects to address bail, but not without first demonstrating that community investment can assuage the concerns of law enforcement and judicial officials over releasing potentially dangerous defendants back into the community.<sup>151</sup>

### *B. Community-Bail Funds*

Under the same model as the Vera Institute, the Bronx Freedom Fund emerged as an outgrowth of the Institute's work.<sup>152</sup> The fund works to provide bail in the amount of \$2,000 or less to defendants who can not afford it.<sup>153</sup> The organization created a charitable revolving bail fund in which it used the same funds repeatedly to pay the bail of those who could not.<sup>154</sup> In 2017, the Bronx Freedom Fund evolved into The Bail Project, a national organization with the

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146. *Supra* Section III.C.

147. Andrea Clisura, *None of Their Business: The Need for Another Alternative to New York's Bail Bond Business*, 19 J.L. & POL'Y 307, 322 (2010).

148. *Id.* at 323.

149. *Id.* at 324–25.

150. *Id.* at 325.

151. Logan Abernathy, *Bailing Out: The Constitutional and Policy Benefits of Community and Nonprofit Bail Funds*, 42 LAW & PSYCHOL. REV. 85, 90 (2018) (arguing that community bail funds are the best way to resolve competing interests).

152. Alan Feuer, *Bronx Charity Founder Wants to Pay Bail for Poor Defendants Nationwide*, N.Y. TIMES (Nov. 13, 2017), <https://www.nytimes.com/2017/11/13/nyregion/bail-project-fund-poor-defendants.html> (on file with *The University of the Pacific Law Review*).

153. Jaime Williams, *Borough's Charitable Bail Fund Touts Success*, BRONX TIMES (Feb. 28, 2015), [https://www.bxtimes.com/stories/2015/9/09-fund-2015-02-27-bx\\_2015\\_9.html](https://www.bxtimes.com/stories/2015/9/09-fund-2015-02-27-bx_2015_9.html) (on file with *The University of the Pacific Law Review*).

154. *Id.*

goal of securing freedom for as many people as possible utilizing the sort of revolving bail fund that worked so effectively in the Bronx.<sup>155</sup> By organizing under the model of a revolving bail fund, reformers can focus on specific jurisdictions in need, recycling the monetary resources that various actors invest in the project.<sup>156</sup>

Coordinating this movement through community-driven efforts instead of through law enforcement organizations avoids the red tape associated with government action and the political implications that often limit bail reform.<sup>157</sup> Although general community bail funds do not fully remedy the problems associated with cash bail because not everybody is an ideal candidate to be bailed out by such funds, they do represent a foundational change in the bail reform movement.<sup>158</sup> They do so by transferring action and accountability to communities that have a concrete interest in bail reform rather than leaving them in the hands of disinterested politicians or those with only a tangential connection to the issue.<sup>159</sup> Such funds can serve to address the problems associated with bail by offering a solution during the transition period from cash bail to its replacement, whatever that may be.<sup>160</sup>

### *C. Community-Based Organizations*

United States law defines Community-Based Organizations (“CBOs”) as any public or private nonprofit that “is representative of a community or significant segments of the community” and “provides education or related services to individuals in the community.”<sup>161</sup> Aside from providing the actual money for bail, the CBOs that evolved from Vera Institute’s model offer an excellent example of how these organizations can serve the community—both the accused and others—to reduce levels of incarceration.<sup>162</sup> The Bronx Freedom Fund, initially mentioned above, organized as the Bronx Defenders in 2007 to provide bail to those unable to afford it by using a revolving bail fund.<sup>163</sup> However, much of the Fund’s success now exists in providing services to those for whom it provides bail to ensure that those people appear for their court appearances after

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155. Feuer, *supra* note 152.

156. See Abernathy, *supra* note 151 at 90–92 (explaining the way in which a community bail fund functions).

157. Jocelyn Simonson, *Bail Nullification*, 115 MICH. L. REV. 586, 637 (2017).

158. Alysia Santo, *Bail Reformers Aren’t Waiting for Bail Reform, They’re Using Charity to Set Poor Defendants Free*, THE MARSHALL PROJECT (Aug. 23, 2016), <https://www.themarshallproject.org/2016/08/23/bail-reformers-aren-t-waiting-for-bail-reform> (on file with *The University of the Pacific Law Review*).

159. See Abernathy, *supra* note 151 at 94 (arguing that community bail funds are the best way to resolve competing interests).

160. *Infra* Part IV.A.

161. 20 U.S.C.A § 7801(6) (West).

162. Simonson, *supra* note 157 at 590–92.

163. Clisura, *supra* 147 at 315.

the fund posts bail.<sup>164</sup> Such tactics allowed the organization to bail almost 150 people from October 2013 to October 2014, with 98% of those people making their required court appearances.<sup>165</sup>

Another fund, the Brooklyn Community Bail Fund, works with referring agencies and other social service providers to give pretrial defendants access to re-entry support including attorneys, housing and education workers, and employment agencies.<sup>166</sup> The Fund has kept over 4,000 people out of pretrial detention where they would have been more likely to plead guilty and where they would have had less access to defense-building strategies that could keep them out of jail.<sup>167</sup> Ninety-five percent of all inmates for whom the Fund obtained release made their appearances regardless of the level of risk the court found those defendants to pose.<sup>168</sup> Additionally, courts were three times more likely to dismiss those defendants' charges, and the defendants received more favorable outcomes than if they did not have help from the fund.<sup>169</sup>

Although a number of jurisdictions implement social services following a person's conviction, few provide pre-trial services that serve to prevent the initial interactions with the criminal justice system that often start an endless and repetitive process of incarceration.<sup>170</sup> Furthermore, in those that do, it is parole entities and other government bodies run by law enforcement that offer such services.<sup>171</sup> CBOs can tailor the social services they offer to address varied individual community needs and take action in response to community voices because CBOs comprise people that the criminal justice system has directly affected.<sup>172</sup>

Additionally, for people without ties to the community and with no way for a defendant to demonstrate to a judge that she should release him before trial, these groups can intervene to provide the necessary ties and services to demonstrate to

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164. The Bronx Freedom Fund, *One Year Report 2* (Nov. 2014).

165. *Id.*

166. BROOKLYN DEFENDERS, 2016 ANNUAL REPORT (2016), available at <https://bds.org/wp-content/uploads/BDS-2016-Annual-Report.pdf> (on file with *The University of the Pacific Law Review*).

167. BROOKLYN COMMUNITY BAIL FUND, <https://brooklynbailfund.org/our-results-1> (last visited Nov. 15, 2018) (on file with *The University of the Pacific Law Review*).

168. *Id.*

169. *Id.*

170. See generally Amber Taylor, *A Free Start: Community-Based Organization as an Antidote to the Mass Incarceration of Women Pretrial*, 26 HASTINGS WOMEN'S L.J. 51 (2015) (detailing how inadequate pretrial services and defense often lead to longer sentences and future recidivism).

171. See PRETRIAL JUSTICE INSTITUTE, PROMISING PRACTICES IN PROVIDING PRETRIAL SERVICES FUNCTIONS WITHIN PROBATION AGENCIES: A USER'S GUIDE 13 (June 2010) ("In recent years, many [ . . . ] . . . programs have merged with probation, leaving only 22 of the 94 federal districts where pretrial services and probation are separate") available at <https://www.appa-net.org/eweb/docs/appa/pubs/PPPSFWPA.pdf> (on file with *The University of the Pacific School of Law*).

172. Taylor, *supra* note 170 at 59. (arguing that individual-led provisions of service focusing on the tailoring of support to the individual needs of a defendant most effectively accomplish the goals of pretrial detention and bail).

that judge that release is not only tenable, but also desirable.<sup>173</sup> These groups demonstrate that in communities where individuals participate and maintain a stake in the well-being of the community's citizens, less law enforcement is necessary, and, incarceration both pre and post-trial decreases.<sup>174</sup>

#### V. CHALLENGES ASSOCIATED WITH COMMUNITY-BASED ORGANIZATIONS

Despite the clear success that many CBOs have had throughout the country in providing direct pretrial services and funds to the accused pretrial, the inability of those groups to gain the support of local and state officials has stymied such action.<sup>175</sup> Today, CBOs function in a number of different ways; in some jurisdictions, local legislatures channel funding to community bail funds and other non-profits that work in tandem with local public defenders to provide the services detailed in the previous section.<sup>176</sup> In others, the legislature promulgates laws that facilitate community bail funds and other forms of community defense and rehabilitation by permitting the funds to post bail whereas other state laws would have denied them that right.<sup>177</sup>

For example, the state lawmakers enacted the New York Charitable Bail Act of 2012 to allow non-profit organizations in New York to pay bail in the amount of \$2,000 or less for those defendants that cannot afford it.<sup>178</sup> The legislature passed the law in direct response to a court decision where the judge rejected the Bronx Freedom Fund's posted bail because he was concerned with the unknown identities of the individuals who provided the bail.<sup>179</sup> The legislation allowed the Brooklyn Bail Fund to continue evolving to serve the community's needs, while removing obstacles, like the court decision above, that prevent community organizers from doing their work.<sup>180</sup>

Many are concerned about defendants using nontraditional sources to pay bail.<sup>181</sup> As a result, some commentators claim these crowdfunding sources, such

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173. Simonson, *supra* note 157 at 605–06.

174. *Id.* at 606.

175. *E.g.*, Raven Rakia, *New Orleans Prosecutor Calls New Bail Fund 'Extremely Disturbing,'* THE APPEAL (Nov. 28, 2018), <https://theappeal.org/new-orleans-da-stokes-fears-over-bail-fund/> (on file with *The University of the Pacific Law Review*) (highlighting New Orleans district attorney's criticism of community bail group as "playing a very dangerous game with public safety").

176. BDS Memo of Support of A4880, Which Would Limit Restrictions on Charitable Bail Organizations (CBOS), Brooklyn Defender Services (Feb. 9, 2017), <https://bds.org/bds-memo-of-support-of-a4880-which-would-limit-restrictions-on-charitable-bail-organizations-cbos/> (on file with *The University of the Pacific Law Review*); *see also* Simonson, *supra* note 157 at 600–02 (providing examples of various community bail funds and the way in which they function).

177. *See* Simonson, *supra* note 157 at 600–02 (providing examples of various community bail funds and the way in which they function).

178. Susan Loeb, *Go Fund Me, Please: Crowdsourcing for Bail as an Insufficient Surety*, 44 HOFSTRA L. REV. 1319, 1331 (2016).

179. *Id.*

180. Simonson, *supra* note 157 at 642.

181. *See generally* Loeb, *supra* note 178 (explaining the reservations related to and problems associated

as Go Fund Me, are illegitimate bail sources.<sup>182</sup> Conversations surrounding cash bail sources beyond traditional bondsmen often center around the argument that a person will not feel the same obligation to appear if someone with whom the person has no connection pays the bail insuring his appearance.<sup>183</sup> Although this argument is initially compelling, it doubly disadvantages indigent defendants;<sup>184</sup> indigent defendants are likely unable to afford even a small amount of bail, and they are unlikely to have any meaningful connection to the community to which they belong.<sup>185</sup>

Bail funds, CBOs, and other methods of community defense assuage these concerns by providing the community connection the defendant previously lacked.<sup>186</sup> Focusing on community defense allows groups to combat the notion that dangerous defendants will not appear at trial and will commit crimes in the interim.<sup>187</sup> This should demonstrate to courts the strong likelihood of the defendant's appearance at trial without employing the use of pretrial detention.<sup>188</sup>

## VI. RECOMMENDATIONS FOR ENSURING COMMUNITY ACCESS TO AND IMPACT ON THE BAIL REFORM CONVERSATION

A system relying on community defense would ideally task legislatures with developing standards to determine the legitimacy of bail that comes from individuals and from charitable bail funds.<sup>189</sup> This is because some argue that “bail funds may [] usurp the traditional democratic process.”<sup>190</sup> However, most states have already enacted those regulations for commercial bail bonds businesses, so a regulatory model already exists.<sup>191</sup> A gradual erosion of the bail industry by removing for-profit bail businesses would help the bail reform movement gain further traction by eliminating a large impediment to the political success of cash bail reform.<sup>192</sup> Weakening of the bail bonds industry would, in

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with permitting the use of crowdsourcing, and why certain states might choose to prohibit such sources of bail).

182. Loeb, *supra* note 178 at 1332–35.

183. Loeb, *supra* note 178 at 1331.

184. Simonson, *supra* note 157 at 617.

185. *Id.*

186. *Id.* at 619.

187. Marisa Gerber, With California's Cash Bail System in Limbo, Compton Pilot Program Serves as 'Petri Dish,' L.A. TIMES (Dec. 30, 2018), <https://www.latimes.com/local/lanow/la-me-ln-bail-project-compton-20181230-story.html> (on file with *The University of the Pacific Law Review*).

188. *Supra* Part III.

189. See Loeb, *supra* note 178 at 1336 (demonstrating that state and federal law already examine the sufficiency of bail and have procedures for doing so).

190. Simonson, *supra* note 157 at 633.

191. See *Pretrial Policy: State Laws*, NAT'L CONFERENCE OF STATE LEGISLATURES (June 2018), (giving a brief overview of pretrial policy in the states including state law guidelines with which bail bonds agents must comply).

192. See Ulloa, *supra* note 71 (“Over the last two years, bail companies have been the fiercest opponents of efforts in Sacramento to overhaul how judges assign bail. . . .”)

turn, release some pressure on legislators from a billion-dollar industry.<sup>193</sup>

Part A of this section demonstrates that by enacting regulations that allow certain groups to provide bail and other bail services, local legislatures can ease the weight on their own coffers while providing bail reformers the capital they need to run as successful ventures.<sup>194</sup> Furthermore, such regulations would address concerns regarding donations coming from legitimate sources.<sup>195</sup> These regulations would allow CBOs and other bail funds to more seamlessly enter the political process to impact meaningful bail reform.<sup>196</sup> Part B then highlights a model through which local jurisdictions could address bail reform until voters decide SB 10's fate.<sup>197</sup>

#### *A. California's Neglect of Community-Based Organizations in Implementing Bail Reform and Its Need for Their Input*

To illustrate, a coalition of nine groups representing different stakeholders originally supported California's SB 10.<sup>198</sup> By the time Governor Brown signed the bill into law, almost all the CBOs that initiated the law's ascent withdrew their support for it.<sup>199</sup> They cited cooption by the bill's authors and the remaining groups that supported the authors' conception of the bill.<sup>200</sup>

Such groups as Essie Justice Group argue that reform done in the name of low-income black and brown people should substantively help those people.<sup>201</sup> However, because the voices most dedicated to the plight of that demographic were shut out of the legislative process, the law Governor Brown signed does not reflect their views.<sup>202</sup> As such, the groups that once represented a driving coalition in California's bail reform movement are no longer working in tandem, leaving them without the force necessary to drive lasting change and placing the success of such bold reform movements as SB 10 in a precarious position.<sup>203</sup>

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193. See also JUSTICE POLICY INSTITUTE, FOR BETTER OR FOR PROFIT: HOW THE BAIL BONDING INDUSTRY STANDS IN THE WAY OF FAIR AND EFFECTIVE PRETRIAL JUSTICE 8 (Sept. 2012), available at [http://www.justicepolicy.org/uploads/justicepolicy/documents/\\_for\\_better\\_or\\_for\\_profit.pdf](http://www.justicepolicy.org/uploads/justicepolicy/documents/_for_better_or_for_profit.pdf) (on file with *The University of the Pacific Law Review*) (detailing the control and influence that the bail industry has over legislation surrounding bail across the country).

194. *Infra* Section VI.A.

195. Christopher Zoukis, *Community Funds, Federal Legislation Challenging Bail System from Different Angles*, PRISON LEGAL NEWS (Nov. 6, 2017), <https://www.prisonlegalnews.org/news/2017/nov/6/community-funds-federal-legislation-challenging-bail-system-different-angles/> (on file with *The University of the Pacific Law Review*).

196. Simonson, *supra* note 157 at 625.

197. *Infra* Section VI.B.

198. Melanie Havelin, *Webinar on Bail Reform and SB 10*, CAL. CRIM. JUST. FUNDERS GROUP (Nov. 1, 2018) (webinar) (on file with *The University of the Pacific Law Review*).

199. *Id.*

200. *Id.*

201. ESSIE JUSTICE GROUP, *supra* note 109.

202. Havelin, *supra* note 198.

203. ESSIE JUSTICE GROUP, *supra* note 81; SV De-Bug, *supra* note 109.

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However, in an effort to assuage some of the concerns of these grassroots organizations, Governor Brown signed SB 10 into law as an implementation bill, with the California Judicial Council to prescribe the rules of implementation.<sup>204</sup> At the end of 2018, the Council produced its first set of draft rules for public comment with the hope of garnering more support for the bill.<sup>205</sup> One such provision would “require[] courts to. . .consult with local resource providers, as appropriate, including the county behavioral health agency and community-based organizations that provide support for defendants and for victims. . .” in implementing the new system of pretrial detention.<sup>206</sup>

Although the remaining language of the draft rules leaves much unsettled, a change to this provision could allow access to the process from which SB 10 ultimately excluded certain community-based organizations.<sup>207</sup> By including language requiring local courts and other criminal justice system actors to consult community-based organizations continuously and not only “as appropriate,” the judicial council’s rules could garner much more support than the language of the proposed rules.<sup>208</sup> The current language, according to critics, would allow local jurisdictions to bypass working with these organizations or to limit the amount of input that they have in developing the systems that each jurisdiction will use.<sup>209</sup> Such a system likely would lead to a neglect of defendant’s rights which, as demonstrated above, does not serve to protect the community or the defendant.<sup>210</sup> Rules *requiring* consultation with CBOs, however, would give the entire system more legitimacy by ensuring that political actors respond to all voices so that the movement represents more competing interests and nuanced views.<sup>211</sup>

### B. Moving Forward

Because SB 10 will not go into effect until after November 2020, if at all, reformers need to continue brainstorming solutions to the problems cash bail causes if the reform movement wants to avoid stalling.<sup>212</sup> Governor Newsom, who allocated 75 million dollars in his budget to the Judicial Council in its efforts

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204. Associate Press, *California to Become First State to Eliminate Bail for Suspects Awaiting Trial*, CBS NEWS (Aug. 29, 2018), <https://www.cbsnews.com/news/california-to-become-first-state-to-eliminate-bail-for-suspects-awaiting-trial/> (on file with *The University of the Pacific Law Review*).

205. INVITATION TO COMMENT, JUDICIAL COUNCIL OF CALIFORNIA (Dec. 2018), *available at* <https://www.courts.ca.gov/documents/LEG16-05.pdf> (on file with *The University of the Pacific Law Review*).

206. *Id.*

207. ESSIE JUSTICE GROUP, *supra* note 109.

208. Ralphling, *supra* note 107.

209. *Id.*

210. *See* Ralphling, *supra* note 107 (“The rules do not enhance the due process rights of accused people in deciding their pretrial custody status”).

211. Abernathy, *supra* note 151 at 97–98.

212. *See* Ulloa, *supra* note 29 (explaining how “civil rights groups have since sought to distance themselves from the bail industry’s referendum efforts, and [are] instead pushing for new court rules from the Judicial Council to prevent racial bias in the use of risk assessment tools”).

to aid in implementing SB 10,<sup>213</sup> should also allocate money to the myriad community-defense oriented groups that currently act within in the state to ameliorate the conditions of those that bail affects, even as SB 10 is in limbo.<sup>214</sup>

The chance encounter between the head deputy of the Compton Public Defender's Office, Jane Newman, and Robin Steinberg, the founder of the Bail Project and the Bronx Defenders, serves as one such example of how the state could accomplish this.<sup>215</sup> After meeting, the two women managed to create a three-way partnership under which the non-profit Bail Project will work with UCLA's law students and the Public Defender's Office to implement community-defense in which the partnership focuses on the defendant's needs to avoid any pretrial detention and its associated costs.<sup>216</sup> In the clinic, "students work closely with their client's families and community supporters to present judges with whole pictures of their clients."<sup>217</sup> In communities such as Compton, where seven out of ten clients the public defender's office represents cannot afford bail, there is an obvious need for such collaboration.<sup>218</sup>

The coalition has already secured the release of eleven of the fourteen people they have helped.<sup>219</sup> Securing spots in drug programs, sending daily text reminders to attend trial, and attaining the assurance of family members that they would be responsible for their loved one's appearance are some examples of how these coalitions have secured pre-trial release for their clients.<sup>220</sup> While these methods do not always work because judges fear the consequences of releasing defendants into the public without proper assurances, one person who avoids unnecessary detention is one more person who will not experience the negative effects of that detention which could be expansive.<sup>221</sup>

Released individuals can maintain their daily routines for the days, months, or even years until trial, allowing them to keep their jobs and care for their children.<sup>222</sup> Even more, the founder of the Bail Project urges that over the ten years she has been working on bail reform 96% of defendants have appeared for trial.<sup>223</sup> Such figures should assuage concerns from supporters of bail who fear allowing defendants to rely on untraditional sources of bail will not hold them

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213. *Id.*

214. *Supra* Sections IV.B–C.

215. Gerber, *supra* note 187.

216. *Id.*

217. UCLA LAW, CHANGE IN COMPTON: UCLA LAW PROGRAM BRINGS BAIL REFORM TO LOS ANGELES COUNTY, <https://www.law.ucla.edu/news-and-events/in-the-news/2019/02/change-in-compton-ucla-law-program-brings-bail-reform-to-los-angeles-county/> (last visited Apr. 13, 2019) (on file with *The University of the Pacific Law Review*).

218. Gerber, *supra* note 187.

219. *Id.*

220. *Id.*

221. *Supra* Part III.

222. HUM. RTS. WATCH, *supra* note 2 at 42.

223. Gerber, *supra* note 187.



accountable to the court.<sup>224</sup> Furthermore, the argument that the possibility of getting one's bail returned encourages appearances ignores the reality that most bailees do not receive their money back and often lose that money to the bail bondsmen regardless of whether they appear.<sup>225</sup>

Critics are concerned that this reformed system of addressing bail cannot work in a state the size of California.<sup>226</sup> They argue these programs would still be costly.<sup>227</sup> However, even the Compton district attorney acknowledged that “the program is an encouraging step away from what has long been the status quo in L.A. County: If you have money, you bail yourself out; if you're poor, you don't.”<sup>228</sup> For too long, the state of California has let the bail industry control the narrative surrounding pretrial defendants,<sup>229</sup> and this is a chance to squash that narrative.<sup>230</sup>

## VII. CONCLUSION

Despite the difficulties associated with relying on CBOs as the primary driver of change,<sup>231</sup> the inclusion of legislation or judicial rules providing for the financial support of and cooperation with these groups by local law enforcement and other actors in the criminal justice system would reduce the disparity in bail outcomes.<sup>232</sup> Ultimately, by funding community-based organizations through legislation and officially integrating them into the legal process whereby defendants secure release prior to trial, California can harness the energy and power of movements that already exist within the state and across the country to more effectively accomplish the goals that SB 10 sought to achieve.<sup>233</sup>

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224. *Id.*

225. JUSTICE POLICY INSTITUTE, *supra* note 193.

226. Gerber, *supra* note 187.

227. *Id.*

228. *Id.*

229. UCLA SCHOOL OF LAW CRIMINAL JUSTICE REFORM POLICY CLINIC, THE DEVIL IS IN THE DETAILS: BAIL BONDS CONTRACTS IN CALIFORNIA 3 (on file with *The University of the Pacific Law Review*) (“The commercial bail industry has exerted significant political influence through organized lobbying, fueling growth in the use of money bail and curtailing expansion of non-monetary pretrial release mechanisms such as release on recognizance, unsecured bond, or conditional release”).

230. See Bill Armstrong, *California Pass A Law to Put Me Out of Business—And Taxpayer Will Get the Bill*, THE MARSHALL PROJECT (Feb. 05, 2018), <https://www.themarshallproject.org/2018/12/05/california-passed-a-law-to-put-me-out-business-and-taxpayers-will-get-the-bill> (on file with *The University of the Pacific Law Review*) (detailing a bail bondsman's assertion that SB 10 will destroy the bail industry in California).

231. *Supra* Part IV.

232. *Supra* Part IV.

233. *Supra* Part V.