California Pretrial Reform: The Next Step in Realignment

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“PUBLIC SAFETY REALIGNMENT [HAS FORCED] A RETHINKING OF ALL ELEMENTS OF THE CRIMINAL JUSTICE SYSTEM, INCLUDING BAIL. IF INDEED BAIL DECISIONS ARE BASED PRIMARILY IF NOT EXCLUSIVELY ON FINANCIAL FACTORS, THAT APPROACH SEEMS INCONGRUENT WITH THE GOALS OF REALIGNMENT.”

– Matthew Cate, former Secretary of California’s Department of Corrections and Rehabilitation¹
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# Table of Contents

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Executive Summary</td>
<td>1</td>
</tr>
<tr>
<td>I. Background</td>
<td>3</td>
</tr>
<tr>
<td>A. California’s Pretrial Framework</td>
<td>3</td>
</tr>
<tr>
<td>B. Realignment and the Next Wave of Necessary Reforms</td>
<td>3</td>
</tr>
<tr>
<td>II. Bail Reform Advances the Objectives of Realignment</td>
<td>5</td>
</tr>
<tr>
<td>A. Bail is Ineffective at Achieving the Pretrial Goals of Protecting</td>
<td>5</td>
</tr>
<tr>
<td>the Public and Ensuring that Defendants Appear Before Trial</td>
<td></td>
</tr>
<tr>
<td>B. Bail Reform Would Relieve Overcrowded County Jails</td>
<td>6</td>
</tr>
<tr>
<td>C. Bail Reform Would Achieve Justice Reinvestment</td>
<td>6</td>
</tr>
<tr>
<td>III. California’s Wealth-Based Pretrial Detention System May Be</td>
<td>8</td>
</tr>
<tr>
<td>Susceptible to a Constitutional Challenge</td>
<td></td>
</tr>
<tr>
<td>IV. Money Bail Imposes Devastating Consequences on Defendants,</td>
<td>10</td>
</tr>
<tr>
<td>Their Families, and Their Communities and Exacerbates Racial Disparities</td>
<td></td>
</tr>
<tr>
<td>V. A Risk-Based Pretrial System is More Fair and Effective and Would Build on the Principles of Realignment</td>
<td>12</td>
</tr>
<tr>
<td>VI. Conclusion &amp; Recommendations</td>
<td>14</td>
</tr>
<tr>
<td>Endnotes</td>
<td>16</td>
</tr>
</tbody>
</table>
The 2011 Public Safety Realignment Act (Realignment) is “the most significant criminal justice legislation passed in three decades in California.” With the goal of dramatically reducing California’s state-prison population, Assembly Bill 109 provided counties with funding and responsibility over local jail populations and ensured that low-level offenders would not be transferred from county jail to state prisons. When signing AB 109, Governor Jerry Brown addressed the crisis in the state’s criminal justice system: “For too long, the state’s prison system has been a revolving door for lower-level offenders... Cycling these offenders through state prisons wastes money, aggravates crowded conditions, thwarts rehabilitation, and impedes local law enforcement supervision.” By shifting the responsibility for non-serious, non-violent, and non-sex offenders from the state prisons to counties, the legislation created an opportunity for local governments to implement local solutions to address the crisis of overcrowding and recidivism. To accommodate the influx of inmates from state prisons to county jails many counties are considering building new jails. Other counties are seeking to reduce jail populations and maintain public safety by expanding alternatives to incarceration such as probation, pretrial, and mental health services. The most promising approach to lowering jail populations and protecting public safety is to reform pretrial decision-making statewide through comprehensive legislation.

Reforming California’s pretrial justice system is the next step in Realignment. In 2015, 63% of jail beds in California were filled by people awaiting either trial or sentencing. According to the Public Policy Institute of California, 58.5% of those booked on misdemeanor or felony charges are detained pretrial. This high rate of pretrial detention is the product of a cash-based system of bail. Even though a judge has determined that they are safe to return to their community, many people remain in jail only because they cannot afford bail. Statewide action is necessary to eliminate or minimize secured money bonds and move toward a pretrial system that avoids unnecessary detention, addresses wealth- and race-based disparities, and allows for individualized, evidence-based pretrial decisions.

**EXECUTIVE SUMMARY**

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**FIVE REASONS WHY REFORM IS NEEDED**

1. Reforming California’s money bail system advances the goals of Public Safety Realignment.

2. Money bail is an ineffective tool to achieve community safety and to assure appearance at trial.

3. Detaining people pretrial on the basis of wealth is unconstitutional under the Equal Protection and Due Process clauses of the Fourteenth Amendment.

4. The negative consequences of pretrial detention disproportionately affect communities of color and low-income people.

5. Pretrial services that assess risk, provide court reminders, and conduct community monitoring cost less money than bail, are more effective at achieving pretrial release goals, and have worked in many jurisdictions across California and the United States.
The moment for pretrial justice reform in California is now. Governor Jerry Brown, Chief Justice Tani G. Cantil-Sakauye, Senator Robert Hertzberg, and Assemblyman Rob Bonta have all committed to work together to reform California’s pretrial justice system. In her 2016 State of the Judiciary Address, Chief Justice Cantil-Sakauye said money bail “penalize[s] the poor for being poor” and called for the creation of more pretrial service programs. The Chief Justice formed a Pretrial Detention Reform Workgroup comprised of superior court judges from across the state. This group determined that California’s pretrial system “unnecessarily compromises victim and public safety” and recommended a risk-based assessment system to replace cash bail. Senator Hertzberg and Assemblyman Bonta have introduced The California Money Bail Reform Act of 2017, which aims “to safely reduce the number of people detained pretrial, while addressing racial and economic disparities in the pretrial system, to ensure that people are not held in pretrial detention simply because of their inability to afford money bail.” A broad coalition of policymakers, advocates, and communities support the bill. These groups join others who have called for bail reform across the country, including the American Bar Association, the Conference of State Court Administrators, the National Association of Counties, the Conference of Chief Justices, the American Jail Association, the International Association of Chiefs of Police, the Association of Prosecuting Attorneys, and the National Association of Criminal Defense Lawyers. In recent lawsuits against states and counties across the country, courts have found many contemporary bail practices to be unconstitutional. Unless reforms are adopted, California’s bail practices are vulnerable to similar constitutional challenges.

Effective pretrial practices will enable counties to reduce pretrial jail populations, reduce costs, and maintain public safety. Pretrial reform will directly advance Realignment’s vision of local, efficient criminal justice solutions. California counties with established pretrial service programs have already demonstrated their capacity to reduce jail populations, protect the community, save money, and increase appearance rates. Requiring statewide use of evidence-based practices in pretrial decisions will bring California closer to realizing Realignment’s goal of a safer, fairer criminal justice system.
A. CALIFORNIA’S PRETRIAL FRAMEWORK

The California Constitution guarantees that defendants “shall be released on [non-excessive] bail,”28 except when the defendant is charged with a capital crime, a felony involving acts of violence or felony sexual assault when there is a substantial likelihood that the person’s release would result in great bodily harm, or any felony when there is a substantial likelihood that the person would carry out the threat of great bodily harm if released.29 A judge may release individuals who have not been charged with a capital crime on their own recognizance.30 A person released on recognizance signs a form promising to return to court for trial. Alternatively, California law authorizes a judge to condition a defendant’s release on bail. When deciding whether to set, reduce, or deny bail, a judge must consider “the protection of the public, the safety of the victim, the seriousness of the offense charged, the previous criminal record of the defendant, and the probability of his or her appearing at the trial or hearing of the case. Public safety and the safety of the victim shall be the primary considerations.”31

A judge technically has discretion over the amount of bail.32 She may set a bail amount according to the countywide bail schedule or may depart from the schedule. Bail schedules are set by “the superior court judges in each county,”33 with the bail amounts determined by “consider[ing] the seriousness of the offense charged,”34 as well as a pre-assigned “additional amount of required bail for each aggravating or enhancing factor chargeable in the complaint.”35 Bail schedules do not consider an individual’s ability to pay the bail amount, nor do they involve an individual assessment of flight risk or risk of danger to the community.

Judges in California face institutional pressure to set monetary bail according to the countywide bail schedules. Because of the high volume of cases in their courts, judges feel the need to make decisions quickly.36 If a judge wants to depart from the bail schedule when setting bail for serious or violent felonies, the judge must hold a hearing in open court and state for the record the reasons for departing from the bail schedule.37 The judge must consider past court appearances, the maximum potential sentence, and any potential danger, as well as “any evidence offered by the detained person regarding his or her ties to the community and his or her ability to post bond.”38 In contrast, a judge can just impose the scheduled bail and avoid the hearing and findings on the record.

A defendant can pay bail three different ways: 1) pay the full amount,39 2) use real estate equity or a government bond as collateral,40 or 3) purchase a bail bond from a bond agent.41 The last option is the most common.42 In California, bail bond agents charge fees of up to 10% of a person’s bail amount,43 although some bond agents may charge a lower percentage or work out an installment plan.44 Bond-agent fees are not refundable, even if a case is dismissed.45

B. REALIGNMENT AND THE NEXT WAVE OF NECESSARY REFORMS

Realignment, as enacted in AB 109, is the legislative response to the United States Supreme Court’s ruling in Brown v. Plata, which required California to reduce the state prison population.46 Realignment changed California’s criminal justice system in two ways: 1) it gave county jails, rather than state prisons, responsibility over certain low-level offenders, parole violators, and
juvenile offenders; and 2) it granted counties greater responsibility over these defendants after their release.47

The goal of Realignment was to eliminate the waste and ineffectiveness of the prison system. Under the previous system, low-level offenders and parole violators would often cycle in and out of state prisons, serving time for a few months or less. In his signing statement, the Governor noted that this pattern of repeated short stints in prison “wastes money, aggravates crowded conditions, thwarts rehabilitation, and impedes local law enforcement supervision.”48

The transition of responsibility to the county jails was supported by the belief “that counties would be positioned to best serve the low-level offenders in the community, both through the criminal justice system and in providing services to help them succeed.”49 Central to Realignment is the idea that a local community correction plan can more efficiently and carefully address low-level offenses because those who commit that type of crime “don’t commit it in some abstraction called the state, they commit it in some city, or some county, on some street corner, and they have a family, and they have a neighborhood.”50

Realignment was designed not only to transfer custodial responsibilities from the state to the counties but also to encourage counties to develop alternatives to jail for parole violations and low-level offenses. It rested on the belief that local authorities would be best equipped to design and implement the services that would help offenders reintegrate into their local communities.51 In a 2011 speech delivered to California law enforcement leaders on Realignment, Governor Brown espoused a local approach to criminal justice management: “The real answer is not to let violent criminals out of prison, but it’s to realign the process so that which can be handled at the local level, is handled at the local level.”52
A. BAIL IS INEFFECTIVE AT ACHIEVING THE PRETRIAL GOALS OF PROTECTING THE PUBLIC AND ENSURING THAT DEFENDANTS APPEAR BEFORE TRIAL

The Public Safety Realignment Act calls on counties to “maximize the effective investment of criminal justice resources.” Money bail has proven to be a costly and ineffective investment of resources. California’s pretrial system has two goals: to protect “the safety of victims and the community” and to ensure that “the defendant will reappear at court for trial.” Skeptics of bail reform worry that changes to California’s pretrial system will harm the safety of the public and result in defendants missing court dates, but the current money bail system is not an optimal or effective tool for ensuring safety or reappearance.

Money bail has no link to public safety. In fact, bail is “unnecessarily risky: defendants with financial resources can purchase release even if there is a high risk that they will engage in pretrial misconduct.” In a law review article criticizing the money bail system’s inability to protect the public, Judge Karnow explains that California judges determine bail amounts based on the severity of the charged offense, an approach that is “premised on the notion that higher bail guards against a higher level of dangerousness, and lower bail is appropriate given a lower risk to the public.” However, Judge Karnow surveys a wealth of empirical studies that reveal that “the severity of the crime cannot be used as a proxy for the danger posed by the defendant if he were to be released on bail.” And Judge Karnow notes a “central flaw” in California’s money bail system: “defendants do not forfeit bail when they commit a new offense; they forfeit bail only when they do not appear at a hearing.” Therefore, the amount of bail does not constrain or deter a defendant from committing a crime during the pretrial period.

Bail reform advances the objectives of realignment

Money bail is understood by some to promote public safety by providing a covert method of preventative detention—judges can purposely set bail beyond what defendants can afford in order to ensure that they will remain in jail. But assigning money bail to achieve pretrial detention distorts the purpose of bail as an attainable financial incentive to reappear and circumvents constitutional due process requirements for pretrial detention based on dangerousness.

Bail is less effective at ensuring defendants’ reappearance for trial than alternative methods of pretrial release. In a report on the state’s pretrial practices, the Public Policy Institute of California notes that “California’s high rates of pretrial detention have not been associated with lower rates of failure to appear or lower levels of felony rearrests” compared to the rest of the United States. The Santa Clara County Bail and Release Work Group agrees, noting that “the evidence does not support the notion that bail is more effective than other means at ensuring a defendant will appear for scheduled court dates.” In fact, “[w]hat the evidence does reflect is that most defendants who are released from custody pending trial will appear for their court dates without any financial incentive, and that many of those who miss a court appearance do so for mundane reasons such as lack of reliable transportation, illness, or inability to leave work or find childcare, rather than out of a desire to escape justice.”

The data from Santa Clara County and elsewhere bear this out. The county’s pretrial services program, which assesses pretrial defendants’ risk of re-offending and possibility of flight, “has achieved [failure to appear] rates of less than 5%.” Other jurisdictions that utilize pretrial risk assessment, court reminders, and community-based monitoring also show high rates of reappearance. “In Kentucky, for example, 90% of
defendants released pretrial make all scheduled court appearances... In Washington, D.C., where 80% of defendants are released without financial conditions, 88% make all scheduled court appearances.\textsuperscript{64}

\section*{B. Bail Reform Would Relieve Overcrowded County Jails}

Realignment’s shift of certain inmates from state prisons to county jails has increased California’s overall jail population, exacerbating the problem of jail overcrowding in many counties.\textsuperscript{65} The Public Policy Institute of California notes that “[o]vercrowding has long been a problem for many California jails. For more than a decade, a number of counties have operated facilities under court orders that mandate the release of inmates at specified population thresholds. At last count, 39 jail facilities in 19 counties were operating under such population caps.”\textsuperscript{66} According to a Bureau of Prisons and Government Accountability Office survey of federal and state facilities, overcrowding negatively affects staff safety and security, as well as inmates and infrastructure.\textsuperscript{67}

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Bail reform can help reduce overcrowding. Given that 63\% of the California jail population (nearly 47,000 people) are non-sentenced inmates—many of whom are awaiting trial and could leave if they had enough money for bail—replacing the current wealth-based detention system would free up jail beds across the state.\textsuperscript{68} Jail beds will remain empty because releasing a defendant pretrial does not just delay his inevitable jail or prison term. Last year more than 40\% of the felony arrests in California resulted in an outcome other than a jail or prison sentence.\textsuperscript{69}

With slight variation from county to county, California’s pretrial system is characterized by the rote imposition of pre-determined bails that are extremely high: The median bail level in California is more than five times the median bail level nationwide.\textsuperscript{70} The current system’s comparatively high bail amounts and generic application of bail schedules indicate that reform aimed at smartly and safely reducing pretrial confinement has enormous potential to achieve more “effective investment in criminal justice resources.”\textsuperscript{71}

\section*{C. Bail Reform Would Achieve Justice Reinvestment}

The text of AB 109 frames Realignment as a “justice reinvestment,” calling for counties “to manage and allocate criminal justice populations more cost-effectively, generating savings that can be reinvested in evidence-based strategies that increase public safety while holding offenders accountable.”\textsuperscript{72} Although reform includes costs such as creating and operating a pretrial services agency and conducting pretrial hearings, the resulting long-term reduction in jail populations will save counties money overall for months and years ahead—all while preserving public safety.\textsuperscript{73}

For Realignment’s shift to counties to be effective, counties must not be overburdened with the costs of managing excessive pretrial detention. A survey of six California counties—Alameda, Fresno, Orange, Sacramento, San Bernardino, and San Francisco—found that “the total cost of jailing people whom the prosecutor never charged or who had charges dropped or dismissed was $37.5 million over two years.”\textsuperscript{74}

Pretrial detainees make up a significant portion of the criminal justice population in county jails. According to the most recently available data, 63\% of California’s county jail population consists of inmates who have not been sentenced, many of whom are awaiting trial.\textsuperscript{75} Detaining pretrial defendants is costly. Statewide estimates suggest pretrial detention costs $113.87 a day per defendant, with some variation by county.\textsuperscript{76} It costs $159 a day to detain a pretrial defendant in Santa Clara County,\textsuperscript{77} and $177 in Los Angeles County.\textsuperscript{78}

These costs add up. On a nationwide level, pretrial incarceration costs an estimated $14 billion each year.\textsuperscript{79} A Human Rights Watch analysis of data from the Sacramento County Sheriff’s Department found that “the cost of detaining people who were bail-eligible but who did not pay bail was over $44.3 million from 2014–2015.”\textsuperscript{80}

Jail is not the only option. There are more cost-effective alternatives to manage pretrial defendant populations...
and protect public safety. Santa Clara County found that pretrial service supervision cost only $15 dollars a day per defendant, while jail detention cost $159 a day. Santa Clara estimated that release of pretrial defendants on their own recognizance during a six-month period in 2011 "saved the County $31.3 million in detention costs." Los Angeles has also found community-based monitoring to be more cost-effective. According to the Los Angeles County Board of Supervisors, "[t]he current cost of Los Angeles County pretrial services ranges from 0 to $25.80 per person per day, compared to the $177 per day to house someone in jail." Pretrial monitoring has also proved more cost effective than money bail outside California. A study of Baltimore, Maryland found that it cost only $2.50 per day to monitor someone through a pretrial program but cost $100 per day to incarcerate someone before trial. Camden County, New Jersey saved an estimated $9 million per year by reducing its jail population through a series of jail management reforms, including "adopting validated risk assessment tools and alternatives to incarceration [community-based monitoring] for low-risk pretrial defendants.”

According to one pretrial cost-benefit model, courts with pretrial polices that "releas[e] low risk individuals more quickly while also detaining high risk defendants would result in overall system cost savings as well as lower costs related to new crime.” Data from the federal and state level bear out these calculations. At the federal level, “[p]retrial detention for a defendant was nearly 10 times more expensive than the cost of supervision of a defendant by a pretrial services officer.” In one year, Kentucky avoided an estimated $102.9 million in incarceration costs through its statewide pretrial services program, which operated on a budget of under $12 million.

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Any analysis of the costs and benefits of implementing pretrial service systems should account for the savings that accrue to individuals and the state. Marginal savings for each released person add up. When the reduction in jail population becomes significant enough to allow a housing unit within a jail to be closed, fixed costs, like staffing or facilities, are also reduced. Some foreseeable but indirect savings are difficult to measure, like the contributions of released defendants who can keep their jobs and pay taxes. Similarly, released people can provide for their families, which reduces the need for their families to seek assistance from state welfare systems. Without a cash bail system, families of defendants would also save money because they would not have to pay bail bond fees that cannot be recovered. These substantial costs also fall upon the innocent. During the first half of 2017 in Santa Clara County, 265 people who were never charged with a crime had to pay approximately $500,000 in nonrefundable bail bond fees.

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Detention also has hidden costs. Several recent social science studies have found that “pretrial detention causally increases the likelihood of conviction, the likelihood of receiving a carceral sentence, the length of a carceral sentence, and the likelihood of future arrest for new crimes.” Given these connections between pretrial detention, future criminal activity, and length and likelihood of post-conviction incarceration, the potential for resultant savings stretches beyond the cost of jail beds. With pretrial reform, cash-strapped counties can avert jail overcrowding and make better use of money that would have been spent on unnecessary detention.
The Supreme Court has affirmed that the United States Constitution prohibits a state from depriving individuals of their liberty on the basis of wealth. Jailing criminal defendants only because they cannot afford monetary requirements violates the Fourteenth Amendment’s equal protection and due process guarantees. The Court has emphasized that “[t]here can be no equal justice where the kind of trial a man gets depends on the amount of money he has.” For example, in Griffin v. Illinois, the Court held that equal protection and due process require that a defendant’s ability to appeal a conviction should not depend on whether he could pay a fee to provide an appellate court with his trial transcript. In Tate v. Short, the Court extended that principle, overturning a lower court decision that sentenced a defendant to a “prison farm” because he could not pay $425 in traffic fines. The Court explained that “the Constitution prohibits the State from imposing a fine as a sentence and then automatically converting it into a jail term solely because the defendant is indigent and cannot forthwith pay the fine in full.”

The Constitution requires courts to carefully inquire into the defendant’s individual circumstances—in particular, his ability to pay and the possibility of alternative punishments—before depriving him of his liberty on the basis of unpaid fines. In Bearden v. Georgia, the Supreme Court examined its past decisions involving wealth-based detention and explained that “[d]ue process and equal protection principles converge in the Court’s analysis in these cases.” Bearden concerned an individual whose probation was revoked based on non-payment of fines and restitution. The Court ruled that sending a person back to prison, without inquiring into the willfulness of the person’s failure to pay and without considering the adequacy of alternatives to imprisonment, violated principles of due process and equal protection.

Although the Supreme Court has not yet had occasion to apply Bearden to bail, Bearden’s holding could readily extend to the pretrial setting. Indeed, Bearden’s principles apply with even greater urgency in the bail context: Because pretrial defendants have not been convicted and must be presumed innocent, they have a strong liberty interest—stronger than the interests of defendants who have been convicted. Even in a case in which the Supreme Court found pretrial detention to be constitutionally permissible because the prosecution had met the heavy burden of proving that a pretrial detainee was a significant threat to the public, the Court emphasized that “[i]n our society liberty is the norm and detention prior to trial or without trial is the carefully limited exception.” Following this line of cases, courts must carefully inquire into the defendant’s ability to pay before depriving him of his liberty on the basis of non-payment of money bail.

The United States Department of Justice has advanced this same understanding of the requirements of due process and equal protection principles in the pretrial context. Last year, in an amicus brief on behalf of indigent defendants challenging bail practices in Calhoun, Georgia, the DOJ explained its view of the relevant constitutional principles: “[A] bail scheme violates the Fourteenth Amendment if, without a court’s meaningful consideration of ability to pay and alternative methods of assuring appearance at trial, it results in the detention of indigent defendants pretrial.”
Recent federal court rulings have affirmed these important constitutional principles governing pretrial decision-making. In a civil lawsuit in federal district court, pretrial detainees in Harris County, Texas challenged the constitutionality of the county’s practice of using “a generic offense-based bail schedule” that did not include an individual determination of a person’s ability to pay. The court issued a preliminary injunction for the plaintiffs, halting Harris County’s bail practices. The court concluded that the plaintiffs were likely to succeed on the merits of an equal protection claim and at least parts of a due process claim against the county. The opinion emphasized that “institutions charged with safeguarding the public have an extraordinary trust and a difficult task. The difficulty and importance of the task cannot defeat an equally important public trust, which the court and the defendants share—to enforce the Constitution.”

Lawsuits challenging contemporary bail practices are proliferating across the country. Civil rights groups have sued both San Francisco and Sacramento over their bail practices. Non-profits are funding efforts to eliminate cash bail in at least 36 states. Defendants held on bail have filed a lawsuit against the city of Jacksonville, Florida for imposing unaffordable bail. The Chief Judge of Cook County, Illinois recently issued an order forbidding judges from setting bail beyond what a defendant can afford to pay. A civil rights lawsuit resulted in a federal judge striking down money bail practices for those accused of misdemeanors in Calhoun, Georgia. And in another recent case, the Massachusetts Supreme Judicial Court held that state judges must “consider a defendant’s financial resources” before setting bail.

Courts in California regularly detain indigent people pretrial without “meaningful consideration” of their ability to pay or other methods of release, resulting in a wealth-based detention scheme. Contrary to the individualized assessment necessary to ensure that a financial condition is consistent with a person’s ability to pay, individuals throughout the state have their bail amounts set according to the pre-determined money bail schedules. These one-size-fits-all bail schedules are the opposite of “individual” assessments. Instead, “[b]y law, the bail amounts contained in the countywide bail schedule are presumptive fixed amounts set based on the superior court judges’ general assessment of the seriousness of each offense type.” These default bail schedules are vulnerable to civil rights litigation because they fail to meet the constitutional requirements the Supreme Court has prescribed for pretrial decision making.
The collateral consequences of pretrial detention are severe. The Los Angeles County Board of Supervisors recently noted that “[m]any people remain in jail awaiting trial simply because they cannot afford bail, often losing their jobs, their housing, and, in some instances, even their families—despite a Court’s determination that they are eligible for bail and, therefore, pose only a minimal threat to public safety.” Testimony from a 2015 public forum in Santa Clara County confirms that people detained pretrial lost their jobs, been separated from their children, and been unable to care for sick and elderly family members.

Foreseeable costs related to pretrial detention extend beyond just the defendant and her family. “The disruption caused by pretrial detention can also lead to increased reliance on the social safety net—both by defendants upon release, and by the families they may be unable to support as a result of their detention[.]” The pressures on a defendant’s friends and family can be particularly acute: “The economic consequences for lower-income communities are compounded because bail agents often require collateral and/or co-signers to support a bail bond contract. In many cases, this means that a family member or friend must co-sign the bond and put up his or her own assets—such as a home or personal property—as collateral.”

The collateral consequences of pretrial detention can also lead to recidivism. “Jail time can result in job loss, home loss, and disintegrated social relationships, which in turn increase the likelihood of re-offending upon release.” The United States Supreme Court has noted that, in addition to job loss, threats to housing stability, and disruption of family life, “if a defendant is locked up [before trial], he is hindered in his ability to gather evidence, contact witnesses, or otherwise prepare his defense.” Indeed, studies have “identified a causal link between pretrial detention and adverse case outcomes.” Compared to similarly situated releases, detained defendants are 25% more likely to be convicted and 43% more likely to be sentenced to jail.” A study commissioned by the Laura and John Arnold Foundation found that people detained until trial are “over four times more likely to be convicted and 43% more likely to be sentenced to jail.” Pretrial detainees also have longer sentences upon conviction, “almost three times as long for defendants sentenced to jail, and more than twice as long for those sentenced to prison.”

Furthermore, pretrial detention has a disproportionate impact on the poor and communities of color. California is “plagued by profound racial disparities in pretrial detention rates due to racial disparities in arrest and booking rates. The rate at which black people are booked into California jails is many times higher than for white people—for example, it is nine times higher in San Francisco.” According to Human Rights Watch, “[b]ecause of the high rates of black people booked
into custody, the problems of the bail system have a disproportionate impact and contribute to racial bias in the overall criminal system.”126 One national study found that “Hispanic and black defendants are more likely to be detained [pretrial] than similarly situated white defendants.”127 Nationally, “most people who are unable to meet bail fall within the poorest third of society.”128

“[I]n 2015 dollars, people in jail had a median annual income of $15,109 prior to their incarceration, which is less than half (48%) of the median for non-incarcerated people of similar ages.”129 The data reveal that “[t]he median bail bond amount in this country represents eight months of income for the typical detained defendant.”130
Realignement created an opportunity for counties to design and implement effective pretrial practices. There is growing consensus that “[m]aking pretrial release decisions based on a detainee’s risk and needs, versus their ability to post bail, is key to improving public safety and offender outcomes.” Pretrial release systems serve two primary functions: to collect information that will assist the court in making pretrial release decisions and to provide a range of support services for released defendants. Pretrial release systems can supplement a bail system that uses money bail or they can replace money bail with a system based solely on evidence-based risk and needs assessment. “When used effectively, pretrial programs can uphold the presumption of release as outlined in federal law, reduce unnecessary incarceration, and help maintain public safety.”

The use of pretrial risk assessment, court reminders, and community-based supervision varies widely across California counties, but some jurisdictions have reduced their number of pretrial detainees by implementing objective, validated pretrial risk assessment and then releasing lower risk people on their own recognizance or with some form of pretrial supervision. Counties that have implemented such systems now have fewer pretrial detainees, fewer missed court dates, and lower rates of crimes committed by people on pretrial release. A survey of the existing pretrial approaches employed across the state reveals the variety of practice models. Counties in California that have implemented pretrial release reform have reduced pretrial detention of lower-risk defendants, lowered rates of re-offense, lowered rates of failure to appear, and, for some, lowered recidivism rates. While establishing a pretrial services agency requires start-up funding, counties can achieve significant overall savings as jail populations decrease. The experiences of these counties demonstrate that pretrial release reform is possible and effective, but reform in isolated counties is not enough. Statewide reform is necessary to ensure that best practices and constitutional requirements are followed across California. Twelve counties in the state do not have any kind of pretrial services. Six of these counties reported that insufficient resources were the primary barrier.

Counts that have implemented pretrial risk assessment systems now have fewer pretrial detainees, fewer missed court dates, and lower rates of crimes committed by people on pretrial release.
to establishing pretrial services.\textsuperscript{139} Funding from the state would ensure that those counties with fewer resources will still be able to provide their population with fair treatment at the pretrial stage. While program implementation should be individualized to address the particular needs of each county, statewide standards would ensure that critical elements, such as a validated pretrial risk assessment tool, are incorporated in each county’s pretrial justice system.

While most counties have some kind of pretrial risk assessment tool, there are no standards to mandate the use of such tools or require that they be validated locally.\textsuperscript{140} Recognizing the need for statewide standards, states on the forefront of bail reform, such as New Jersey, Kentucky, and Colorado, have passed state laws to mandate individualized, evidence-based release decisions.\textsuperscript{141} The quality of justice that Californians receive should not depend on wealth and should not depend on where in the state they live. Statewide pretrial justice reform would ensure that all Californians benefit from fair and effective pretrial practices.
Realignment addressed the immediate crisis of California’s correctional overcrowding and supported counties in seeking lasting solutions. Pretrial justice reform is the urgently needed next step in California’s efforts to maximize safety, efficiency, and fairness in the criminal justice system. States and localities nationwide, including pioneering jurisdictions within California, have achieved well-designed, responsive, and impactful solutions to the problem of jails overflowing with presumptively innocent people. Numerous interventions can promote public safety and system efficiency while mitigating the harms that result from unnecessary restrictions on pretrial liberty. Reforming pretrial practices statewide and breaking reliance on the rigid application of secured money bail offers a durable solution to support Realignment’s goal of managing California’s jail and prison populations.

The following key elements of statewide reform would ensure an effective, fair system of pretrial justice that would have a lasting statewide impact:

1. **Establish and fund county-level pretrial systems that facilitate release decisions based on evidence-based risk assessment.** Any pretrial release process should begin by assessing the risk of individual defendants in order to improve pretrial decision-making. This assessment focuses on the defendant’s risk of committing a crime during the pretrial period or failing to appear for scheduled court dates. The state should mandate that each county implement a pretrial release system that measures risk and provides defendants with the least restrictive supervision necessary. These systems will allow counties to better manage their pretrial populations, enabling judicial officers to identify appropriate candidates for pretrial release rather than relying upon corrections executives to alleviate overcrowding by releasing convicted detainees early.

Actuarial risk assessment tools rely on statistical analysis to generate a risk score that indicates the probability of pretrial failure. The risk score can help determine what kind of supervision is needed to enable defendants to be released pending trial, while reducing risk of missed court appearances or new charges.

Proper implementation of risk assessment tools requires validation of the risk assessment tool, engagement with stakeholders, and training of personnel. Validation and periodic re-validation of the risk assessment’s inputs and outputs ensure accurate prediction outcomes and safeguard against algorithms producing or reinforcing racial disparities. Stakeholder engagement is needed to determine precisely how pretrial services and third-party services will be integrated into a court’s procedures. Training for judges, prosecutors, defense attorneys, and pretrial employees is necessary in order for these actors to understand the constitutional infirmities of the current system and to prevent those problems from reemerging within a risk-based pretrial system.142

Risk-calibrated release and conditional-release decisions will address the harms caused by unjustified pretrial detention while providing the best outcomes for the dual goals of pretrial justice: court appearance and public safety.

2. **Eliminate the use of wealth-based detention.** Money bail fails to achieve the pretrial goals of public safety and appearance in court. Inefficient and unfair, fixed money bail schedules result in detention based on wealth, fail to adequately consider individual circumstances and more effective alternative solutions, violate established constitutional principles of due process and equal protection, and result in stark racial disparities. If preventive detention

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**VI. CONCLUSION & RECOMMENDATIONS**

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CRIMINAL JUSTICE POLICY PROGRAM
is appropriate for a defendant, the detention decision should only occur following a hearing, and must be supported by explicitly stated findings of demonstrable risk that meet the legal standards outlined in the state constitution. Financial resources should not be a substitute for a principled detention determination.

Instead of resorting to money bail, courts should recommend a range of services and supervision to mitigate the risk of pretrial misconduct. A low-cost, highly effective intervention to ensure return to court is simply to remind people of their court dates, either by mail or phone. Pretrial monitoring may use a variety of methods to maintain contact with defendants including phone reporting and in-person reporting. Other supports may include referral to drug, alcohol, or mental health services. Electronic monitoring is an intensive intervention that should only be used as an alternative to pretrial detention. When truly necessary, it may allow counties to track geographic movement in order to deter a defendant from committing crime or absconding.

It is important to remember that excessive supervision conditions that go beyond what is appropriate for the defendant’s assessed risk can be counterproductive, leading to increased and unnecessary costs and raising constitutional considerations. This bundle of tools, when well-calibrated to risk, is both less restrictive and more likely to produce positive outcomes than a system that relies exclusively on cash bonds and pretrial detention.

3. Collect and analyze data regarding pretrial justice programs. Implementation of pretrial improvements should be paired with a system that collects and analyzes data. Each county should employ a mechanism to collect data both on individual performance on pretrial release and on system outcomes. Better data collection about jail populations and the outcome of pretrial supervision will facilitate the implementation of ongoing improvements. Shared data will allow coordination among the players of the criminal justice system, including courts, community-supervision agencies, and law enforcement. Such data can also be used to dispel misinformation and demonstrate to the public the effectiveness of evidence-based release decisions.

Reporting requirements and periodic analysis will enable necessary validation of risk instruments and will promote the transparency necessary to make well-informed and evolving policy decisions. Measuring successful interventions and establishing reliable points of comparison will further serve Realignment’s encouragement of localized innovation.
ENDNOTES


5. *Id.* (“Brown also signed AB 111 today, [a bill that] gives counties additional flexibility to access funding to increase local jail capacity for the purpose of implementing AB 109”); see also Anat Rubin, *California’s Jail-building Boom, The Marshall Project* (July 2, 2015, 7:15 AM), https://www.themarshallproject.org/2015/07/02/california-s-jail-building-boom#HaH5ppe6Y (“Twenty-eight counties are leveraging $1.7 billion in state grants to build and expand 35 jails.”).


13. *Id.* at 1.

14. *Id.* at 50.


29. Id.
30. Id.; CAL. PENAL CODE § 1270 (West 2017) (“Any person who has been arrested for, or charged with, an offense other than a capital offense may be released on his or her own recognizance by a court or magistrate who could release a defendant from custody upon the defendant giving bail.”).
32. See CAL. PENAL CODE § 1275(a)(1) (West 2017) (stating that a judge can set, reduce, or deny bail).
33. CAL. PENAL CODE § 1269b(c) (West 2017).
34. Id. at (e).
35. Id.
37. CAL. PENAL CODE § 1270.1(a),(d) (West 2017); see also CAL. PENAL CODE § 1275(c) (West 2017) (requiring a judge who reduces the amount from the schedule for defendants charged with serious felonies to make a finding setting forth the “unusual circumstances” for the record).
38. CAL. PENAL CODE § 1270.1(c) (West 2017).
41. CAL. PENAL CODE § 1276 (West 2017).
42. See Karnow, supra note 39, at 4.
43. See HUMAN RIGHTS WATCH, supra note 36, at 29.
44. Id. at 39 (“Competition among different bond agencies means they will often make deals, including reducing their fee to 8%, sometimes lower. They frequently offer payment plans, sometimes agreeing to down payments as low as 1%, along with monthly payments.”) (citation omitted).
45. Id. at 29.
53. CAL. PEN. CODE § 1230.1(d) (West 2017).
54. CAL. CONST. art. I, § 12; CAL. CONST. art. I, § 28(a)(8)(b)(3), (f) (3). Other considerations include “the seriousness of the offense charged, [and] the previous criminal record of the defendant.” CAL. CONST. art. I, § 12; see also CAL. PEN. CODE § 1275(a)(1) (West 2017).
56. See Karnow, supra note 39, at 13.
57. Id. at 15–16.
58. Id. at 20.
59. See id.
60. See CAPACITY IN CALIFORNIA, supra note 55, at 1.
62. Id.
63. Id. at 31–32.
64. Id. at 3.
66. See CAPACITY IN CALIFORNIA, supra note 55, at 1.
69. CALIF. DEP’T OF JUSTICE, CRIME IN CALIFORNIA 50 (2016). In 2016, there were 207,022 total felony arrests that resulted in 25,434 prison sentences, 17,413 jail sentences, and 78,273 probation with jail sentences. Id.
70. HUMAN RIGHTS WATCH, supra note 36, at 33 (citing SONYA TAFOYA, PUB. POLICY INST. OF CAL., PRETRIAL DETENTION AND JAIL CAPACITY IN CALIFORNIA (2015)).
71. CAL. PEN. CODE § 1230.1(d) (West 2017).
72. CAL. PEN. COD §17.5(7) (West 2017).
73. CRIMINAL JUSTICE POLICY PROGRAM, HARV. L. SCH., MOVING BEYOND MONEY: A PRIMER ON BAIL REFORM 15–16 (2016), http://cipr.law.harvard.edu/assets/FINAL-Primer-on-Bail-Reform.pdf [hereinafter BAIL REFORM PRIMER].
74. HUMAN RIGHTS WATCH, supra note 36, at 3.
76. BRANDON MARTIN & RYKEN GRATTE, PUB. POLICY INST. OF CAL., ALTERNATIVES TO INCARCERATION IN CALIFORNIA 1, n.3 (2015), http://www.ppic.org/content/pubs/report/R_415BM.pdf (“Jail cost is from a BSCC 2012 average daily cost survey of type II and III jails in California[,]”).
77. Santa Clara Bail Report, supra note 61, at 34.
80. HUMAN RIGHTS WATCH, supra note 36, at 20.
81. See Santa Clara Bail Report, supra note 61, at 34.
82. Id. (emphasis removed).
83. LA County Motion, supra note 78.
89. BAIL REFORM PRIMER, supra note 73, at 15–16.
90. COST-BENEFIT MODEL, supra note 86, at 4.
91. See HumAn Rights Watch, supra note 36, at 3 (“These nearly half-a-million people spent time in jail at taxpayer’s expense, missing work, not picking their children up at school, not caring for elderly parents, missing classes, and subject to violence and miserable conditions, because they did not post bail.”).
93. See, e.g., Paul Heaton et al., The Downstream Consequences of Misdemeanor Pretrial Detention 69 STAN. L. REV. 711, 714–717 (2017) (analyzing hundreds of thousands of misdemeanor cases filed in Harris County and finding that “[c]ompared to similarly situated releases, detained defendants are 25% more likely to be convicted and 43% more likely to be sentenced to jail.” Id. at 717); LAURA & JOHN ARNOLD FOUND., RESEARCH SUMMARY 5 (2013), http://www.arnoldfoundation.org/wp-content/uploads/2014/02/LJAF-Prettrial-CJ-Research-brief_FNL.pdf (“Compared to individuals released within 24 hours of arrest, low-risk defendants held 2-3 days were 17% more likely to commit another crime within two years. Detention periods of 4-7 days yielded a 35% increase in re-offense rates. And defendants held for 8-14 days were 51% more likely to recidivate than defendants who were detained less than 24 hours.”); Arpit Gupta, et al., The Heavy Costs of High Bail: Evidence from Judge Randomization, 45 J. L. STUDIES 471, 472 (2016).
94. Griffin v. Illinois, 351 U.S. 12, 19 (1956); see also Douglas v. California, 372 U.S. 353, 355 (1963) (“For there can be no equal justice where the kind of appeal a man gets ‘depends on the amount of money he has.’”) (quoting Griffin 351 U.S. at 19).

124. *Id.*

125. **Human Rights Watch, supra note 36, at 2.**

126. *Id.* at 21.


129. *Id.*

130. *Id.*

131. See **Pretrial Detention & Community Supervision, supra note 2, at 2.**

132. *Id.* at 9.

133. See generally, **Pretrial Progress, supra note 27, at 7-16.**

134. *Id.*

135. **Pretrial Detention & Community Supervision, supra note 2, at 14-18; Santa Clara Bail Report, supra note 61, at 31, 44**


137. **Pretrial Progress, supra note 27, at 6.**

138. *Id.* at 11.

139. *Id.*

140. *Id.* at 7.


142. For a broad discussion of these considerations, see **Bail Reform Primer, supra note 73, at 18–24.**

143. *E.g.*, Timothy R. Schnacke, et al., **Increasing Court-Appearance Rates and Other Benefits of Live-Caller Telephone Court-Date Reminders: The Jefferson County, Colorado FTA Pilot Project and Resulting Court Date Notification**, 48 CT. REV. 86, 92 (2012) (detailing a pilot project that resulted in a 43% reduction in failure to appear rates using live call reminders one week prior to arraignments, and a 52% FTA decrease in the first six months of the program, *id.* at 89, 92); see also **Matt O’Keeffe, Court Appearance Notification System: 2007 Analysis Highlights** 2 (2007) (finding that the Multnomah County Court Appearance Notification System program “effectively reduces the likelihood of FTA by 31%" and that the "estimated annual net cost efficiency for CANS is approximately $1.55 million”).

144. See **Bail Reform Primer, supra note 73, at 16–18.**