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Punishing Poverty: California's Unconstitutional Bail System

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Last year, an article in *The Guardian* highlighted the disparities inherent in California's pretrial detention system.[1] Reporter Sam Levin compared the cases of Tiffany Li, accused of murder for hire, who was released under house arrest after satisfying the $35 million bail set in her case, and Joseph Warren, who at the time was in custody pending his trial on welfare fraud charges because he could not afford to pay his bail, which was set at $75,000.[2] Disparities like these have not gone unnoticed by policymakers, and during the 2017 legislative session, companion bills were introduced in the State Assembly and Senate "to ensure that people are not held in pretrial detention simply because of their inability to afford money bail."[3]

California has one of the highest pretrial detention rates in the country,[4] which has significant consequences for both individual defendants and the

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1. Sam Levin, *Wealthy Murder Suspect Freed on Bail as Man Accused of Welfare Fraud Stuck in Jail*, GUARDIAN (Apr. 25, 2017, 5:00 AM), https://perma.cc/5YHY-23ZS.
2. *Id.* After the article first ran, a reader paid Joseph Warren's bail, and he was released. SF Public Defender (@sfdefender), TWITTER (Apr. 28, 2017, 11:13 AM), https://perma.cc/438C-UUVG.
3. S.B. 10, 2016 Leg., Reg. Sess. § 2 (Cal. 2016).
4. SONYA TAFOYA, PUB. POLICY INST. OF CAL., PRETRIAL DETENTION AND JAIL CAPACITY IN CALIFORNIA 4 fig.3 (2015), https://perma.cc/E2U9-AEME (finding that only 41% of felony defendants in large urban counties in California obtained pretrial release between 2000 and 2009, compared with 68% in the remaining states).

system as a whole.[5] However, despite widespread support for changes to the bail system,[6] neither bill became law: The Assembly bill died on the floor, and while the Senate's companion bill passed, Governor Jerry Brown announced that the bill would be held in order for negotiations to continue.[7] This Essay argues that the passage of bail reform legislation in 2018 is vital, in large part because it would eliminate California's system of bail schedules, which, as it currently operates, appears to violate both the Eighth and Fourteenth Amendments of the United States Constitution. Indeed, lawsuits challenging the bail systems of San Francisco (City and County) and the County of Sacramento are currently pending in federal court,[8] while a California court of appeal recently held that the Fourteenth Amendment requires courts to consider a defendant's ability to pay as well as less restrictive conditions of release before ordering pretrial detention.[9] Relying on an empirical study of pretrial detention and bail that we recently conducted in Southern California,[10] this Essay argues that bail schedules are unconstitutional because they are used presumptively in a way that typically denies defendants the individualized pretrial detention determination to which they are entitled.

5. This Essay does not address the negative impacts of pretrial detention on defendants, which are well-documented elsewhere. *See, e.g.*, Paul Heaton et al., *The Downstream Consequences of Misdemeanor Pretrial Detention*, 69 STAN. L. REV. 711, 748 (2017) (finding that detained defendants are more likely than those released to plead guilty, receive a jail sentence, and receive a longer than average jail sentence); Nick Pinto, *The Bail Trap*, N.Y. TIMES MAG. (Aug. 13, 2015), https://perma.cc/SK9S-DFVP (describing how pretrial detention can result in job loss and loss of custody of a child).

6. *See, e.g.*, PRETRIAL DET. REFORM WORKGROUP, PRETRIAL DETENTION REFORM: RECOMMENDATIONS TO THE CHIEF JUSTICE 1 (2017) (concluding that "California's current pretrial release and detention system unnecessarily compromises victim and public safety because it bases a person's liberty on financial resources rather than the likelihood of future criminal behavior and exacerbates socioeconomic disparities and racial bias").

7. Taryn Luna, *No California Bail Reform This Year, Governor Announces*, SACRAMENTO BEE (Aug. 25, 2017, 11:03 AM), https://perma.cc/Z6RX-NKEQ.

8. Third Amended Class Action Complaint, Buffin v. City & County of San Francisco, No. 15-CV-04959 (N.D. Cal. May 27, 2016), 2016 WL 3587128; Amended Class Action Complaint, Welchen v. County of Sacramento, No. 16-CV-00185-TLN-DB (E.D. Cal. Nov. 9, 2016), https://perma.cc/88JL-95FT.

9. *In re* Humphrey, 228 Cal. Rptr. 3d 513, 517 (Ct. App. 2018).

10. Sarah Ottone & Christine S. Scott-Hayward, *Pretrial Detention and the Decision to Impose Bail in Southern California*, 19 CRIMINOLOGY CRIM. JUST. L. & SOC'Y (forthcoming 2018) (manuscript at 17-19), https://perma.cc/J2N9-MLKG.

I. Bail Schedules

Bail schedules have existed since as early as 1945, when California developed bail schedules for misdemeanor defendants.[11] California adopted felony bail schedules in 1973.[12] They were initially intended to help people who were arrested get out of jail without having to wait potentially days before appearing in court.[13]

On paper, that is still the purpose of bail schedules; for example, the 2018 Los Angeles County Bail Schedule states that its purpose "is to fix an amount upon which a person who is arrested without a warrant may be released from custody prior to appearance in court."[14] Typically, a bail schedule consists of a list of offenses with a presumptive bail amount for each offense, along with a list of enhancements and prior convictions for which bail may be increased.[15] In California, county bail schedules are approved by the judges of the superior court and then jail officers are authorized to release arrestees upon payment of the presumptive bail.[16]

At the defendant's first court appearance, regardless of whether the defendant has already been released (on bail or on her own recognizance) or remains in custody, as long as bail is allowed by statute,[17] the judge has almost complete discretion over the pretrial release decision. The judge may detain the defendant, release the defendant on her own recognizance (an unconditional promise to return), or set bail.[18] If the judge does choose to set bail, she is typically not bound by the bail schedule,[19] and instead is instructed to consider a variety of factors, including, first and foremost, public safety.[20]

California is not alone in its reliance on bail schedules. A 2009 survey of 112 of the most populous U.S. counties found that 64% of those counties relied

11. WAYNE H. THOMAS, JR., BAIL REFORM IN AMERICA 211 (1976) (citing CAL. PENAL CODE § 1269b (1970)).

12. *See Review of Selected 1973 California Legislation, Criminal Procedure: Adoption of Bail Schedules*, 5 PAC. L.J. 205, 334 (1974).

13. THOMAS, *supra* note 11, at 211-12.

14. Superior Court of Cal., County of L.A., 2018 Felony Bail Schedule 1, https://perma.cc/T26T-2ZWH.

15. CAL. PENAL CODE § 1269b(e) (West 2018); *see also* Superior Court of Cal., *supra* note 14, at 1.

16. CAL. PENAL CODE §§ 1269b(c), (g).

17. CAL. CONST. art. 1, § 12.

18. *See* CAL. PENAL CODE §§ 1269b(b), (g).

19. CAL. PENAL CODE § 1275(c) (requiring a court to "make a finding of unusual circumstances" if it sets bail below the amount listed in the schedule only where the defendant is charged with a serious or violent felony).

20. CAL. PENAL CODE §1270.

on them.[21] This survey also found that most counties that used bail schedules (51% of 68) did so both before and at the initial appearance.[22] A review of state laws governing bail and pretrial detention conducted earlier this year found that bail schedules are authorized in more than 30 states, either at the state level or at the judicial district/county level. However, their use varies. For example, Georgia *allows* courts to establish bail schedules for most offenses,[23] while California *requires* counties to establish bail schedules for both misdemeanor and felony offenses.[24]

Despite this widespread use, for policy reasons, bail schedules have been criticized since the early years of their use. The primary concern is that using money as the sole criterion for release is problematic; this is both because it can lead to poor defendants remaining in custody even if they are neither dangerous nor a flight risk and because it can lead to dangerous defendants or defendants who pose a flight risk being released purely because they can afford to post bail. As John Goldkamp noted over 30 years ago, "Bail schedules have been criticized . . . because of the inequity inherent in setting financial bail solely in line with the ranked seriousness of the criminal charges. Similarly charged persons will have different abilities to afford the bail and thus different likelihoods of release, regardless of the risks they may pose."[25]

More recently, the American Bar Association (ABA) recommended against the use of bail schedules in its Criminal Justice Standards:[26]

> Financial conditions should be the result of an individualized decision taking into account the special circumstances of each defendant, the defendant's ability to meet the financial conditions and the defendant's flight risk, and should never be set by reference to a predetermined schedule of amounts fixed according to the nature of the charge.[27]

Bail schedules simply use offense seriousness as a proxy for both flight risk and dangerousness, even though there is no evidence that bail schedules that tie

21. PRETRIAL JUSTICE INST., PRETRIAL JUSTICE IN AMERICA: A SURVEY OF COUNTY PRETRIAL RELEASE POLICIES, PRACTICES AND OUTCOMES 3, 15 (2010). This survey targeted the 150 most populous counties in the United States; 112 of those counties responded. *Id.* at 2.

22. *Id.* at 8. 41% of counties that used bail schedules did so only before the initial appearance, while 7% used them at the initial appearance only. *Id.*

23. GA. CODE ANN. § 17-6-1(f) (2017).

24. CAL. PENAL CODE § 1269b(c).

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

26. These standards are approved by the ABA's policymaking body and comprise a set of principles aimed at guiding policy and practice in the field of criminal justice. *Criminal Justice Standards*, AM. BAR ASS'N, https://perma.cc/74K3-EP7M (archived Apr. 18, 2018).

27. STANDARDS FOR CRIMINAL JUSTICE: PRETRIAL RELEASE § 10-5.3(e) (AM. BAR ASS'N 2007), https://perma.cc/53UG-2US5.

bail amounts to the charge have any impact on either public safety or a defendant's likelihood to appear.[28]

Moreover, the concern about the lack of individualized decisionmaking is particularly significant when the use of bail schedules is not limited to pre-appearance release decisionmaking and there is a risk that they can be used to deprive defendants of an individualized release determination. As Thomas cautioned in 1976:

> As long as the defendant has not yet appeared, the schedule helps by making it possible to know immediately what bail is required and to secure release if he can afford the cost. Once the defendant appears in court, there is much less justification for determining the bail amount solely by the offense charged. The defendant is present, and the court can make an individual determination.[29]

In the next section, we explore whether this individual determination occurs.

II. How Bail Schedules Operate in Practice

In California and other jurisdictions where bail schedules operate, once a defendant appears in court, the judge can review all of the relevant factors and make an individualized assessment as to whether the defendant poses a risk to public safety, and, if not, whether conditions (including financial conditions) are necessary to ensure his or her appearance at trial.

In California, judges are guided by the state constitution,[30] its penal code,[31] and the rules of court[32] in making the pretrial release decision. These laws and rules require judges to consider a variety of factors including the seriousness of the offense, prior criminal record, the likelihood of the defendant to appear in court if released, and the safety of the public, victim, and victim's family.[33] In addition, as explained earlier, judges in each county are required to adopt a bail schedule, which judges may also consider.[34]

Until recently, little was known about how bail schedules operated in practice, and how they were used by judges. As described above, while some commentators noted the potential problems with bail schedules, there was no

28. Curtis E.A. Karnow, *Setting Bail for Public Safety*, 13 BERKELEY J. CRIM. L. 1, 15 (2008) (concluding that the "seriousness of criminal charges was not a predictor of (was not systematically related to) flight or crime by defendants who gained pretrial release" (quoting JOHN S. GOLDKAMP ET AL., PERSONAL LIBERTY AND COMMUNITY SAFETY: PRETRIAL RELEASE IN CRIMINAL COURT 125 (1995)).

29. THOMAS, *supra* note 11, at 212.

30. CAL. CONST. art. 1, §§ 12, 28.

31. CAL. PENAL CODE §§ 1270, 1275 (West 2018).

32. CAL. R. CT. 4.105.

33. *See, e.g.*, CAL. PENAL CODE § 1269b(e).

34. *Id.* § 1269b(c).

widespread evidence that they were being used in ways that could violate the constitution. However, the findings from a study of pretrial detention and bail imposition in Southern California that we completed in 2016 suggest that they are.

Between December 2015 and July 2016, we observed over 234 felony arraignment hearings, at which the pretrial release decision is made, in Los Angeles and Orange Counties.[35] We documented case information, what the parties said (if anything) about bail, and the amount of bail imposed in each case.[36] After the observations were complete, we attempted to obtain additional information, including the defendants' release statuses, from the courts' online databases.[37] In addition, to provide context, we conducted several interviews with attorneys and judges who routinely participate in arraignment hearings. A brief summary of our findings follows.

Overall we found that while California law instructs judges to consider a variety of factors when setting bail, the county bail schedules appeared to be the main factor determining pretrial decision making.[38] The importance of the schedule was demonstrated in a variety of ways. In some cases judges specifically said that they were setting bail according to the schedule. On one occasion, prior to conducting the individual arraignment hearings, a judge asked all the defense attorneys to "submit on the county-wide bail schedule."[39] Further, many of the arguments over the amount of bail imposed focused on whether it had been correctly calculated according to the schedule; for example, whether a prior offense had been correctly held to be a "strike" that would increase the bail amount.[40] Finally, all of the judges and attorneys interviewed acknowledged the importance of the bail schedule.[41]

Given the variety of factors that California judges are asked to consider in making the pretrial release decision, we expected that bail hearings would be long and contested. On the contrary, we found that bail hearings were extremely short and arguments of any kind were rare.[42] It was unusual for a hearing, even one in which bail was actually discussed, to last more than a few minutes. In some cases, after the defendant entered her plea, the judge asked whether the parties wished to be heard on bail; in other cases, the judge just set bail after accepting the defendant's plea. Regardless of how the judge typically

35. Ottone & Scott-Hayward, *supra* note 10 (manuscript at 18, 20).

36. *Id.* (manuscript at 20-21). For more information about the methods used in the study and the limitations of the study, see *id.* (manuscript at 17-22, 32-34).

37. *Id.* (manuscript at 21).

38. *Id.* (manuscript at 25).

39. *Id.* (manuscript at 24).

40. *See id.* (manuscript at 27-29).

41. *Id.* (manuscript at 25-27).

42. *Id.* (manuscript at 25).

set bail, arguments over the bail amount or over the decision to release the defendant on her own recognizance (ROR) were rare. Arguments were made in roughly one third of cases (82 of 234), and when defense attorneys asked for lower bail or ROR, their requests were usually denied without comment.[43]

Thus the vast majority of the bail hearings we observed were not individualized and, as described above, the main factor determining the bail amount set appeared to be the county bail schedule. The ability of a particular individual to pay the bail amount set was typically not considered and was referenced in just two of the 82 cases in which arguments were made.[44] In both of those cases, the arguments were rejected.[45]

To our knowledge, there is no other research examining how bail schedules operate, but at least one court has found that where a bail schedule exists, it appears to operate presumptively. In *O'Donnell v. Harris County*, the court relied on the expert testimony of Stephen Demuth, showing that hearing officers in Harris County "adhered to the prescheduled bail amount stated on the charging documents in 88.9 percent of all misdemeanor cases."[46]

III. Implications

The fact that bail schedules appear to operate presumptively and are the most important consideration for judges in making the pretrial release decision suggests that California's system is currently unconstitutional, violating both the Eighth and Fourteenth Amendments to the U.S. Constitution.

A. The Eighth Amendment

As the U.S. Supreme Court made clear in *Carlson v. Landon*, there is no federal constitutional right to bail.[47] The Eighth Amendment explicitly prohibits *excessive* bail,[48] although due to the limited precedent in this area, it is unclear exactly what this means. In its 1951 decision in *Stack v. Boyle*, the Supreme Court noted that the purpose of bail was to assure "the presence of an accused" and that "[b]ail set at a figure higher than an amount reasonably calculated to fulfill this purpose is 'excessive' under the Eighth Amendment."[49]

43. *Id.*

44. *Id.* (manuscript at 29-30).

45. *Id.*

46. 251 F. Supp. 3d 1052, 1095 (S.D. Tex. 2017), *aff'd in part, rev'd in part on other grounds*, 882 F.3d 528 (5th Cir. 2018). The expert for the defendant found a slightly lower percentage of 80.7% of cases; however, the Court found that Demuth's calculation was "more reliable." *Id.* at 1095-96 n.42.

47. 342 U.S. 524, 545-46 (1952).

48. U.S. CONST. amend. VIII.

49. 342 U.S. 1, 5 (1951) (citing United States v. Motlow, 10 F.2d 657 (7th Cir. 1926)).

However, the Court's decision in *Stack* was complicated by its later decision in *United States v. Salerno*, where, in upholding the 1984 Bail Reform Act, it held that bail could be denied if a defendant posed a danger to others.[50] In doing so, it emphasized the "number of procedural safeguards," including the right to testify at a hearing, provided to such defendants under the Act.[51]

Since *Salerno*, courts (include the Supreme Court) have provided little guidance as to what it means to be free from excessive bail, although the Court has recently stated that the right applies in both state and federal courts.[52] The Ninth Circuit in *Galen v. County of Los Angeles* held that states "may not set bail to achieve invalid interests."[53] However, just because the bail amount is beyond a person's means does not mean that it is excessive.[54] Instead, the Eighth Amendment requires "only that it be greater than necessary to achieve the purposes for which bail is imposed."[55] In *Galen*, the court rejected defendant's argument that bail of $1 million, enhanced from the $50,000 listed in the county's bail schedule, was excessive, as he failed to show that his bail was enhanced "for an improper purpose or that [it] was excessive in light of the purpose for which it was set."[56]

Scholars disagree on the meaning of the Excessive Bail Clause. Samuel Wiseman argues that, "as interpreted by the Court, [it] has so little force that it simply does not matter very much whether it applies to the states or not."[57] Wiseman argues that the clause places limits only on "the most extreme legislatures and courts, and the most careless."[58] On the other hand, Scott Howe argues, given that "incorporation conveys that the protection is viewed as exceptionally important in protecting liberty or justice by our society," the Excessive Bail Clause would only have merited incorporation if it "confers a right to bail in some circumstances and regulates the permissible purposes of bail and, thus, the measure of excessiveness."[59] We agree. The Supreme Court has held that only guarantees in the Bill of Rights that are "fundamental to our scheme of ordered liberty and system of justice" should be incorporated.[60] It

50. 481 U.S. 739, 741 (1987).

51. *Id.* at 742.

52. *See* Samuel Wiseman, Essay, *McDonald's Other Right*, 97 VA. L. REV. IN BRIEF 23, 24-26 (2011) (discussing the incorporation of the Excessive Bail Clause to the states).

53. 477 F.3d. 652, 660 (9th Cir. 2007).

54. *Id.* at 661.

55. *Id.*

56. *Id.*

57. Wiseman, *supra* note 52, at 26-27.

58. *Id.* at 29.

59. Scott W. Howe, *The Implications of Incorporating the Eighth Amendment Prohibition on Excessive Bail*, 43 HOFSTRA L. REV. 1039, 1052, 1058 (2015).

60. McDonald v. City of Chicago, 561 U.S. 742, 764 (2010) (emphasis omitted).

would make little sense for the Court to have incorporated a meaningless guarantee.

What restrictions the Excessive Bail Clause places on the use of bail schedules is unclear. The only circuit to explicitly address the issue found that "the mere use of a schedule does not itself pose a constitutional problem under the Eighth Amendment."[61] However, the court did note: "That is not to say that using a bond schedule can never violate the Excessive Bail Clause."[62] Relying on Howe's work, we argue that the use of bail schedules in California violates the Excessive Bail Clause.

Howe correctly points out that the scope of the right to nonexcessive bail is unclear, but he convincingly argues that, at a minimum, "a defendant should receive non-excessive bail—which may sometimes mean release without bail—unless there are no conditions of release that could reasonably assure his appearance, his non-interference with the judicial process, and his compliance with the criminal law."[63] Nonetheless, Howe argues that bail schedules may be constitutional as long as a defendant has a "prompt opportunity for individualized consideration of additional evidence that bears on whether he will reappear and the scheduled amount carries no presumption of correctness."[64] Unfortunately, our research demonstrates that in practice, most California defendants do not receive individualized consideration of either dangerousness or likelihood of appearance, and further that the California bail schedules do appear to operate presumptively. As a result, we argue that a challenge to California's bail system under the Eighth Amendment should likely meet with some success.[65]

Despite this potential, the Eighth Amendment remains "one of the least litigated provisions in the Bill of Rights"[66] and in recent years, claims challenging state bail systems have instead focused on the Fourteenth Amendment. Given recent state and federal precedent, arguments based on the Fourteenth Amendment appear to be more likely to succeed.

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61. Fields v. Henry County, 701 F.3d 180, 184 (6th Cir. 2012).

62. *Id.*

63. Howe, *supra* note 59, at 1058.

64. *Id.* at 1063.

65. We acknowledge that no court has yet found that the Excessive Bail Clause requires an individualized hearing but agree with Howe's argument about the importance of incorporation, and, in particular, his reasoning that "because the issue at the bail stage should focus on the defendant's reappearance, and the answer depends on various factors about his character, record, and crime, there is good reason for individualized consideration." *Id.* at 1067.

66. Wiseman, *supra* note 52, at 28 (quoting Galen v. County of Los Angeles, 477 F.3d 652, 659 (9th Cir. 2007)).

B. The Fourteenth Amendment

The Supreme Court has consistently held that the Fourteenth Amendment prohibits states from discriminating against convicted defendants based on their poverty. For example, in *Griffin v. Illinois*, it held that requiring defendants to provide a trial transcript in order to obtain appellate review unconstitutionally denied appellate review to indigent defendants.[67] More recently in *Bearden v. Georgia*, the Court held that a court may not revoke an individual's probation for failing to pay a fine or restitution if that individual genuinely lacks the resources to do so,[68] noting that doing so is "little more than punishing a person for his poverty."[69]

Although the Supreme Court has not addressed the constitutionality of bail schedules, or indeed money bail generally, the Fifth Circuit in *Pugh v. Rainwater* has suggested that there are problems with the use of bail schedules.[70] Although that court found the plaintiffs' claim moot, it noted that while "[u]tilization of a master bond schedule provides speedy and convenient release for those who have no difficulty in meeting its requirements . . .[t]he incarceration of those who cannot, without meaningful consideration of other possible alternatives, infringes on both due process and equal protection requirements."[71]

Despite this dicta, until recently, bail schedules had not been challenged in any circuit. Since 2015, however, lawsuits have been filed in multiple jurisdictions challenging the constitutionality of systems of money bail, most of which involved some use of bail schedules.[72] Although some of these cases

67. 351 U.S. 12, 18-19 (1956).

68. 461 U.S. 660, 672 (1983).

69. *Id.* at 671. The Court did note that the State may imprison someone who has made an effort to pay but lacks resources to do so, but only if "alternative measures are not adequate to meet the State's interests in punishment and deterrence." *Id.* at 672.

70. 572 F.2d 1053 (5th Cir. 1978) (en banc).

71. *Id.* at 1057.

72. *See, e.g.*, Walker v. City of Calhoun, No. 4:15-cv-0170-HLM, 2017 WL 2794064, at *4 (N.D. Ga. June 16, 2017) (granting the plaintiff's motion for a preliminary injunction, which, among other things, prohibits the City from detaining indigent arrestees "who are otherwise eligible for release but are unable, because of their poverty, to pay a secured or money bail in accordance with the Standing Bail Order," which includes a bail schedule); *see also* Jones v. City of Clanton, No. 2:15-cv34-MHT, 2015 WL 5387219 (M.D. Ala. Sept. 14, 2015); Snow v. Lambert, No. 15-567-SDD-RLB, 2015 WL 5071981 (M.D. La. Aug. 27, 2015); Pierce v. City of Velda City, No. 4:15-cv-570-HEA, 2015 WL 10013006 (E.D. Mo. June 3, 2015). Many of these suits were filed by Equal Justice Under Law, a nonprofit organization. *See Ending American Money Bail*, EQUAL JUSTICE UNDER LAW (describing its litigation in nine states and highlighting successes in ending money bail in seven communities), https://perma.cc/FJN9-P6D3 (archived Apr. 18, 2018).

settled,[73] in April 2017, Chief Judge Lee H. Rosenthal of the United States District Court for the Southern District of Texas held that the misdemeanor bail system in Harris County, Texas was unconstitutional.[74] She found that the county had a "systematic policy and practice of imposing secured money bail as de facto orders of pretrial detention [against the indigent accused] in misdemeanor cases."[75] A key feature of this system was the use of bail schedules, and Judge Rosenthal noted that neither hearing officers nor county judges were "making individualized bail assessments."[76] In February 2018, the Fifth Circuit Court of Appeals affirmed much of Judge Rosenthal's judgment, including all of her findings of fact.[77] Highlighting the county's "current custom and practice, with their lack of individualized assessment and mechanical application of the secured bail schedule," the court concluded that the lower court "had sufficient evidence to conclude that Harris County's use of secured bail violated equal protection."[78]

Earlier this year, the California Court of Appeal for the First Appellate District determined that California's bail system suffers from similar problems to those identified in *O'Donnell*. In *In re Humphrey*, the court granted the defendant's habeas petition, finding that the trial court's failure to inquire into and make findings as to the defendant's ability to pay or alternatives to money bail violated the Fourteenth Amendment.[79] In doing so the court relied on two lines of Supreme Court cases.

First, the court reviewed *Bearden* and other cases relating to the treatment of indigency and emphasized that in the pretrial context, "[t]he liberty interest of the defendant, who is presumed innocent, is even greater."[80] The court concluded that these cases "establish that a defendant may not be imprisoned solely because he or she is unable to make a payment that would allow a wealthier defendant to avoid imprisonment."[81] Second, it highlighted the importance of the Court's jurisprudence on bail and emphasized the importance of *Salerno*'s procedural safeguards in "ensuring that orders for release on bail do not become de facto detention orders."[82]

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73. *See, e.g.*, *Jones*, 2015 WL 5387219, at *4 (granting the parties' joint motion for the entry of final judgment and adopting the parties' settlement agreement); *Pierce*, 2015 WL 10013006, at *1 (approving settlement).

74. O'Donnell v. Harris County, 251 F. Supp. 3d 1052, 1059 (S.D. Tex. 2017).

75. *Id.*

76. *Id.* at 1104.

77. O'Donnell v. Harris County, 882 F.3d 528, 543-44 (5th Cir. 2018).

78. *Id.* at 545.

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

80. *Id.* at 528.

81. *Id.* at 525.

82. *Id.* at 536.

The court concluded that bail determinations "must be based on factors related to the individual defendant's circumstances."[83] Specifically it held:

> [A] court may not order pretrial detention unless it finds either that the defendant has the financial ability but failed to pay the amount of bail the court finds reasonably necessary to ensure his or her appearance at future court proceedings; or that the defendant is unable to pay that amount and no less restrictive conditions of release would be sufficient to reasonably assure such appearance; or that no less restrictive nonfinancial conditions of release would be sufficient to protect the victim and community.[84]

The court stopped short of holding that bail schedules are unconstitutional. However, it noted that they "represent the antithesis of the individualized inquiry required before a court can order pretrial detention"[85] and cautioned that "unquestioning reliance upon the bail schedule without consideration of a defendant's ability to pay, as well as other individualized factors bearing upon his or her dangerousness and/or risk of flight, runs afoul of the requirements of due process for a decision that may result in pretrial detention."[86]

Although our research is limited, it demonstrates that in two of the three most populous counties in California, courts appear to suffer from this problem. Our findings that bail schedules are the main factor considered by judges at felony arraignments, that judges do not take into consideration an individual's ability to pay, and that the schedules appear to operate presumptively, without any individualized determination, suggest that their use violates the Fourteenth Amendment.

Conclusion

When used properly, as they were originally intended, to offer arrested people a way to get out of custody prior to appearance in court, bail schedules can be "of utility to overburdened courts and jails."[87] However, when bail schedules are used in a way that denies defendants an individualized detention determination, as in California, their use is unconstitutional. As the California Court of Appeal for the First Appellate District noted in *In re Humphrey*, "legislation is desperately needed";[88] California legislators should make bail reform a priority in 2018.

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83. *Id.* at 538.

84. *Id.* at 526.

85. *Id.* at 539-40.

86. *Id.* at 541.

87. Lindsey Carlson, Pretrial Justice Institute, Bail Schedules: A Violation of Judicial Discretion? 3 (2010), https://perma.cc/UM6U-UA5R.

88. 228 Cal. Rptr. 3d at 545.