Bail Reform: Justice or a Get Out of Jail Free Card?

By Michael D. White

LAST OCTOBER, CALIFORNIA Supreme Court Chief Justice Tani Cantil-Sakauye wrote a strongly-worded essay in the *Harvard Law Review Blog*, expressing her support for bail reform.[1] Cash bail generates $308 million every year in California, she wrote, "and produces significant collateral damage for low-income individuals and their families if they don't somehow find a way to raise the cash necessary to pay that non-refundable fee," adding that "an individual's employment, housing, financial stability, and family can all be threatened by just a few days of pretrial detention."

According to the most recent data compiled by a workgroup established by Chief Justice Cantil-Sakauye, between May 2016 and May 2017, defendants in Los Angeles County paid approximately $173 million in non-refundable cash to bail bondsmen and $13.6 million directly to the courts.[2]

Ventura County Superior Court Judge Brian J. Back, the workgroup's co-chair, stated that, "Thousands of Californians who pose no risk to the public are held in jail before trial, while others charged with serious or violent offenses may pose a high risk and can buy their freedom simply by bailing out."

The study's recommendations, if followed, he said, "will help keep Californians safer and preserve scarce jail resources while providing new tools to monitor those released before trial. Importantly, those accused of a crime who pose no risk to the public can keep their jobs, homes and families intact, with profound benefits also to the community at large."

In March of 2017, the Los Angeles County Board of Supervisors voted on a motion by Supervisors Sheila Kuehl and Hilda Solis to explore possibilities for reforming the county's cash bail system. A year later, the Board made public the results of a workgroup study that analyzed the County's current policies and practices surrounding bail and pretrial release, and returned to the Board with a timeline for creating and piloting a new risk assessment tool and other pretrial services.[3]

"Rooted in financial, social equity, and justice considerations, there is a growing acknowledgment that the current money bail system in Los Angeles County deeply needs reform," said Supervisor Solis at the time. "Despite a court's determination that someone is eligible for bail, and therefore poses only a minimal threat to public safety, far too many people remain in jail simply because they cannot afford bail, often losing their jobs, their housing, and in some instances, even their families."

Humphrey Decision

Van Nuys-based criminal defense attorney David Kestenbaum feels that "it's most important to note that they are all presumed innocent, yet our jails are overcrowded mainly with citizens awaiting trial, not convicted felons. In fact, during the nine years I was a prosecutor, it was well known that if you could keep a defendant in jail due to a high bail, they are more likely to plead to something just to get out."

Since the January decision by the First District Court of Appeal in the so-called "Humphrey decision,"[4] before setting bail, "the court must take into consideration a defendant's ability to post bail in addition to other factors. Previously, the courts prepared and followed a bail schedule that was based on the seriousness of the crime and did not look at all at the arrestee's ability to post bail."

The landmark court ruling involved Kenneth Humphrey, a 64-year-old

man charged with stealing a bottle of cologne and $5 from an elderly neighbor at a San Francisco residential hotel. Humphrey's bail was initially set at $600,000, and, though later reduced to $350,000, was well beyond his financial means.

In rendering its decision, the court agreed with Humphrey's counsel and ordered judges in the state to stop relying on the conventional bail schedule for criminal offenses, "especially in cases where a defendant does not pose a substantial safety risk by being freed." The ruling also compels judges to consider bail alternatives like electronic monitoring with ankle bracelets.

The court stated that Humphrey "is entitled to a new bail hearing at which the court inquires into and determines his ability to pay, considers nonmonetary alternatives to money bail, and, if it determines [he] is unable to afford the amount of bail the court finds necessary, follows the procedures and makes the findings necessary for a valid order of detention."

Since the decision, Kestenbaum says, "a bail bondsman told me his business is down 70 percent and that many clients are being released on their own recognizance. Unlike what most prosecutors feel, I do not believe that this will lead to more bench warrants as people now have money to hire a lawyer instead of spending it all on bail."

The reality, he says, "is that bail bond companies are backed by giant insurance companies and we know that their bottom line is profit. It is wrong to have that element involved in an individual's freedom prior to a trial."

Get Out of Jail Free Card

The rhetoric surrounding bail reform and its impact on California's criminal justice system continues to percolate as Senate Bill 10 winds its way through the legislative process. Co-sponsored by Van Nuys State Senator Bob Hertzberg and Oakland Assemblyman Rob Bonta, the bill would largely eliminate the cash bail system in California and have courts instead rely on pretrial assessments of an offender's flight risk and danger to public safety.

> "... if you could keep a defendant in jail due to a high bail, they are more likely to plead to something just to get out."
> — David S. Kestenbaum

In a recent editorial published in the *Sacramento Bee*,[5] crime victim advocate Marc Klaas wrote "SB 10 is a get out of jail free card that ignores constitutional protections guaranteeing crime victims the right to be notified, to be informed, and an opportunity to testify, before an accused defendant can be released from jail."

Klaas is president of the Klaaskids Foundation, which was established after the 1993 kidnap and murder of his daughter, 12-year-old Polly Hannah Klaas. California's bail system, he says, "needs thoughtful, structural reform, not an out of control chainsaw approach that disregards public safety. As currently written, SB 10 only provides consideration of information about the current offense, not a defendant's criminal history. With exceptions, it will

allow 'recommendations on conditions of release for the person immediately upon booking.' In other words, SB 10 will create a catch and release system that allows dangerous criminals back onto the street too quickly, making it impossible to facilitate victim guaranteed rights and protections, as it endangers innocent citizens."

SB 10, Klass concluded, "is an ill-conceived bill that follows the current trend in criminal justice legislation that puts more value on the rights of accused criminals than it does on the health, safety and welfare of crime victims or the greater public at large."

Purpose of Bail

"The Eighth Amendment to the U.S. Constitution provides that 'excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted'," says Shep Zebberman, an Encino criminal defense attorney.

In addition, "Article I, §12 of the California Constitution which establishes a person's right to obtain release on bail from pretrial custody prohibits the imposition of 'excessive bail.' *Robinson v. California* held that the 'cruel and unusual punishment' clause of the Eighth Amendment to the United States Constitution has been specifically held applicable to the states through the Fourteenth Amendment."[6]

For non-capital defendants, "the court may neither deny bail nor set it at a sum that is the functional equivalent of no bail."[7]

"The purpose of bail is to assure the defendant's attendance in court when his presence is required, whether before or after conviction," says Zebberman. "Bail was not meant as a means for punishing defendants nor for protecting the public safety. Such objectives are provided for otherwise. Bail is merely a device used to secure the appearance of a defendant who has been released from actual custody."[8]

The court, he says, "has broad discretion to set the actual amount of

"For poor persons arrested for felonies, reliance on bail schedules amounts to the functional equivalent to a presumption of incarceration."
— Shep A. Zebberman

bail," citing Penal Code §1275(a)(1), which sets forth the following factors to be taken into consideration in setting, reducing, or denying bail: protection of the public, the seriousness of the offense, the previous criminal record of the defendant, and probability of their appearing at trial or at a hearing of the case.

"After a defendant has been admitted to bail upon an indictment or information, the court in which the charge is pending may, upon good cause shown, either increase or reduce the amount of bail. The test for excessiveness of bail is not whether defendant is financially capable of posting bond but whether the amount of bail is reasonably calculated to assure the defendant's appearance at trial."[9]

The only requirement in the bail statutes "is that a court considering imposition of money bail take into account the defendant's financial circumstances and also consider

'any evidence offered by the detained person' regarding ability to post bond."[10]

Nothing in the statutes, says Zebberman, requires the court to consider less restrictive conditions as alternatives to money bail.

In *In re Kenneth Humphrey*, "the court held that the trial court erred in failing to inquire into and make findings regarding petitioner's financial ability to pay bail and less restrictive alternatives to money bail. Failure to consider a defendant's ability to pay before setting money bail is one aspect of the fundamental requirement that decisions that may result in pretrial detention must be based on factors related to the individual defendant's circumstances."

Setting bail in the amount prescribed by the bail schedule, he adds, "remains the default position in California and by declining to depart from the bail schedule a court relieves itself of the statutory duty to state reasons. For poor persons arrested for felonies, reliance on bail schedules amounts to the functional equivalent to a presumption of incarceration."

According to Zebberman, "Current proposed legislation seeks to level the playing field for those who would be eligible to be released on bail but cannot afford to post bail by doing away with the requirement posting of a money bail. Proponents of the movement for bail reform contend that money bail is not making us any safer or making sure people come back to court."

Money bail, he asserts, "has created a two-tiered system of justice in California—one for the rich, and one for everyone else by giving those with financial means a chance to buy their way out of jail while the case is pending. Of course, correcting the socio-economic injustices existing in the current system is a noble goal. Of concern to those opposing such legislation are the unanswered questions as to who bears the cost of going after those who are released on their own recognizance but fail to appear in court, i.e., fugitives."

Currently, Zebberman says, "There are financial incentives for those posting bail to actively look for and surrender fugitives; to wit, the loss of the bail posted. Under proposed legislation to do away with bail, the cost to seek out and return fugitives would presumably ultimately be shifted to the taxpayer in one form or another. The other alternative is not to actively seek out fugitives and hope they are picked up in a traffic stop or collateral arrest."

"Kentucky, Oregon, Wisconsin and Illinois have banned the bail-bondsman system and instead allow defendants to deposit ten percent of their bail amounts directly with the court, and to get the money back if they make their court appearances," according to Zebberman. "New Jersey and Washington, D.C. have similarly moved away from a cash-money bail system. The methods and successor—or lack thereof—of these reforms could be a good starting point in analyzing how best to reform our current system of bail."

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[1] Hon. Tani G. Cantil-Sakauye, "Costs of Money Bail to Justice," *Harvard Law Review Blog* (October 17, 2017), https://blog.harvardlawreview.org/costs-of-money-bail-to-justice.

[2] Judicial Branch of California Pretrial Detention Reform Workgroup, "Pretrial Detention Reform—Recommendations to the Chief Justice," (October 2017), https://newsroom.courts.ca.gov/internal_redirect/cms.ipressroom.com.s3.amazonaws.com/262/files/20179/PDRReport-FINAL%2010-23-17.pdf.

[3] Memorandum from County Counsel Mary C. Wickham to Los Angeles County Board of Supervisors re. Report Back on Your Board's March 2017 Bail Reform Motion (March 22, 2018), http://file.lacounty.gov/SDSInter/bos/supdocs/112299.pdf.

[4] *In re Humphrey*, A152056 (Cal. App., January 25, 2018).

[5] Marc Klass, "California bail reform bill may be trendy, but it would hurt victims' rights," *Sacramento Bee*, March 28, 2018, http://www.sacbee.com/opinion/california-forum/article207085264.html#storylink=cpy.

[6] *Robinson v. California,* 370 U.S. 660 (1962).

[7] *In re Christie,* 92 Cal.App.4th 1105, 1109 (2001).

[8] *Williams v. Superior Court*, 226 Cal.App.2d 666, 673 (1964).

[9] *United States v Beaman,* 631 F2d 85, 86 1980)(emphasis added).

[10] Cal. Penal Code §1270.1(c).