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Needle in a Bail Stack: How Humphrey's Vague Ruling Leaves Lawyers Searching

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NEEDLE IN A BAIL STACK: HOW *HUMPHREY'S* VAGUE RULING LEAVES LAWYERS SEARCHING

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INTRODUCTION

Money rules all. Nowhere is this truer than in the world of cash bail. The American cash bail system conditions pretrial release on a defendant's ability to pay a monetary amount in the form of a cash bond.[1] This is extremely problematic because approximately 40% of people in the United States are not able to afford even a $400 personal

1. CNBC, *Who Makes Money from Bail?*, YOUTUBE (Nov. 14, 2019), https://www.youtube.com/watch?v=YJ4jFYFAiYU.

emergency cost.[2] What happens when someone within this 40% is arrested? How can someone afford to pay thousands of dollars to secure release? Unfortunately, many simply cannot. Therefore, many criminal defendants sit in jail prior to trial, unable to afford even a commercial bond.[3] In fact, in March of 2020, three out of five people in American jails were awaiting trial, not yet convicted of a crime.[4] In other words, the majority of people in jails across the country are still presumed innocent.

The stories of Daria Morrison and Sarah Jackson perfectly illustrate the socio-economic inequity within the cash bail system. Daria and Sarah found themselves in similar situations when they were arrested and charged with robbery.[5] Their similarities do not end there: both women were twenty-years-old and had no prior criminal record.[6] Not surprisingly, both women received equal bail amounts of $150,000.[7] With such similar circumstances, this is only fair, right? Unfortunately, this is not the case. After this initial determination, their paths diverge dramatically. Daria's father could pay a bail bondsman's fee of 6% of the bail amount, while Sarah and her family lacked the financial means to do so.[8] Sarah remained in jail, unable to afford bail and faced with the unfortunate decision many defendants face: either plead guilty and get out of jail or stay and wait potentially years for a trial.[9] Sarah, after three months in county jail, decided to plead guilty to a time-served

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2. *Id.*

3. Jud. Branch of Cal., *Pretrial Detention Reform: Recommendations to the Chief Justice*, 40 (2017), https://www.courts.ca.gov/documents/PDRReport-20171023.pdf.

4. Brian Howard II & Laura Muse, *In re Humphrey: California High Court's Invocation of the Fourteenth Amendment May Influence Money Bail Systems Across the Nation*, JD SUPRA (Apr. 6, 2021), https://www.jdsupra.com/legalnews/in-re-humphrey-california-high-court-s-9813719/.

5. "*Not in it for Justice*" *How California's Pretrial Detention and Bail System unfairly Punishes Poor People*, HUMAN RIGHTS WATCH (Apr. 11, 2017), https://www.hrw.org/report/2017/04/11/not-it-justice/how-californias-pretrial-detention-and-bail-system-unfairly#.

6. *Id.*

7. *Id.*

8. *Id.*

9. *Id.*

sentence and five years of probation.[10] Meanwhile, Daria was able to get the charges dismissed in exchange for community service.[11]

Tragically, the disparity in outcomes for Daria Morrison and Sarah Jackson is not unique. The cash bail system is effective in forcing plea bargains on those who cannot afford bail.[12] Cash bail is a linchpin in the American criminal legal system made to "keep people in jail, coerce guilty pleas, and make court machinery move more rapidly."[13] Part of the reason pretrial incarceration has this effect is because the inability to post bail greatly affects the outcome of a criminal case.[14] Defendants are much more likely to plead guilty when they cannot afford bail. Often, the plea deal allows for release, so the defendant is incentivized to plead guilty as soon as possible rather than wait to be acquitted.[15] Unfortunately, this very rational desire to return to normal life can have catastrophic consequences later in life and only perpetuates disparities within the criminal legal system.[16] After three months in jail, Sarah made the difficult choice to be released to probation rather than await trial while incarcerated.[17] While Daria, who benefited from her freedom, was able to fight the charges and keep her record clear of a conviction.[18]

These disparate outcomes caused by economic disparities are what the California Supreme Court attempted to address in its 2021 decision

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10. *Id.*

11. *Not in it for Justice*, *supra* note 5.

12. *See* Carissa Byrne Hessick, *The Constitutional Right We Have Bargained Away*, THE ATLANTIC (Dec. 24, 2021), https://www.theatlantic.com/ideas/archive/2021/12/right-to-jury-trial-penalty/621074/ (explaining the criminal legal system is not equipped to take every criminal case to trial; without plea bargaining the criminal legal system would fall apart).

13. *Not in it for Justice*, *supra* note 5.

14. Bloomberg Law Podcast*, How the Rich Get Bail*, BLOOMBERG LAW (Aug. 4, 2021) (downloaded using Spotify).

15. *Id.*

16. *See* Tara O'Neill Hayes & Margaret Barnhorst, *Incarceration and Poverty in the United States*, AMERICAN ACTION FORUM (June 30, 2020) (explaining poverty and excessive legal punishments contribute significantly to one mass incarceration); *see also Race and Ethnicity*, PRISON POLICY INITIATIVE, (updated Mar. 4, 2022), https://www.prisonpolicy.org/research/race_and_ethnicity/ (Black Americans are incarcerated at a higher rate than White Americans: 2,306 vs. 450 per 100,000).

17. *Not in it for Justice*, *supra* note 5.

18. *Id.*

In re Humphrey.[19] Petitioner Kenneth Humphrey filed a writ of habeas corpus arguing that by setting his bail without considering his financial resources, the superior court denied his due process rights under the Fourteenth Amendment.[20] Humphrey did not claim that the cash bail system is inherently unconstitutional, but rather argued that setting bail beyond a defendant's economic means is "the functional equivalent of a pretrial detention order."[21] And this, he asserted, is unconstitutional.

In its decision, the Supreme Court of California agreed with Kenneth Humphrey, holding "the practice of conditioning freedom solely on whether an arrestee can afford bail is unconstitutional."[22] However, the *Humphrey II* decision lacks concrete guidance on how to adequately protect indigent Californians from excessive bail fees. By failing to answer these important questions, defendants like Sarah and Daria may continue to face similar disparate treatment. This Note will examine the *Humphrey II* decision and expose its inadequacies in protecting the rights of indigent people accused of crimes. Part I will introduce a general overview of bail and what inspired our modern bail system. Part II will provide background on the *Humphrey* decisions. Humphrey first appealed his bail decision to the court of appeals (commonly referred to as *Humphrey I*). Then, the Supreme Court of California reviewed that decision (commonly referred to as *Humphrey II*). Part III will extensively analyze the shortfalls of *Humphrey II*, exposing the language as too vague to protect defendants with limited financial resources and examining a procedural problem inherent within the timing of bail determinations that disadvantages criminal defendants and their attorneys. Finally, the Note will compare *Humphrey II* to the Federal Bail Reform Act of 1984, which fails to adequately protect the rights of poor defendants in the federal system. By analyzing cases that apply the Act, the

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19. *See In re* Humphrey (*Humphrey II*), 482 P.3d 1008 (Cal. 2021) ("The indiscriminate imposition of money bail has consequences. [S]ome people currently in California jails who are safe to be released are held in custody solely because they lack the financial resources for a commercial bail bond, and other people who may pose a threat to public safety have been able to secure their release from jail simply because they could afford to post a commercial bond . . . . That disparity lies at the heart of this case.") (internal quotes omitted).

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

21. *Id.* (citing United States v. Leathers, 412 F.2d 169, 171 (D.C. Cir. 1969); *In re* Christie 112 Cal. Rptr. 2d 495 (Ct. App. 2001)).

22. *Humphrey II,* 482 P.3d at 1012.

analyses expose how *Humphrey II's* factors may perpetuate the status quo of the cash bail system. Part IV will attempt to provide guidance on this extremely complex issue. This Note does not purport to solve the complex issues of the cash bail system, but offer suggestions to create more equity in bail determinations.[23]

I. THE HISTORY OF BAIL IN AMERICA

Bail describes "the conditions required to release someone from incarceration" before trial.[24] In the American criminal legal system, however, bail "is synonymous with money."[25] When someone is charged with a crime, conditions of release are determined at an arraignment hearing.[26] At this hearing, the prosecutor can request the judge impose specific conditions to be followed upon release and/or an amount of money to be posted before a defendant's release.[27] If the judge requires cash bail, the defendant can deposit money, or an asset, in order to secure his or her pretrial release.[28]

At our country's inception, the right to pretrial release "was one of the best-protected . . . rights."[29] This right dates back to medieval England, where it was common for criminal defendants to be released upon the payment of a bond to ensure defendants did not evade punishment and provide compensation for victims.[30] English common law deeply influenced the American colonies' adoption of a right to conditional

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23. Like most issues within the criminal legal system, we should view cash bail through the lens of the racial and economic discrimination that fuels the system.

24. Josie Duffy Rice & Clint Smith III, *Justice in America Episode 1: Justice for the Rich, Money Bail*, THE APPEAL (July 25, 2018) https://theappeal.org/justice-in-america-episode-1-justice-for-the-rich-money-bail/.

25. Elizabeth Munisoglu, *Redefining Money Bail Post Humphrey II*, LOS ANGELES LAWYER (July/Aug. 2021).

26. Rice & Smith, *supra* note 24.

27. *Id.*

28. *Criminal Injustice*, *#130 Does Eliminating Cash Bail Harm Public Safety?*, REDCIRCLE (Dec. 15, 2020), http://www.criminalinjusticepodcast.com/blog/2020/12/15/does-eliminating-cash-bail-harm-public-safety.

29. Matthew J. Hegreness, *America's Fundamental and Vanishing Right to Bail*, 55 ARIZ. L. REV. 909, 916 (2013).

30. Munisoglu, *supra* note 25, at 14.

pretrial release.[31] "[S]ome of the most fundamental constitutional documents in Anglo-American history: the Magna Carta, issued in 1215; the Statute of Westminster I in 1275; the Petition of Right in 1628; the Habeas Corpus Act of 1679; and the English Bill of Rights in 1689" solidified this right.[32]

The Constitution does not establish a right to pretrial release; however, it establishes a right against "excessive bail" under the Eight Amendment.[33] The protection against excessive bail has been critiqued as "some of the most ambiguous language in the Bill of Rights," making it extremely difficult to defend.[34] The California Constitution contains similarly vague language prohibiting excessive bail.[35] Vague language makes it difficult for courts to apply standards because the "vague right[] of 'due process,' leav[es] courts and Congress to tinker with what is 'due.'"[36] However, this is precisely what the California Supreme Court attempted to do in *Humphrey II*.

II. *HUMPHREY'S* PROCEDURAL POSTURE

A. Humphrey I

In *Humphrey I*, sixty-three-year-old Humphrey followed seventy-nine-year-old Elmer J. into his apartment and asked him for money.[37] Humphrey told Elmer to get on his bed and "threatened to put a pillow case over [Elmer's] head."[38] "When Elmer stated he had no money," Humphrey threw Elmer's phone on the ground.[39] In the end, Humphrey left with only seven dollars and a bottle of cologne.[40] Prosecutors

31. Hegreness, *supra* note 29, at 916.
32. *Id.*
33. Munisoglu, *supra* note 25, at 545–546; U.S. CONST. amend. VIII.
34. Joseph L. Lester, *Presumed Innocent, Feared Dangerous: The Eighth Amendment's Right to Bail*, 32 N. KY. L. REV. 1, 2 (2005) (quoting Caleb Foote, *The Coming Constitutional Crisis in Bail: I*, 113 U. PA. L. REV. 959, 969 (1965)).
35. *See* CAL. CONST. art. I, § 12 (1994).
36. Hegreness*, supra* note 29, at 912.
37. *Humphrey I,* 228 Cal. Rptr. 3d 513, 518 (Ct. App. 2018).
38. *Id.*
39. *Id.*
40. *Id.*

charged Humphrey with first-degree residential burglary, inflicting injury on an elder, and theft from an elder. At arraignment, Humphrey asked to be released on his own recognizance, citing:

> his advanced age, his community ties as a lifelong resident of San Francisco and his unemployment and financial condition, as well as the minimal property loss he was charged with having caused, the age of the alleged priors (the most recent of which was 1992), the absence of a criminal record of any sort for more than 14 years, and his never previously having failed to appear at a court ordered proceeding.[41]

The State asked the court to follow the Public Safety Assessment, which did not recommend release and suggested bail be set according to the bail schedule at $600,000.[42] Despite Humphrey's many mitigating factors, the trial court followed the State's recommendation and set bail at $600,000, and required a protective stay-away order for the victim against Humphrey, which was extremely difficult for Humphrey because he lived in the same housing complex as the victim. [43]

Upon this decision, Humphrey filed a motion to have a formal bail hearing, claiming bail was unreasonable because the judge set bail "beyond [his] means," which violated the Eighth Amendment.[44] Humphrey further argued that the Fourteenth Amendment required the court to tailor the conditions for pretrial release to him individually, and "his guilt may not be presumed" when setting bail.[45] Humphrey, a black man, also cited several studies "showing racial disparities in bail determinations," including an exhibit about the San Francisco criminal justice system that showed "'Black adults in San Francisco are 11 times as likely as White adults to be booked into County Jail' prior to trial."[46] Further, Humphrey provided positive information about himself to

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41. *Id.* at 519.
42. *Id.*
43. *Humphrey I,* 228 Cal. Rptr. 3d 513, 520 (Ct. App. 2018).
44. *Id.*
45. *Id.*
46. *Id.* (quoting *San Francisco Justice Reinvestment Initiative: Racial and Ethnic Disparities Analysis for the Reentry Council,* THE W. HAYWOOD BURNS INST., https://sfgov.org/sfreentry//sites/default/files/FileCenter/Documents/2899-SF%20JRI%20report_FINAL_7-21.pdf).

demonstrate that he was a good candidate for release—including his substantial efforts in recovery from a drug addiction, the completion of his high school diploma and two years of college, and his service as a mentor in his community.[47] Humphrey even secured acceptance into a residential substance abuse treatment program, with an intake date the day after his bail hearing.[48] He argued the program was better than jail because the program would address his substance abuse issues, which were "the root of his past criminal conduct."[49]

The prosecutor insisted that Humphrey was not a good candidate for release. First, because Humphrey had a prior that required prison time, under the California Penal Code, "the court had to find unusual circumstances in order to deviate from" the bail schedule.[50] Second, Humphrey's criminal activity facilitated his drug use, which made his "addiction and inability to address it . . . 'a continued public safety risk.'"[51] Finally, Humphrey was a flight risk because he was facing considerable prison time for the charged crimes.[52] All these factors considered, the State did not want Humphrey to be released to the treatment program.[53]

The trial court found Humphrey's motivation to get treatment was an unusual circumstance warranting deviation from the bail schedule.[54] However, "because of the public safety and flight risk concerns," bail was only reduced to $350,000.[55] Humphrey asserted that he could not afford even the reduced bail amount, which meant he would stay in county jail.[56] Following his denial for release, Humphrey filed a writ of habeas corpus.[57] In his writ, he claimed "he was denied due process

47. *Id.*
48. *Id.*
49. *Humphrey I,* 228 Cal. Rptr. 3d 513, 520 (Ct. App. 2018).
50. *Id.* at 521 (citing CAL. PENAL CODE § 1275 (West 2015)).
51. *Id.*
52. *Id.*
53. *Id.*
54. *Humphrey I,* 228 Cal. Rptr. 3d 513, 522 (Ct. App. 2018).
55. *Id.*
56. *Id.*
57. *Id.*

of law and deprived of his personal liberty on the basis of poverty."[58] The appellate court agreed, finding the trial court erred in:

(1) Failing to consider Humphrey's ability to pay;
(2) Failing to consider alternatives to money bail;
(3) Failing to set bail based on an individualized criterion.[59]

The court knew the perplexities this decision would create. It opined that "legislation is desperately needed" to take the pressure off of the court to uphold the constitutionality of the bail process.[60] However, instead of waiting for the legislature to pick up the slack, the court asserted "the highest judicial responsibility is and must remain the enforcement of constitutional rights."[61] Therefore, it reversed Humphrey's bail determination.

B. Humphrey II

The controversy, of course, did not end there. After the Court of Appeal granted Humphrey habeas corpus relief, neither named party petitioned the California Supreme Court for review.[62] Upon the request of several parties, and supported by the amicus briefs of many (including the District Attorney of San Diego County and San Bernardino County, as well as the Gold State Bail Agents Association and the Criminal Justice Legal Foundation), the California Supreme Court granted review on its own to "address the constitutionality of money bail as currently used in California."[63] The California Supreme Court held:

> The common practice of *conditioning freedom solely on whether an arrestee can afford bail is unconstitutional*. Other conditions of release—such as electronic monitoring, regular check-ins with a pretrial case manager, community housing or shelter, and drug and alcohol treatment—can in many cases protect public and victim safety as well as assure the arrestee's

58. *Id.* at 523.
59. *See id.* at 525, 538.
60. *Humphrey I,* 228 Cal. Rptr. 3d 513, 545 (Ct. App. 2018).
61. *Id.*
62. *See Humphrey II*, 482 P.3d 1008, 1015 (Cal. 2021).
63. *Id.* at 1012–1013.

> appearance at trial. What we hold is that where a financial condition is nonetheless necessary, the court must consider the arrestee's ability to pay the stated amount of bail—and *may not effectively detain the arrestee "solely because" the arrestee "lacked the resources" to post bail*.[64]

Pretrial detention should not depend on the arrestee's financial condition and should only occur when less restrictive conditions are incapable of protecting the government's interest in protecting the public and "the integrity of the criminal proceedings."[65] The Supreme Court's decision attempts to protect a defendant's "fundamental constitutional right to liberty," explaining that, "[i]n our society, liberty is the norm."[66] Therefore, unless there is a strong reason to detain a defendant before trial, the court must set bail at a price the arrestee can afford, or release him or her using less restrictive means.[67] A court must find, by clear and convincing evidence, that "no nonfinancial condition of release can reasonably protect" the government's interests.[68]

So, while pretrial detention is an important part of our criminal legal system, holding an individual in jail solely because he cannot afford his bail when less restrictive alternatives are adequate is not.[69] Seemingly, the Supreme Court sided with pretrial release and upheld the Constitutional right against excessive bail. Upon a deeper look, though, *Humphrey II's* decision fails to protect criminal defendants from economically-charged pretrial detention.

III. WHERE *HUMPHREY II* FAILS TO PROTECT CRIMINAL DEFENDANTS

At face value, the *Humphrey II* decision reads beautifully for freedom fighters, and many of these fighters have come out to praise the decision. The founder of the Civil Rights Corporation went as far as to say the decision will "eradicat[e] wealth-based human caging from our

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64. *Id.* (emphasis added).

65. *Id.* at 1013.

66. *Id.* at 1021 (quoting United States v. Salerno, 481 U.S. 739 (1987)).

67. *See id.* at 1019–1021.

68. *Humphrey II*, 482 P.3d 1008, 1019–1021 (Cal. 2021) (the government's interests being public or victim safety and the defendant's appearance in court).

69. *Id.* at 1022.

society."[70] A law firm in California posted a blog asserting that the decision will "fundamentally change how bail is set."[71] And an activist called Humphrey "the most historically significant individual in the history of California bail reform."[72]

Undoubtedly, the decision represents massive progress by telling California courts that their past policies in setting bail were unconstitutional: a seemingly strong stance. However, the decision leaves much undetermined and open-ended. For example: what does it mean to consider someone's finances? How is the trial court supposed to do this? Can the court consider the whole family's financial situation? How much weight should the court give flight risk? How much weight should the court give a history of failing to appear in court? The list goes on and on. Leaving such important questions unanswered will prove to be problematic for various reasons. This Section attempts to expose a few reasons but is not exhaustive.

A. Humphrey Provides for Immense Judicial Discretion

Vague decisions provide for more judicial discretion. The previous paragraph illuminates many unanswered questions, but this Section will focus primarily on the vague language regarding the ability to pay and the risk to public safety. A similar analysis can be applied to the other unanswered questions to expose even more problems with the *Humphrey II* decision. Under *Humphrey II*, courts must consider nonmonetary conditions for pretrial release.[73] For Humphrey, the nonmonetary condition he asked the court to consider was for release to a drug treatment program.[74] If such nonmonetary means would not protect the public,

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70. *California Supreme Court Rules in Favor of Pretrial Rights in Re Kenneth Humphrey Decision*, S.F. PUB. DEF. (Mar. 25, 2021), https://sfpublicdefender.org/news/2021/03/california-supreme-court-rules-in-favor-of-pretrial-rights-in-re-kenneth-humphrey-decision/.

71. Howard, *supra* note 4.

72. Nico Savidge, *Trust into Spotlight of California's Crusade Against Cash Bail, Kenneth Humphrey Hopes to be an Example*, MERCURY NEWS (Nov. 28, 2020), https://www.mercurynews.com/2020/11/28/thrust-into-spotlight-of-californias-crusade-against-cash-bail-kenneth-humphrey-hopes-to-be-an-example/.

73. *Humphrey II*, 482 P.3d at 1015.

74. *Humphrey I*, 228 Cal. Rptr. 3d 513, 520 (Ct. App. 2018).

or ensure the defendant's return to court, a judge can begin a cash bail analysis.

In order to ensure bail is not "the functional equivalent" of a pretrial detention order (or a finding that pretrial release is not suitable), the court has to know what a defendant can pay.[75] The court explained the following:

> If the [superior] court concludes that money bail is reasonably necessary, then *the court must consider the individual arrestee's ability to pay*, along with the seriousness of the charged offense and the arrestee's criminal record, and—unless there is a valid basis for detention—set bail at a level the arrestee can reasonably afford. And if a court concludes that public or victim safety, or the arrestee's appearance in court, cannot be reasonably assured if the arrestee is released, it may detain the arrestee only if it first finds, by clear and convincing evidence, that no nonfinancial condition of release can reasonably protect those interests.[76]

While *Humphrey II* is championed for explicitly saying "liberty is the norm," its further evaluation of Humphrey's situation waters down this powerful assertion.[77] Instead of standing by the notions of liberty, the Court essentially said liberty is only attainable if a defendant is not charged with a serious offense and does not have a criminal record. Beyond this, the vague instruction allows for more judicial discretion, which gives judges immense power to decide what this means and how to apply the standard.[78] When it comes to judicial discretion, "the common debate in legal literature focuses on the extent to which judges deviate from formal legal rules and are allowed or required to balance

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75. *Humphrey II*, 482 P.3d at 1014.

76. *Id.* at 1020 (emphasis added).

77. *Id.* at 1021.

78. Judicial Discretion, LEGAL INFORMATION INSTITUTE, https://www.law.cornell.edu/wex/judicial_discretion#:~:text=Judicial%20discretion%20gives%20courts%20immense,when%20legislature%20allows%20for%20it.&text=Judicial%20discr%20tion%20is%20granted%20to,a%20rigid%20application%20of%20law.

between elements such as social goals or legal principles."[79] The concern with *Humphrey II* is that by allowing judges to balance the societal goal of maintaining public safety against the right to pretrial release, the scales will tilt in a way that does not protect poor defendants.

Traditionally, courts used a Uniform Bail Schedule to determine the bail amount required for each crime.[80] These Uniform Bail Schedules suggest bail amounts for each crime, and do not permit deviations, except in specific circumstances. For example, the Los Angeles County Bail Schedule recommends a bail amount of $20,000 for a battery charge.[81]

SECTION	CRIME	BAIL (IN DOLLARS)[82]
243(a)	Battery	20,000
459	Burglary	5,000
488	Petty Theft	1,000
646.9	Stalking	50,000

This is precisely the practice that favors defendants with the financial means to easily secure release. As with Sarah Jackson and Daria Morrison, the practice could significantly alter a defendant's outcome.[83] While *Humphrey II* does not explicitly denounce these bail schedules, its dicta inherently provide they are unconstitutional.

This is part of the reason why an opponent of the *Humphrey I* decision was the Gold State Bail Agents Association. Bail bonds offer a way out of jail when a defendant cannot afford their entire bail

79. Yuval Sinai & Michal Alberstein, *Expanding Judicial Discretion: Between Legal and Conflict* Considerations, 21 HARV. NEGOT. L. REV. 221, 228–29 (2016).

80. CAL. CT. R. 4.102 (promulgating "uniform bail and penalty schedules for certain offenses in order to achieve a standard of uniformity in the handling of these offenses").

81. *Bail Schedule for Infractions and Misdemeanors*, SUPERIOR CT. OF CAL., COUNTY OF L.A. (2021), https://www.lacourt.org/division/criminal/pdf/misd.pdf.

82. *Id.*

83. Sarah Jackson and Daria Wilson, two women of the same age and criminal background, received the same cash bail amount. Daria posted cash bail, but Sarah could not. Daria received community service in exchange for dismissal of the charges, while Sarah took a plea to be released. *See supra* Introduction.

amount.[84] The use of commercial bail bondsmen is also the most common way defendants meet bail in America.[85] Bail bondsmen typically charge a fee of ten percent of the entire bail amount.[86] If the defendant returns to court, the bondsman gets his money back, but the defendant will never get back his ten percent fee.[87] If he did, the bail bondsman would not make any money. In Humphrey's case, to pay the bail bondsman's fee, he would have had to find $60,000 (10% of the entire bond)—$60,000 he would never get back.

Additionally, evaluating one's threat to public safety is extremely fact-specific, and the judge is required to make difficult determinations. Unfortunately, when it comes to judicial discretion, "[i]n 'hard' cases, where no clear-cut rule exists, non-legal factors [will] guide the judges in their decision."[88] The most important non-legal factor that may impact *Humphrey II* analyses is bias: in particular, racial bias and professional bias. Very notably, most judges are former prosecutors.[89] In the federal system, for every former public defender on the bench, there are more than four former prosecutors.[90] Unlike prosecutors:

> Public defenders and civil rights attorneys, by the nature of their professions, are required to consider the impact of the law on everyday people. *Their jobs require them to understand the circumstances of marginalized groups* and ensure that large institutions do not strip them of their most basic rights. They spend their careers representing these everyday people, hearing what led them to possibly engage in criminal behavior and hearing stories of being falsely accused. They also understand mitigating factors that have led to harm to the individual, their

84. CNBC, *supra* note 1.

85. Bernadette Rabuy & Daniel Kofp, *Detaining the Poor: How Money Bail Perpetuates an Endless Cycle of Poverty and Jail Time*, PRISON POL'Y INITIATIVE (May 10, 2016), https://www.prisonpolicy.org/reports/incomejails.html.

86. *Bloomberg Law Podcast*, *supra* note 14.

87. *Id.*

88. Sinai, *supra* note 79, at 221.

89. Sarah Fair George, *There are Too Many Prosecutors on the Bench. Take it From Me, a Prosecutor*, THE APPEAL (Jan. 8, 2021), https://theappeal.org/there-are-too-many-prosecutors-on-the-bench-take-it-from-me-a-prosecutor/.

90. *Id.*

> families, and their communities, often because of the government's failure to meet their basic needs. They spend their careers attempting to convince the government that these individuals are also a part of their community and deserve to be treated with the same respect and dignity.[91]

Recent studies show many judges use their discretion in a way that disproportionately favors white defendants.[92] Consequently, poor defendants of color will likely suffer more from the discretion provided by *Humphrey II*. Studies also show law enforcement officers over-police communities of color.[93] Black Californians are about two times as likely to be searched and booked into jails as white Californians.[94] This increases the likelihood that Californians of color will be convicted of crimes. Because *Humphrey II* allows judges to continue considering prior criminal convictions, it may exacerbate the bias and racism within the system.[95] Such inherent racial disparities, which *Humphrey II* did not acknowledge, will not go away.

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91. *Id.* (emphasis added).

92. While *United States v. Booker* gave judges more flexibility to permit individualized sentencing, studies show this discretion led to black men receiving harsher sentences than white men. United States v. Booker, 534 U.S. 220 (2005) (holding that the Sentencing Reform Act is advisory, not mandatory, and judges should consider the guidelines but may tailor sentences as they see fit) (citing 18 U.S.C.. § 3553 (2021)); Christopher Zoukis, *Judicial Discretion: There's Good News, and Some Pretty Bad News*, HUFFPOST (Dec. 6, 2017), https://www.huffpost.com/entry/judicial-discretion-there_b_8473376 (discussing statistics released by the Bureau of Justice indicating that black men, in comparison with white men, receive "far harsher" sentences for similar criminal convictions).

93. Magnus Lofstrom, et al., *Racial Disparities in Law Enforcement Stops*, PUB. POL'Y INST. OF CAL. (Oct. 2021) https://www.ppic.org/publication/racial-disparities-in-law-enforcement-stops/.

94. *Id.*

95. *See* James Doubek, *Police Researcher; Officers Have Similar Biases regardless of Race*, NPR (June 22, 2020) (noting how the police exhibit bias against black people; police are more likely to associate black people with weapons and speak less respectfully to black people (compared to white people) during traffic stops); *see also* Bernice Donald, *Judges on Race: Reducing Implicit Bias in Courtroom*, LAW360 (Dec. 6, 2020), https://www.law360.com/articles/1309550/judges-on-race-reducing-implicit-bias-in-courtrooms (detailing how in federal courts, the average sentence for white defendants is fifty-five months, while the average sentence for black defendants is ninety months).

In regard to public safety, the Court goes on to explain that you can never eliminate all possibility of harm.[96] Even still, superior courts should focus on "risks to public or victim safety or to the integrity of the judicial process that are *reasonably likely* to occur."[97] The standard "reasonably likely," leaves vast room for interpretation. It also leaves room for judges to continue adhering to arbitrary uniform bail schedules, arguing it is for the sake of public safety. At the same time, defendants who have money can "pay for release regardless of how dangerous they are."[98] The emphasis on public safety is also problematic because local judges are elected.[99] As elective officials, judges may feel pressure to adhere to the whim of the public and use their discretion to give more weight to public safety in the spirit of being tough on crime. Judges need to stay in the good graces of their constituents and if they appear soft on crime, they may be voted out of office.

Additionally, whenever courts are given factors to consider, uniformity disappears.[100] This significantly weakens *Humphrey II's* power. Of course, there are many proponents for broader judicial discretion. Many sentencings laws that removed judicial discretion, like mandatory minimums and "Three Strikes Laws," created catastrophic damage within the criminal legal system. [101] Such laws make it impossible for judges to consider a defendant's life circumstance and unique

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96. *Humphrey II*, 482 P.3d 1008, 1020 (Cal. 2021).

97. *Id.* (emphasis added).

98. Many defendants suffer pretrial incarceration due to their dangerousness, but most defendants awaiting trial committed nonviolent crimes. *See Not in it for Justice: How California's Pretrial Detention and Bail System Unfairly Punishes Poor People*, HUMAN RIGHTS WATCH (Apr. 11, 2017), https://www.hrw.org/report/2017/04/11/not-it-justice/how-californias-pretrial-detention-and-bail-system-unfairly#.

99. *Judicial Selection: How California Choses its Judges and Justices*, CAL. CTS. NEWSROOM, https://newsroom.courts.ca.gov/branch-facts/judicial-selection-how-california-chooses-its-judges-and-justices (last visited Apr. 24, 2022).

100. Judges possess increased discretion during sentencing, which makes them more likely to rely on their own implicit biases (which vary from judge to judge) at this stage. *See* Bernice Donald, *Judges on Race: Reducing Implicit Bias in Courtrooms*, LAW360 (Dec. 6, 2020), https://www.law360.com/articles/1309550/judges-on-race-reducing-implicit-bias-in-courtrooms.

101. *See* Timothy K. Lewis, *Judicial Discretion Can Help the Poor*, THE N.Y. TIMES (Feb. 18, 2014), https://www.nytimes.com/roomfordebate/2014/02/18/affluenza-and-life-circumstances-in-sentencing/judicial-discretion-can-help-the-poor

characteristics at the sentencing phase by taking sentencing decisions out of judges' hands.[102] Looking at the legacy of reducing discretion within sentencing is certainly a cause for concern. However, it is also true that sometimes discretion leads to "disparate treatment of those arrested, charged and prosecuted."[103] This is because judges, like everyone else, have implicit biases.[104] It is important to protect defendants against individual biases to ensure a more just system.

Thus, *Humphrey II* fails to adequately protect the accused in California courts and perpetuates the same system it criticized. Due to the vague language that amounts to inadequate protection, large bail amounts will continue to disproportionately impact defendants without financial means. By giving judges the power to set bail under the guise of public safety, *Humphrey II* maintains the status quo of the bail system. When judges have such broad discretion, criminal defendants cannot know what will happen to them with any certainty. Their futures could change dramatically depending on which judge is assigned their cases. California legislatures must draft more concrete legislation on financial protection in the criminal justice system. Without it, judges may use their judicial discretion to protect the public from potential dangers rather than uphold the right to pretrial release. This is only the first hurdle defendants must overcome.

B. There Are Procedural Issues with Bail Determinations that Humphrey Does Not Account for

Humphrey II operates under the standard of clear and convincing evidence.[105] This is an extremely high standard that requires the court find it is *highly probable* that public safety will be threatened if a defendant is released.[106] This standard is the same standard that courts

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(noting how these sentencing laws contributed to the explosion of the prison population from 338,000 in 1972 to more than 2,000,000 today).

102. *Id.*

103. Juan Villasenor & Laurel Quinto, *Judges on Race: The Power of Discretion in Criminal Justice*, LAW 360 (Jan. 10, 2021), https://www.law360.com/articles/1330865/judges-on-race-the-power-of-discretion-in-criminal-justice.

104. *Id.*

105. *Humphrey II,* 482 P.3d 1008, 1012 (Cal. 2021).

106. *Id.* at 1020.

use to terminate parental rights, commit someone involuntarily, and deport someone.[107] These examples illustrate how strong the prosecutor's arguments must be. However, the timing of bail arguments weakens the standard and disadvantages defendants, essentially rendering the standard ineffective.

The initial bail determination occurs at the arraignment hearing, which generally occurs either the day of arrest or the day after.[108] This is the first appearance for a defendant and is often the first time the defendant learns what charges the prosecutor has filed.[109] Prosecutors have the complaint and the police report, which offer a biased description of events leading to arrest, leaving defense attorneys with incriminating information and minimal time to prepare.[110] "Because the hearing is so quick, judges rarely get a full picture of the accused's individual circumstances, and too often rely on their own stereotypes and biases."[111] Therefore, even when judges weigh the *Humphrey II* factors in the way the California Supreme Court intended, the bail system may continue to disfavors people in poverty and people of color simply because of timing.

Defendants might meet their attorney minutes before arraignment, especially if the defendant is appointed a public defender (people who hire a private attorney have likely spoken to their attorney before, which

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107. Weiner v. Fleischman, 816 P.2d 892, 898 (1991) (quoting Herman & MacLean v. Huddleston, 459 U.S. 375, 389 (1983)).

108. U.S. Dep't of Just., *Initial Hearing / Arraignment*, OFFS. OF THE U.S. ATT'Y, https://www.justice.gov/usao/justice-101/initial-hearing (last visited Mar. 19, 2022).

109. *How Criminal Cases Work: Arraignment*, CAL. CTS.: THE JUD. BRANCH OF CAL., https://www.courts.ca.gov/1069.htm?rdeLocaleAttr=en (last visited Mar. 19, 2022).

110. *Cf.* Ari Shapiro et al., *Police Reports are Biased. What Can Journalists do to Better Cover Policing?*, NPR (May 28, 2021), https://www.npr.org/2021/05/26/1000598495/how-police-reports-became-bullet-proof (stating that a police report impacts the narrative of an event and has an outsized influence on subsequent events, but the police report is not the whole story. Additionally, when police write reports, they write the report in a way that is pro-police.).

111. Human Rights Watch, *Q&A: Pretrial Incarceration, Bail and Profile Based Risk Assessment in the United States*, HUMAN RIGHTS WATCH (June 1, 2018), https://www.hrw.org/news/2018/06/01/q-pretrial-incarceration-bail-and-profile-based-risk-assessment-united-states.

may be different for defendants appointed counsel). As evidenced by the California Penal Code:

> In a noncapital case, if the defendant appears for arraignment without counsel, he or she shall be informed by the court that it is his or her right to have counsel before being arraigned, and shall be asked if he or she desires the assistance of counsel. If he or she desires and is unable to employ counsel the court shall assign counsel to defend him or her.[112]

An attorney must quickly meet his or her client and develop a competent argument, while the prosecutor has a time advantage. Thus, the timing aspect makes it more difficult for the defense to prevail in bail arguments.

Similarly, there is little time for the defense attorney to investigate allegations and mitigating circumstances prior to arraignment. If an attorney is appointed at the time of the hearing, the defense attorney may have very little to present. The important mitigating factors Humphrey cited in his defense included: his advanced age, his community ties, his completion of substance-abuse treatment, his educational background, and the large gap between his past and current criminal conduct.[113] While some of these circumstances may be quickly recited in a brief meeting with one's attorney, some require an intimate conversation between the attorney and client. The quick nature of pre-arraignment meetings can limit these conversations.

If a client does not yet trust the attorney he just met, or suffers from other impairments—lack of sleep, mental health issues, or substance abuse issues— the defendant may not provide his attorney with the imperative information. It is possible that the police department's description of the crime and the defendant's list of prior offenses is all the court has to evaluate when determining bail. Deferring to this biased description of the crime weighs the scales in favor of the State. So, if the "major premise [is] … assuring the arrestee's appearance at trial and pro-

112. CAL. PENAL CODE § 987(a) (West 2019).

113. *Humphrey II*, 482 P.3d 1008, 1013–14 (Cal. 2021).

tecting the safety of the victim as well as the public," then bail determinations tilt heavily in favor of detention at arraignment.[114] *Humphrey II* does not address these evident procedural biases.

This procedural issue, though, is premised on the idea that release before trial is the presumption. The hope is to quickly release a defendant back into his community, as long as the defendant poses no risk to public safety. This should happen early on. The devastating effects of pretrial detention are widely-known, and discussed in this Note's Introduction. It is important, for both plea negotiation and constitutional protection, to release those who are suitable for release as quickly as possible. It might not make sense to postpone such hearings, forcing defendants to remain incarcerated longer than necessary. The immense burden on defense attorneys, and disadvantage to their clients, will remain unless procedural protections are put in place. Therefore, potential protections are discussed further in Part IV.[115]

C. The Federal Bail Reform Act Demonstrates Potential Application of Humphrey

To see how *Humphrey II* may be applied in California state courts, we can look at federal courts' application of the Bail Reform Act of 1984 ("1984 Act"). The 1984 Act contains similar vague language to *Humphrey II*, which provides that a person charged with a crime should be released or detained, subject to conditions.[116] The 1984 Act created large changes, setting it apart from its predecessor in 1966.[117] Under the Bail Reform Act of 1966 ("1966 Act"), judges had to use the *least restrictive conditions of release*, considering only what was required to assure a defendant would return to his future court appearances.[118] This

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114. *Id.* at 1012.

115. See *infra* Part IV, for a discussion on bail hearings. A potential safeguard for criminal defendants is to allow more time for the hearing itself, which would provide more developed arguments for a defendant's pretrial release.

116. 18 U.S.C. § 3142 (2008).

117. *See generally* Bureau of Justice Statistics, *Pretrial Release and Detention: The Bail Reform Act of 1984*, U.S. DEP'T OF JUST. (1988), https://bjs.ojp.gov/content/pub/pdf/prd-bra84.pdf.

118. *Id.* at 2 (emphasis added).

provided that federal defendants were entitled to pretrial release, or release with conditions, that only aimed to assure a defendant's appearance at trial.

The 1984 Act, though, widened what judges could consider in determining conditions of release.[119] The 1984 Act provides that judges can also consider aspects like "the nature and the circumstances of the charges, the weight of the evidence, the history and characteristics of the putative offender, and the danger to the community,"[120] plus financial conditions.[121] This added hurdle weakened the right to pretrial release. The legislative history regarding the 1984 Act shows that instead of truly holding that liberty is the norm, Congress's language limited the liberty of federal defendants.[122] The California Supreme Court adopted similar limiting language in the *Humphrey II* decision.[123] The Court could have set the precedent the 1966 Act did, but instead chose to follow in the footsteps of an act that disadvantages criminal defendants.

By looking at how other jurisdictions have applied the 1984 Act, we can preview how California superior courts may use *Humphrey II* to continue perpetuating the standing bail system that negatively impacts poor defendants. *United States v. Lemos* provides an example of a federal court applying the Federal Bail Reform Act. There, the federal court explained:

> Section 3142(c) provides that a judicial officer may not impose a financial condition of release that results in the pretrial detention of the defendant. The purpose of this provision is to preclude the sub rosa use of money bond to detain dangerous defendants. *However, its application does not necessarily require the release of a person who says he is unable to meet a financial condition of release which the judge has determined*

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119. Kenneth Frederick Berg, *The Bail Reform Act of 1984*, 34 EMORY L. J. 685, 701 (1985).

120. Hill v. Hall, 2019 U.S. Dist. LEXIS 173758 at *27 (M.D. Tenn. Oct. 7, 2019).

121. 18 U.S.C. § 3142.

122. *See* Ann M. Overbeck, *Detention for the Dangerous: The Bail Reform Act of 1984*, 55 U. CIN. L. REV. 153, 155 (1986).

123. *See Humphrey II,* 482 P.3d 1008 (Cal. 2021).

> *is the only form of conditional release that will assure the person's future appearance*. Thus, for example, if a judicial officer determines that a $ 50,000 bond is the only means, short of detention, of assuring the appearance of a defendant who poses a serious risk of flight, and the defendant asserts that, despite the judicial officer's finding to the contrary, he cannot meet the bond . . . then it would appear that there is no available condition of release that will assure the defendant's appearance.[124]

The *Lemos* court acknowledged that "[t]he internal contradiction [within the 1984 Act] is obvious" —a contradiction that manifests in *Humphrey II* as well.[125] The contradiction the court is referring to is that it is hard for courts to understand how to consider a defendant's financial means while still being allowed to set bail beyond a defendant's means. This obviously sounds contradictory. However, in *Lemos*, the court indicated that the 1984 Act does not say a defendant is entitled to have bail set at an amount he can pay. Rather, the court said, "bail must be proportionate to the defendant's liability."[126] Therefore, a $25,000 bond was deemed appropriate for the defendant charged with conspiracy to distribute cocaine, even though he could not afford such a bond.[127]

Even if a defendant cannot afford bail, he may be denied affordable bail if the superior court finds his liability warrants a larger bail amount. This analysis from *Lemos* can act as a predictor of what may happen when the courts apply *Humphrey II*. As *Lemos* showed, courts can use *Humphrey II* to continue to set bail beyond a defendant's means. This also implicates the procedural issue analyzed in Section (b) above.[128]

Another concerning aspect of the *Lemos* decision is the court's explicit mention of the defendant's sister's property.[129] This suggests that when applying *Humphrey II*, courts may consider a family's financial

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124. United States v. Lemos, 876 F. Supp. 58, 60 (D.N.J. 1995) (quoting 18 U.S.C. § 3142 (2008)).

125. *Id.* at 61.

126. *Id.* at 63.

127. *See id.*

128. *See supra* Part III.B.

129. *Lemos,* 876 F. Supp. at 63.

means. If a family member has means to pay the bond, he or she may feel pressure to pay such a bond. This is a huge burden on the family members of criminal defendants.

Another cause for concern is the defendant's crime—conspiracy to sell cocaine has no inherent victim.[130] Instead, the decision is based almost entirely on the defendant's potential prison sentence.[131] This is extremely alarming, because in the 1990s, California adopted new "tough on crime laws," including sentencing enhancements that can double a defendant's prison term.[132]

> California's Penal Code is now weighed down by more than 150 separate sentence enhancements, ranging from add-ons for possible gang association, having a prior conviction or being on probation. Such enhancements are now routinely applied in nearly every criminal case in the state. In fact, 80% of people in state prison are serving a term lengthened by a sentence enhancement, and more than 25% of those incarcerated are serving sentences extended by at least three enhancements.[133]

Therefore, criminal defendants charged with many enhancements may receive larger bail amounts strictly because of their charges' potential prison sentence. This is extremely concerning.

IV. WHERE TO GO FROM HERE

As demonstrated throughout this Note, the *Humphrey II* decision is rife with issues. However, the California Supreme Court knew what it was doing when it wrote this decision. It recognized the distinct

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130. *See* Michal Buchhandler-Raphael, *Dignity, and Danger: Human Dignity as a Constitutional Constraint to Limit Overcriminalization*, 80 TENN. L. REV. 291, 294 (2013) (noting that victimless crimes—including prostitution, gambling, and drug crimes—are those where individuals inflict harm only to themselves or to other consenting adults).

131. *See id.*

132. Pete Espinoza & Michael Romano, *It's Time to Reform Sentencing Enhancements*, THE ORANGE COUNTY REGISTER (May 26, 2021, 11:32 AM), https://www.ocregister.com/2021/05/26/its-time-to-reform-sentencing-enhancements/.

133. *Id.*

"boundary between the general rule and limited exception, [which] requires a careful balancing of the government's interest in preventing crime against the individual's fundamental right to pretrial liberty."[134] However, it declined to go further in describing this balance by saying, "this is not a case that requires us to lay out comprehensive descriptions of every procedure by which bail determinations must be made."[135] This quote demonstrates the Court intentionally left many important holes in its decision. By failing to solve fundamental problems in the bail debate, the Court left poor defendants with inadequate protection. Therefore, *Humphrey II* will not create any meaningful change in the bail reform movement.

As alluded to in Part III, Subpart A, diversifying the bench is important to maintain fairness within the criminal legal system.[136] Judges have an immense amount of power in making bail decisions, which means judges must understand the socio-economic conditions of criminal defendants. Defense attorneys spend their careers learning about these conditions, making them particularly qualified to weigh the *Humphrey II* factors. On the other hand, prosecutors spend their careers arguing against the *Humphrey II* factors. Prosecutors often live in a world of solely worrying about victims and public safety, sometimes at the expense of criminal defendants who are not yet legally guilty. As such, having an even mix on the bench could disrupt the system and provide better outcomes for criminal defendants under *Humphrey II*.

However, there should be more than just diversity of careers among the bench. Judges need to come from different backgrounds—including ethnic, racial and economic diversity. "While the ethnicity of judges has nothing to do with the quality of their legal reasoning, diversity is important because of the need for broader perspectives that can be brought to bear on the real-world issues facing judges in complex cases."[137] *Humphrey II* relies on a judge's ability to evaluate complex

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134. *Humphrey II*, 482 P.3d 1008, 1021 (Cal. 2021).

135. *Id.* at 1021–22.

136. *See supra* Part III.A; *see also* Jordan Rubin, *Sotomayor Laments Lack of Professional Diversity on High Court*, BLOOMBERG LAW (Oct. 13, 2021, 4:03 PM), https://news.bloomberglaw.com/us-law-week/sotomayor-laments-lack-of-professional-diversity-on-high-court (Justice Sonia Sotomayor explaining diversity in experience is important).

137. Michele L. Jawando & Allie Anderson, *Racial and Gender Diversity Sorely Lacking in America's Courts*, CTR. FOR AM. PROGRESS (Sept. 15, 2016),

factors of socio-economic status and criminal history. As Supreme Court Justice Sonia Sotomayor said, "[a] different perspective can permit you to more fully understand the arguments that are before you."[138] Unfortunately:

> [n]ot only are nonwhite Americans represented at disproportionately high rates in the criminal justice system, but the judges who are hearing those same cases are disproportionally white. Only 5 percent of state trial court judges are Latino, and only 7 percent are black, according to the American Constitution Society report.[139]

By diversifying the bench on several levels, defendants will have a better chance of being subject to a fair evaluation of the *Humphrey II* factors.

Finally, ending cash bail is a popular solution within the current bail reform movement. The way the cash bail system currently functions works to criminalize poverty, releasing only those with adequate financial means.[140] By eliminating cash bail, this criminalization of poverty will no longer occur. However, the elimination of cash bail may negatively affect the very community the system currently hurts because many issues within the criminal justice system perpetuate bias against poor and disadvantaged communities.

The very reasons *Humphrey II* can be manipulated in criminal courts to keep defendants incarcerated will not disappear under a non-cash bail system. Judges will weigh the same factors to find bail is not appropriate for the very communities that suffer over-policing and increased prosecution. Therefore, eliminating the use of cash bail is not the answer to the issue of pretrial detention. Instead, jurisdictions need to rethink their pretrial systems completely. We must think carefully

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https://americanprogress.org/article/racial-and-gender-diversity-sorely-lacking-in-americas-courts/.

138. Katie Reilly, *Justice Sotomayor Calls for More Supreme Court Diversity*, TIME (Apr. 9, 2016), https://time.com/4287655/sonia-sotomayor-supreme-court-diversity/.

139. Jawando, *supra* note 137.

140. Lea Hunter, *What You Need to Know about Ending Cash Bail*, CENTER FOR AMERICAN PROGRESS (Mar. 16, 2020), https://americanprogress.org/article/ending-cash-bail/.

and intentionally about the bail movement. Without confronting the inherent bias within the criminal legal system, we cannot expect the elimination of cash bail to truly solve anything.

This is a tall order, which will take an immense amount of work and thought. Therefore, this Note will only offer suggestions until the pretrial system is dismantled and rebuilt. One alternative step would be to release all defendants charged with misdemeanors. Misdemeanors make up a majority of the American criminal legal system; misdemeanor charges account for nearly eighty percent of all arrests and state court dockets.[141] In California, misdemeanor offenses include petty theft, vandalism, and prostitution, and the potential sentences are probation, fines, court-ordered programming, or incarceration in county jail for less than one year.[142] However, misdemeanor charges often end in the defendant pleading to lesser charges in exchange for paying a fine or having the case dismissed.[143] Ironically, though, "[p]rosecutors often argue high bail because a defendant is 'too dangerous to be let out' before trial, then offer the same 'dangerous' person a time-served, go home sentence in exchange for a guilty plea."[144] This backward argument could be circumvented by calling for the pretrial release of all defendants arrested for a misdemeanor offense.

Similarly, defendants charged with crimes that do not require prison or jail commitment should be released at arraignment.[145] Minor misdemeanor offenses where the typical punishment is a fine should

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141. *America's Massive Misdemeanor System Deepens Inequality*, EQUAL JUSTICE INITIATIVE (Jan. 9, 2019), https://eji.org/news/americas-massive-misdemeanor-system-deepens-inequality/; *see also* Shima B. Baughman, *Dividing Bail Reform*, 105 IOWA L. REV. 947, 951 (2020) (describing bail reform among serious and minor crimes. Professor Baughman argues for reforms based on the severity of the crime charged).

142. *Misdemeanor*, SUPERIOR COURT OF CALIFORNIA, CNTY. OF SAN DIEGO, https://www.sdcourt.ca.gov/sdcourt/criminal2/criminalcasetypes/criminalmisdemeanor (last visited Mar. 19, 2022).

143. *America's Massive Misdemanor System Deepens* Inequality, EQUAL JUST. INITIATIVE, (Jan. 9, 2019), https://eji.org/news/americas-massive-misdemeanor-system-deepens-inequality/.

144. *Id.*

145. *See Misdemeanors*, SUPERIOR CT. OF CAL., CNTY. OF SANTA CLARA, https://www.scscourt.org/self_help/criminal/misdemeanors.shtml (last visited Mar. 19, 2022) (stating that the maximum punishment for a misdemeanor is a $1,000 fine and up to one year in jail).

warrant automatic release.[146] It is likely that defense attorneys in California can use *Humphrey II* to argue that such minor crimes carry no threat to public safety, however, there should be a mechanism that flags the automatic release for these defendants to ensure no one is wrongfully incarcerated in county jail.

Another improvement could be lengthening bail hearings. As mentioned previously, under *Humphrey II*, the State has to prove by clear and convincing evidence that the defendant's release would risk public safety or that the defendant will not return to court if released.[147] This high standard should warrant careful consideration by the judge and extended time for the defense to argue against pretrial incarceration. Appearances at arraignment typically last only a few minutes.[148] However, more time should be attributed to these hearings because the result of these hearings can take away the liberty of a criminal defendant and impact the entire case's trajectory.

Once again, these are suggestions to mitigate bias within the criminal legal system. However, we cannot effectuate real change without reflecting more on the biases that perpetuate the system. Because of the inherent biases, the *Humphrey II* decision reads like a wasted opportunity to create a meaningful impact for poor accused people in California. However, the California Supreme Court was up against a deeply problematic system that must be completely dismantled in order to protect indigent defendants. And as *Humphrey I* recognized, the court system is doing its best to make change while it waits for the legislature to provide new and concrete guidance.[149]

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146. *See Standard Sentencing Guidelines for Infractions and Misdemeanors*, SUPERIOR CT. OF CAL., CNTY. OF SAN DIEGO (Jan. 2015), https://www.sdcourt.ca.gov/pls/portal/docs/page/sdcourt/criminal2/criminalresources/2015%20courtroom%20counsel%20copy%20sent%20guidelines.pdf (listing the recommended sentences, including fines and probation conditions, for common misdemeanor offenses).

147. *See supra* Part II.B.

148. Office of the Public Defender, *I've Been Arrested. What Happens Now?*, SAN DIEGO CNTY., https://www.sandiegocounty.gov/content/sdc/public_defender/arrested.html (last visited Mar. 19, 2022).

149. *Humphrey I*, 228 Cal. Rptr. 3d 513, 545 (Ct. App. 2018).

CONCLUSION

The problem with vague decisions like *Humphrey II* is that they offer tiny steps towards reform but do not offer true change. Pretrial detention can negatively impact criminal defendants in many ways. One huge disadvantage to pretrial incarceration is the inability for defendants to help with their own defense.[150] In jail, there are added barriers to communicating with attorneys, defendants cannot help locate evidence, and defendants cannot participate in programs (like drug treatment) that courts like to see when considering plea deals.[151] Therefore, allowing the release of more defendants can "shrink[] the footprint of the criminal justice system and sav[e] taxpayer dollars."[152]

Under *Humphrey II*, though, defendants will continue to hope for the best but expect the worst. They will have to be extremely lucky in finding themselves in front of a judge who understands the spirit of *Humphrey II* and chooses to apply it, rather than clinging to public safety and continuing to incarcerate poor defendants. Unfortunately, many will find themselves in front of judges who interpret the decision as telling them to simply look into a person's finances. After doing so, the judge may decide what he wanted to do in the first place—which may be to lock up poor defendants with long criminal histories in the interest of safety. Under *Humphrey II*, the judge can do this even if the charges are minor because it is up to his or her judicial discretion.

Then, facing immense pressure to get out of county jail, a poor defendant may be offered a plea deal. If the plea deal amounts to time served or probation, the defendant will likely plead so he can get back to his life (regardless of guilt, innocence, or strength of his case)—just like Sarah Jackson.[153] Now, the defendant has another conviction on his "sheet." And if he is unlucky enough to be arrested again, he will be right back to where he began. Regardless of the current charge, the long criminal history allows the judge to set a higher bail amount, or deny pretrial release, which will keep him incarcerated in county jail

150. *Id.*

151. *Id.*

152. Hunter, *supra* note 140.

153. See *supra* Introduction, for a discussion on the criminal case of Sarah Jackson and the effect of economic disadvantages on pleading guilty.

awaiting his trial. *Humphrey II* does not help this hypothetical defendant, or Sarah Jackson. Instead, *Humphrey II* allows the system to continue to manipulate poor accused people in ways that it cannot do to people with financial means. And that is the heart of the problem that the California Supreme Court declined to solve in *Humphrey II*.

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[*] J.D. Candidate, California Western School of Law, 2023. I would like to give a special thanks to Morgan Bolin and her team of editors for their work on this Note, Professor Danielle Jefferis for her guidance throughout the writing process, and my family members for their love and support. This Note is dedicated to criminal defense attorneys. Your commitment to fighting the oppressive nature of the criminal legal system is a constant source of inspiration to work hard and be better.