

Setting Bail for Public Safety

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Here the rod is, as it were, held 'in terrorem' over the evildoer, innocuous so long as he behaves well, but ready to descend at any moment if he breaks his promise of good behaviour, for if he does, his bail can be forfeited . . . ‡

INTRODUCTION

Bail hearings affect the liberty of most criminal defendants.¹ While a fraction of arrestees are sentenced to custody after either a guilty plea or a trial, virtually all defendants have their custodial status determined at a bail hearing at the commencement of their cases. At this hearing, the judge determines whether the defendant, presumed innocent, should be kept in custody pending trial or, instead, released on bail. The hearing is brief, allows the introduction of evidence that would be inadmissible at trial, and is conducted according to the discretion of the trial judge.² It usually concludes with the judge setting bail at a certain dollar amount, and the defendant being released when he posts that amount.

The process of setting an appropriate bail amount has historically required both state and federal judges to consider a variety of factors, including the risk that the defendant will flee, the severity of the offense, and the defendant's prior criminal record. In California, although each of these factors is relevant, the Legislature has mandated that none is more important than the potential danger posed to the public by the defendant's release.

This note examines the difficulties posed to California judges as they struggle to follow this statutory command and set bail at an amount that

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‡ Fletcher Moore, *Magistrates' Law and Suggested Increase of Jurisdiction and Powers*, 9 J. OF THE STAT. & SOC. INQUIRY SOC'Y OF IR. 671, 673 (1893), available at http://webird.tcd.ie/bitstream/2262/6677/1/jssisiVolIX671_679.pdf.

1. Some defendants, for example, are cited to come to court by an officer, and they are then legally obligated to come on their own to commence their criminal proceedings. Many minor crimes are handled this way. See CAL. PENAL CODE § 813 (West 1998) (summons may be issued to compel defendant to come to court for his arraignment).

2. See generally *Van Atta v. Scott*, 27 Cal. 3d 424, 432 (1980), superseded by statute on other grounds, CAL. PENAL CODE § 1318 (West 1988); *In re York*, 9 Cal. 4th 1133, 1143 (1995).

protects public safety. In the following four sections, I aim to highlight the conundrum created by the existing statutory scheme, which on the one hand generally prevents judges from denying bail altogether, while on the other hand requires that judges, on the basis of very little information, determine precisely at what amount bail must be set to ensure the defendant does not commit a new crime while on bail. To be clear, unlike federal law, California law does not usually authorize preventive detention,³ that is, denying bail entirely, and therefore California judges must generally set bail at a dollar amount that both permits the release of the defendant and ensures public safety. This note, however, suggests that such a task is usually not possible, because there is no relationship between the dollar amount of bail and any *in terrorem* inhibiting effect that would deter future criminal conduct by the defendant. By exposing a fundamental flaw in the operation of California's bail statutes, this note opens a path to reform by suggesting empirical research and statutory modifications that will both protect the public safety and avoid the pretrial incarceration of defendants who are not likely to re-offend.

In Part I, I set out a brief description of the procedural aspects of setting bail. In Part II, I discuss the historical rationale behind allowing bail in criminal cases, and the subsequent development of laws regarding bail in both the federal and California criminal systems. In Part III, the note distinguishes two methods for protecting public safety—prescribing conditions of release and setting bail at a certain sum of money. Within the context of monetary bail, the note then segregates and distinguishes various rationales—other than public safety—behind setting bail, such as (a) risk of flight, and (b) to account for the severity of the offense and the related operation of bail schedules. Turning then to the public safety rationale, the note introduces the notion of a “combined reasonable penalty,” or CRP, which combines (a) the expected penalty for the commission of the offense for which the defendant was out on bail, and (b) the new offense, the crime sought to be inhibited by the act of setting bail. The note then demonstrates that it will generally be impossible to set bail to account for public safety, because bail will usually be (a) not significant, since it is not forfeited as a direct result of a new crime and in any event is unlikely to have an inhibitory, or *in terrorem*, effect on the defendant contemplating a second crime; (b) imprecise, since it is difficult to set at the edge of affordability; (c) ineffective for the indigent defendant, who has no money to post; and (d) impossible to set accurately for subsequent bail hearings if we assume that bail was accurately set at the first hearing. The note concludes with recommendations for research and modifications to the rules and laws that currently control bail proceedings.

3. See, e.g., CAL. PENAL CODE § 1269 (West 1998).

I. SETTING BAIL: PROCESS AND PROCEDURE

Arrested offenders⁴ are entitled to an arraignment within forty-eight hours of their arrest.⁵ At that time, the defendant is provided a lawyer if he cannot afford one, the judge tells him the nature of the charges against him, and, generally, the issue of bail is determined.⁶ In considering whether bail should be set, the judge looks to the defendant's prior criminal record,⁷ including past failures to appear at court hearings, the nature of the offense charged,⁸ corresponding police reports, possible penalties for the offense, and representations about his ties to the community.⁹ The judge also considers the risk of flight¹⁰ and the risk of danger posed to the community¹¹ if the defendant were to be released.

If the judge determines that the risks of flight and public danger are low, the defendant may be released on his promise to return to court on his "own recognizance" (OR), under the auspices of a supervised pretrial release program,¹² or in accordance with certain conditions of release, such as on the condition that the defendant attend an alcohol treatment program. But if the risks of flight or harm are substantial, the judge may, in certain cases, refuse any form of bail, requiring the defendant to remain in custody pending trial ("preventive detention").¹³ Alternatively, the judge might decide that the various factors weigh in favor of monetary bail, and set at an amount designed to assure the defendant's appearance at future hearings. Thus, while a poor man might consider \$100 a great deal of money, and for him bail in the amount of fifty dollars would be enough, a rich person might have bail set at \$500,000 to ensure her future appearance.

If the judge sets monetary bail, the defendant has three ways of satisfying the amount so that he may be released from custody pending trial. First, he may post with the court collateral for the bail set, such as by providing a government bond,¹⁴ or a deed to a house or other property.¹⁵ Or, he may post

4. See *supra* note 1.

5. CAL. PENAL CODE § 825 (West 2003).

6. CAL. PENAL CODE § 1269(b) (West 1998). Some defendants are arrested on the basis of a district attorney arrest warrant, signed off by a judge who has set bail and endorses it on the warrant. CAL. PENAL CODE §§ 815(a) (West 1985), 1269(b). This pre-arrest bail is usually revisited at arraignment.

7. CAL. CONST. art. I § 12 (West 2008); CAL. PENAL CODE §§ 1275(a) (West 1998), 1298 (West 1995). See, e.g., *O'Neal v. Superior Court*, 185 Cal. App. 3d 1086 (1986).

8. CAL. CONST. art I § 12; CAL. PENAL CODE § 1275(a).

9. For example, a judge would be interested in how long the defendant has lived in the area, whether she lives with family members, her employment status, her membership in community organizations and groups, her enrollment in school or college, and the like.

10. CAL. CONST. art I § 12; CAL. PENAL CODE § 1275(a).

11. CAL. PENAL CODE § 1275(a).

12. These programs usually require the defendant to meet with staff or call in every week, and may require drug testing, attendance at group meetings, and other counseling.

13. CAL. CONST. art. I, § 12 (e.g., violent felonies and sexual assaults).

14. CAL. PENAL CODE § 1298 (West 1995). *HeinOnline*, 13 Berkeley J. Crim. L. 3 2008

the total sum with the court, such as by providing a cashier's check or cash.¹⁶ Third, and most commonly, the defendant may purchase a bail bond, generally at the non-refundable cost of ten percent of the bail set.¹⁷

After posting bail, if the defendant appears for all his court dates, then, regardless of whether he is convicted or acquitted, the posted bail is returned and any bail bonds are discharged.¹⁸ But if the defendant fails to appear at any subsequent hearing, bail is forfeited—the entire bail amount already posted or the face amount of the bond is collected, and the bond company has the right to go after the defendant for the amount of the bond.¹⁹ More commonly, the company will seek an extension on the forfeiture,²⁰ and, if the bail is high enough to make the effort worthwhile, the company will track down the defendant and forcibly return him to custody.

II. BAIL'S EARLY RATIONALE AND HISTORY

The right to bail is older than its embodiment in the U.S. Constitution.²¹ But today, the fundamental touchstone is the Eighth Amendment,²² which provides that when bail is permitted,²³ it must be reasonable.²⁴ Indeed, the Supreme Court in *Stack v. Boyle*²⁵ suggested that bail's sole constitutionally

15. *Id.*

16. CAL. PENAL CODE §§ 1269, 1295(a) (West 1997).

17. CAL. PENAL CODE §§ 1269, 1278 (West 2004).

18. CAL. PENAL CODE §§ 997 (West 1968), 1008 (West 1951), 1116 (West 1935) (on commitment after sentencing), 1117 (West 1935), 1273 (West 1935), 1278(a), 1384, 1458-59 (West 1998).

19. In addition to bail forfeiture, a defendant's failure to appear also results in the issuance of a new arrest warrant. CAL. PENAL CODE § 978.5 (West 1981). At the bail hearing on that charge, bail is generally set at a higher amount.

20. See CAL. PENAL CODE § 1305 (West 1999); see, e.g., *People v. Lexington Nat'l. Ins. Co.*, 158 Cal. App. 4th 370 (2007).

21. "And lest the intention of the law should be frustrated by the justices requiring bail to a greater amount than the nature of the case demands, it is expressly declared by statute 1 W. & M. ft. 2. c. 1. that excessive bail ought not to be required: though what bail shall be called excessive, must be left to the courts, on considering the circumstances of the case, to determine." BLACKSTONE'S COMMENTARIES ON THE LAWS OF ENGLAND, Book the Fourth, ch. 22, *Of Commitment and Bail*, available at <http://www.yale.edu/lawweb/avalon/blackstone/bk4ch22.htm> (edited for modern spelling). See generally JAMES F. STEPHENS, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 235-36 (1883) (bail from 1275 onwards).

22. The Eighth Amendment provides in full: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII.

23. The right to reasonable bail does not *ipso facto* establish the right to bail. See *United States v. Edwards*, 430 A.2d 1321 (D.C. Cir. 1981). For example, where the punishment may be death, bail has generally not been permitted, unless imposed by a court exercising discretion. Judiciary Act of 1789, ch. 20, § 33, 1 Stat. 73, 91. E.g., *People v. Superior Court (Kim)*, 20 Cal. App. 4th 936 (1993) (no bail if defendant charged with capital crime).

24. See generally Joseph L. Lester, *Presumed Innocent, Feared Dangerousness: The Eighth Amendment's Right to Bail*, 32 N. KY. L. REV. 1, 15 (2005).

25. 342 U.S. 1 (1951); see also *People v. Gilliam*, 41 Cal. App. 3d 181 (1974), overruled on other grounds by *People v. McGaughan*, 22 Cal. 3d 469 (1978) (stating that bail's purpose is to assure presence of defendant, not to protect public safety), *in re Underwood*, 9 Cal. 3d 345

valid purpose was to ensure the defendant's appearance for his court dates.²⁶ The court stated that "[l]ike the ancient practice of securing the oaths of responsible persons to stand as sureties for the accused, the modern practice of requiring a bail bond or the deposit of a sum of money subject to forfeiture serves as additional assurance of the presence of an accused."²⁷

As some writers noted, however, there were in fact many other motivations behind setting bail at a given amount. Exaggeratedly high bail could in effect prevent defendants from interfering with prosecution witnesses, coerce guilty pleas and other cooperation with the implied promise of a reduction in bail, and impose informal punishment for those who might not otherwise receive it.²⁸ Although none of these were statutorily or constitutionally endorsed, commentators noted that judges frequently set bail high enough to achieve these goals "under the guise of assuring the defendant's appearance for trial."²⁹ Commentators also indicated that judges often set high bail to prevent defendants from being released and having the opportunity to commit additional offenses³⁰—a sort of *sub rosa* pretrial detention that encountered much criticism from those insisting that the only constitutionally authorized reason to set bail was that suggested in *Stack v. Boyle*—ensuring the defendant's appearance at trial.³¹

A new debate emerged in the late 1950s about the proper role, if any, of preventive detention—denying those defendants considered dangerous the opportunity of release on bail.³² Although Congress in 1966 issued a report stating that pretrial bail could not "be used as a device to protect society from the possible commission of additional crimes by the accused,"³³ federal and

(1973).

26. *Gilliam*, 41 Cal. App. 3d 181 (stating that bail's purpose is to assure defendant's presence, not to protect public safety); *Underwood*, 9 Cal. 3d 345.

27. *Stack*, 341 U.S. at 5.

28. Lester, *supra* note 24; GOLDKAMP 1995, *infra* note 31, at 180.

29. Hans Zeisel, *Defining the Limits of Crime Control and Due Process: The Limits of Law Enforcement*, 73 CAL. L. REV. 212, 233 n.43 (1985).

30. S. REP. NO. 98-147, at 19 (1983); *see also* H.R. REP. NO. 98-1121, at 10 (1984).

31. *E.g.*, *Bail Reform: Hearings Before the Subcomm. on the Constitution of the Comm. on the Judiciary*, 97th Cong. 156 (1981) (Serial No. J-97-56) (discussing amendments to the Bail Reform Act of 1966); *see generally* JOHN S. GOLDKAMP, ET AL., PERSONAL LIBERTY AND COMMUNITY SAFETY: PRETRIAL RELEASE IN CRIMINAL COURT 180, 307-08 (1995) [hereinafter GOLDKAMP 1995]; *see also* John S. Goldkamp, *Danger and Detention: A Second Generation of Bail Reform*, 76 J. CRIM. L. & CRIMINOLOGY 1, 15 (1985).

32. *See generally* JOHN S. GOLDKAMP & MICHAEL R. GOTTFREDSON, POLICY GUIDELINES FOR BAIL: AN EXPERIMENT IN COURT REFORM 13 (1985) [hereinafter GOLDKAMP 1985]; *see also* Donald B. Verrilli, Jr., *The Eighth Amendment and the Right to Bail: Historical Perspectives*, 82 COLUM. L. REV. 328 (1982) (providing background to the emerging preventive detention debate and arguing that preventive detention violated the Eighth Amendment).

33. David J. Rabinowitz, *Preventive Detention and United States v. Edwards: Burdening the Innocent*, 32 AM. U. L. REV. 191, 200 n.75 (1982). The Bail Reform Acts of 1966 and 1984 modified bail procedures in federal courts only and did not purport to preempt state court procedures.

state law did not follow. During the next several decades, in the midst of increased concern over perceived rising crime rates,³⁴ the law changed at both the federal and state levels to allow judges at bail hearings to consider the potential danger posed by the defendant's release to the community. By the 1970s, seventeen states and the District of Columbia had enacted a variety of "danger laws,"³⁵ and fourteen more joined this list in the early 1980s.³⁶

A. Federal Developments

In 1982, President Ronald Reagan's Task Force on Victims of Crime advocated for laws authorizing courts to deny bail to those defendants posing a danger to the community.³⁷ With this growing support for reform to address public safety issues, Congress enacted the Bail Reform Act of 1984, which expressly allowed federal judges to utilize preventive detention where clear and convincing evidence demonstrated that no release conditions reasonably assured the safety of the community³⁸ from violent or even nonviolent crimes,

34. Understandably, perception lagged behind and outlived reality:

Serious crime in the United States soared to alarming heights beginning in the 1960s, but began leveling off in the 1980s and has declined by one-third during the 1990s. Every category of violent crime has decreased since 1993. [As of 1998], serious crime reported to the police was only five percent above the rates for 1970, and in many cities across the country, it matched the crime rates of the 1960s.

NAT'L CTR. FOR POLICY ANALYSIS, NCPA POLICY REPORT NO. 219, CRIME & PUNISHMENT IN AMERICA: 1998 ¶ 1 (1998), <http://www.ncpa.org/studies/s219.html>.

35. BARBARA GOTTLIEB, NAT'L INSTITUTE OF JUSTICE, THE PRETRIAL PROCESSING OF "DANGEROUS" DEFENDANTS: A COMPARATIVE ANALYSIS OF STATE LAWS 25 (1984), *reprinted in* REPORT ON BAIL REFORM ACT OF 1984, H.R. REP. NO. 98-1121, app. A, at 90. The study was part of the legislative history of the 1984 Bail Reform Act and is an appendix to H.R. REP. NO. 98-1121.

36. *See id.*

37. FINAL REPORT OF THE PRESIDENT'S TASK FORCE ON VICTIMS OF CRIME, RECOMMENDATIONS FOR GOVERNMENT ACTION 3, 8-10 (1982), http://www.ojp.usdoj.gov/ovc/publications/presdntstskforcprpt/gov_action.pdf.

38. *See* 18 U.S.C. §§ 3141-50 (1984). *See generally* Kenneth Berg, *The Bail Reform Act of 1984*, 34 EMORY L.J. 685 (1985). Although the Act authorized preventive detention, it also created several specific procedural safeguards to protect against the widely reported errors in the earlier *sub rosa* determinations of dangerousness. Specifically, the Act stated that the defendant:

[M]ay request the presence of counsel at the detention hearing, he may testify and present witnesses in his behalf, as well as proffer evidence, and he may cross-examine other witnesses appearing at the hearing. If the judicial officer finds that no conditions of pretrial release can reasonably assure the safety of other persons and the community, he must state his findings of fact in writing, and support his conclusion with 'clear and convincing evidence.'

§§ 3142(i), (f). The judicial officer is not given unbridled discretion in making the detention determination. Congress has specified the considerations relevant to that decision. These factors include the nature and seriousness of the charges, the substantiality of the Government's evidence against the arrestee, the arrestee's background and characteristics, and the nature and seriousness of the danger posed by the suspect's release. § 3142(g). Should a judicial officer order detention, the detainee is entitled to expedited appellate review of the detention order. §§ 3145(b), (c).

such as those against property.³⁹ The Act's legislative history demonstrated that Congress knew it was changing the fundamental premise of bail, which theretofore had been designed only to ensure appearance at trial, to now also prevent dangerous criminals from re-offending while their cases were pending.⁴⁰ Significantly, the history also included citations to research suggesting that high bail amounts alone did not discourage pretrial crime.⁴¹

Under the Act, federal judges were authorized to hold defendants in custody pending the resolution of their cases, and specific procedural safeguards⁴² were enacted to guard against the widely reported errors found in the earlier ad hoc, *sub rosa* determinations of dangerousness.⁴³

Although the law was criticized as being inconsistent with *Stack v.*

39. Michael Harwin, *Detaining for Danger Under the Bail Reform Act of 1984: Paradoxes of Procedures and Proof*, 35 ARIZ. L. REV. 1091 n.5 (1993). Preventive detention is used to prevent both physical and nonphysical harms. S. REP. NO. 98-147, at 39.

40. S. REP. NO. 98-147, at 2 (new law "marks significant departure" as opposed to former notion that "sole purpose" of bail is to assure appearance of the defendant); *see also* S. REP. NO. 98-225, at 3 (1983), *as reprinted in* 1984 U.S.C.C.A.N. 3182, 3185.

Many of the changes in the Bail Reform Act incorporated in this bill reflect the Committee's determination that Federal Bail laws must address the alarming problem of crimes committed by persons on release and must give the courts adequate authority to make release decisions that give appropriate recognition to the danger a person may pose to others if released.

Id.

41. S. REP. NO. 98-147, at 28. The report concludes that the key indicia here are the nature and seriousness of the offense charged, extent of prior arrests and convictions, and drug addiction. *Id.* at 36.

42. The defendant:

[M]ay request the presence of counsel at the detention hearing, he may testify and present witnesses in his behalf, as well as proffer evidence, and he may cross-examine other witnesses appearing at the hearing. If the judicial officer finds that no conditions of pretrial release can reasonably assure the safety of other persons and the community, he must state his findings of fact in writing, [18 U.S.C.] § 3142(i), and support his conclusion with 'clear and convincing evidence,' § 3142(f). The judicial officer is not given unbridled discretion in making the detention determination. Congress has specified the considerations relevant to that decision. These factors include the nature and seriousness of the charges, the substantiality of the Government's evidence against the arrestee, the arrestee's background and characteristics, and the nature and seriousness of the danger posed by the suspect's release. § 3142(g). Should a judicial officer order detention, the detainee is entitled to expedited appellate review of the detention order. §§ 3145(b), (c).

United States v. Salerno, 481 U.S. 739, 742-43, 751-52 (1987).

43. Specifically, judges concerned about the risk to public safety had often used artificially high bail to detain the defendant—but without transparent and responsible means of actually gauging a defendant's dangerousness, either as to the nature of the offense sought to be prevented or to the likelihood that the defendant would re-offend in the future. There were no standards, no statutory allocation of burdens of proof, and meaningful appellate review was exceedingly difficult since the operative factors in the bail decision—traditionally subject to a trial judge's wide discretion—were invisible on the record. *See, e.g.*, S. REP. NO. 98-147, at 20-21; H. REP. 98-1121, at 10 (no procedural safeguards when bail set as *sub rosa* detention); Lester, *supra* note 24, at 31-33 (listing the errors reported). This behavior likely continues. GOLDKAMP 1995, *supra* note 31, at 180.

Boyle's reasoning that bail was meant solely to ensure the defendant's future court appearances, three years after its passage, the Supreme Court in *United States v. Salerno* held that this concern could be augmented and indeed superseded by public safety considerations.⁴⁴ In doing so, the Supreme Court gave federal trial courts the discretion to impose preventive detention upon those defendants deemed a serious danger to the community.

B. California Developments

Like early federal law, California's bail statutes had initially contemplated that ensuring the defendant's appearance at court proceedings was the sole issue at bail hearings.⁴⁵ But after *United States v. Salerno* upheld the constitutionality of the 1984 Bail Reform Act, California's legislators followed, passing laws mandating that "public safety be the primary consideration."⁴⁶

The process by which California ended up amending its bail statutes was convoluted. To this day, defense counsel argue that because of peculiarities in the legislative enactment process, the *Stack v. Boyle* rationale remains the only proper criterion for bail. For this reason, and because it is important to search for clues as to how the new bail criterion was meant to operate, a brief examination of the legislative history is in order.

The legislative history included but a single report from the Assembly. It did not explain how the new law was expected to work, that is, how setting bail at a given amount was supposed to protect public safety.⁴⁷ Instead, the report merely examined existing state bail laws; enclosed a copy of the *Salerno* opinion upholding the Bail Reform Act's preventive detention law; and cited Proposition 8, a statewide initiative that would have amended the state constitution to state:

...

44. *Salerno*, 481 U.S. at 748, 755 (clear and convincing evidence that defendant constituted danger to community outweighs individual's liberty interest; pretrial detention based solely on the ground of dangerousness does not violate either due process or the Eighth Amendment); see also *Schall v. Martin*, 467 U.S. 253 (1984); see generally *Zadvydas v. Davis*, 533 U.S. 678, 690-91 (2001). For more on the federal statute and its constitutionality, see, e.g., Michael Harwin, *Detaining for Danger Under the Bail Reform Act of 1984: Paradoxes of Procedures and Proof*, 35 ARIZ. L. REV. 1091 (1993); William Duker, *The Right To Bail: A Historical Inquiry*, 42 ALB. L. REV. 33 (1977); Lester, *supra* note 24.

45. E.g., *Underwood*, 9 Cal. 3d at 348 ("The purpose of bail is to assure the defendant's attendance in court when his presence is required, whether before or after conviction Bail is not a means for punishing defendants . . . nor for protecting the public safety."). Cf. *In re York*, 9 Cal. 4th 1133, 1143 (1995) (discussing state of law as of 1979; safety of community may be a factor in felony cases).

46. ASSEMB. B. 630, 1987 Leg., Reg. Sess. (Cal. 1987), Leg. Counsel Digest.

47. LARRY STIRLING, CAL. ASSEMB. COMM. ON PUB. SAFETY, POSITION PAPER ON CALIFORNIA AND FEDERAL BAIL PROVISIONS (1987). The ballot pamphlet, too, provides no guidance on how the new criterion of looking at public safety was to be implemented by judges. See MARCH FONG EU & WILLIAM G. HAMM, CALIFORNIA BALLOT PAMPHLET: PRIMARY ELECTION (1982), available at http://library.uchastings.edu/ballot_pdf/1982p.pdf.
HeinOnline, 13 Berkeley J. Crim. L. 8 (2008)

(e) Public Safety Bail. A person may be released on bail by sufficient sureties, except for capital crimes when the facts are evident or the presumption great. Excessive bail may not be required. In setting, reducing or denying bail, the judge or magistrate shall take into consideration the protection of the public, the seriousness of the offense charged, the previous criminal record of the defendant, and the probability of his or her appearing at the trial or hearing of the case. *Public safety shall be the primary consideration.* A person may be released on his or her own recognizance in the court's discretion, subject to the same factors considered in setting bail.⁴⁸

The Assembly's citation of Proposition 8 was unusual considering the initiative's provisions never went into effect⁴⁹—it garnered fewer votes at the statewide election than competing Proposition 4,⁵⁰ which provided that bail amounts would be determined solely according to “the seriousness of the offense charged, the previous criminal record of the defendant, and the probability of his or her appearing at the trial or hearing of the case.”⁵¹

Importantly, in this list of relevant factors, Proposition 4 did not contain the language in Proposition 8 mandating that public safety be the primary consideration. Yet, when the legislature amended the bail statutes of Penal Code §§1270 and 1275(a) to, in effect, incorporate the provisions of Proposition 4, it specified that public safety would be “the primary consideration.”⁵² Consequently, defense counsel often argue that since the

48. CAL. CONST. art. I § 28(e) (1982) (emphasis added).

49. *People v. Standish*, 38 Cal. 4th 858, 876 (2006); *People v. Cortez*, 6 Cal. App. 4th 1202, 1210-11 (1992) (only bail provisions of Proposition 8 not in effect). However, even the proponents of Proposition 4 probably desired public safety to be considered in bail decisions. *Standish*, 38 Cal. 4th at 876.

50. Proposition 4 was ultimately enacted as CAL. CONST. art. I § 12. The current language results from further amendments in 1994 and 1995. To the extent that the language of article I sections 12 and 28 conflict—and they do, since section 12 blocks bail for certain felonies—§ 12 prevails because it garnered more votes. CAL. CONST. art. II § 10; CAL. CONST. art. XVIII § 4. See *People v. Cortez*, 6 Cal. App. 4th 1202, 1210 (1992).

51. Proposition 4, now enacted as CAL. CONST. art. I § 12, provides in full:

A person shall be released on bail by sufficient sureties, except for:

- (a) Capital crimes when the facts are evident or the presumption great;
- (b) Felony offenses involving acts of violence on another person, or felony sexual assault offenses on another person, when the facts are evident or the presumption great and the court finds based upon clear and convincing evidence that there is a substantial likelihood the person's release would result in great bodily harm to others; or
- (c) Felony offenses when the facts are evident or the presumption great and the court finds based on clear and convincing evidence that the person has threatened another with great bodily harm and that there is a substantial likelihood that the person would carry out the threat if released. Excessive bail may not be required. In fixing the amount of bail, the court shall take into consideration the seriousness of the offense charged, the previous criminal record of the defendant, and the probability of his or her appearing at the trial or hearing of the case. A person may be released on his or her own recognizance in the court's discretion.

CAL. CONST. art. I § 12 (1982).

52. CAL. PENAL CODE § 1275(a). ⁴⁸ *See* *People v. Cortez*, 6 Cal. App. 4th 1202, 1210 (1992).

52. CAL. PENAL CODE § 1275(a). Without opining on the constitutionality of the statute, I

electorate enacted Proposition 4 and not Proposition 8 or its “public safety” criterion, the “public safety” factors in the subsequent legislation—found also in Article I, Section 28 of the California constitution, a constitutional provision not endorsed by the electorate—are unauthorized or unconstitutional.

Nevertheless, setting aside the convoluted way in which the current bail statutes came into being, California law now effectively divides state criminal offenses into two groups: serious felonies involving violence or sexual predation, where preventive detention may be imposed,⁵³ and all other offenses, where danger to the public is to be handled by setting appropriate bail.⁵⁴ The first category mirrors the federal scheme, which addresses the public danger concern by denying bail entirely and holding the defendant in custody until the case is complete.⁵⁵ The second category, which covers the vast majority of California’s criminal offenses, differs from federal practice; there, California allies with those states using bail and conditions of release to protect the public pending trial.⁵⁶ Under both categories of offenses, California law requires public safety to be the primary consideration when judges set, reduce, or deny bail;⁵⁷ the traditional considerations, including the seriousness of the offense, prior criminal record and the probability that the defendant will show up for subsequent hearings, are secondary.⁵⁸ To be sure, the first two of these secondary considerations—the seriousness of the offense and prior criminal record—may be thought of as proxies for the primary public safety factor⁵⁹ since they both appear, at least at first glance, to be predictors of the defendant’s dangerousness. Indeed, we will see below that the “seriousness of the offense” factor is often, and as I will argue, erroneously, alone decisive in bail setting.⁶⁰

simply note that apparently the statute now stands independent of either an endorsing proposition or California constitutional provision. I have located no opinion invalidating the statute for that reason, and the courts of the state in practice follow this statute. *See also* CAL. PENAL CODE § 1270(a) (West 1995) (public safety is the primary consideration of deciding whether to release on OR).

53. *See In re Page*, 82 Cal. App. 576, 578 (1927); CAL. CONST. art. I §§ 12(b)-(c).

54. *See generally In re Christie*, 92 Cal. App. 4th 1105, 1109 (2001).

55. 18 U.S.C. § 3142(e) (2006). *See generally* *United States v. Montoya*, 486 F. Supp. 2d 996 (D. Ariz. 2007).

56. GOTTLEB, *supra* note 35, at 7 (noting range of approaches endorsed by states up through the early 1980s); *see also Standish*, 38 Cal. 4th at 875. To be sure, the federal system also permits the imposition of conditions of release to protect the public, but, unlike California’s system, the federal statutory scheme expressly permits preventive detention in any case where public safety requires it.

57. CAL. PENAL CODE § 1275(a). *See also* CAL. PENAL CODE §§ 1270(a), 1270.1(c) (court considers danger posed by defendant), § 1272.1(b) (bail pending appeal), and § 1269(c) (amount of bail set to “assure protection of the victim or family member of a victim”).

58. CAL. PENAL CODE § 1275(a).

59. *E.g.*, S. REP. NO. 98-147.

60. In sections III(B)(1) and (B)(2), I argue that the severity of the offense factor neither correlates with the public safety factor nor has any independent justification for its use.

III. EVALUATION OF CALIFORNIA'S BAIL SCHEME

The balance of this note focuses on the difficulties California judges face as they struggle to meet the “public safety” standard, presented as they are with competing statutory constraints. As a preliminary matter, the statutory framework prevents judges from imposing preventive detention, since, as discussed above, this option is only applicable in a small minority of cases. As a result, judges are left with three options to implement the statutory mandate requiring them to both allow a defendant’s release on bail while also responding to the defendant’s dangerousness: they can set conditions of release, they can set bail at a certain dollar sum, or they can do a combination of both. This note first considers conditions of release before turning to its focus, the setting of monetary bail.

A. *Protecting Public Safety: Setting Conditions of Release*

Judges who impose conditions of release address the public safety standard by considering the underlying cause of the defendant’s criminal conduct, such as a drug or alcohol addiction, a mental disability, or an anger management problem. Conditions of release often accompany a monetary bail order, and they may also accompany a defendant’s release on OR, or promise to return to court for his subsequent hearings. For example, a judge might release a defendant accused of driving while intoxicated on either OR or \$10,000 bail. In each case, the judge could also impose the condition that the defendant not drive for a certain period of time, or not drink alcohol, or only drive cars equipped with an ignition interlock device that detects alcohol on the driver’s breath.

Of course, the most basic of all conditions—not to commit any new offenses—is a condition of every release.⁶¹ If bail with that condition is not enough to prevent a new offense, there is generally no reason to think that a defendant will obey a court order designed *indirectly* to stop the new offense, such as by imposing conditions barring the use of alcohol or drugs; requiring counseling or the use of GPS bracelets;⁶² implementing stay-away orders (so that the defendant avoids an alleged victim or location), search conditions,⁶³ or variants of home detention; authorizing supervised pretrial release, which involves regular meetings with a case manager; or by imposing other

61. Judges generally admonish defendants released on bail not to commit crimes. *See, e.g.*, CAL. PENAL CODE § 646.93(c)(4) (West 2001) (defendant must obey all laws); *see also* 18 U.S.C. § 3142(b) (West 2008) (requiring all laws to be obeyed).

62. *E.g., In re McSherry*, 112 Cal. App. 4th 856, 858 (2003) (conditions of release, per public safety); *York*, 9 Cal. 4th at 1145.

63. A search condition enables any peace officer to search the defendant or a premises or car under his control without probable cause, at any time of the day or night. Presumably, a defendant who knows that he is subject to this condition will refrain from possessing illegal drugs, weapons, stolen items or other contraband.

conditions.⁶⁴ After all, a defendant bent on assaulting a specific person is unlikely to desist just because a judge told him not to approach the person.

Some of these conditions, such as stay-away orders, expressly forbid a new criminal act; some, such as alcohol treatment, address the supposed underlying cause of the offense. Others, such as supervised pretrial release, act as early-warning devices, harbingers of threatened new offenses. All of these conditions share two features: they solemnize the court's concern about re-offending and, one hopes, impress upon the defendant the need to be law-abiding.

Yet these conditions of release may not advance public safety. First, as suggested above, the conditions that reduce the risk of future criminal acts may have no value over and above an order to be law-abiding. Moreover, conditions such as drug, anger, or alcohol counseling, imposed to confront the underlying cause of offenses, may be useful but their imposition depends on a rapid evaluation by a judge having little information about the defendant's personal history. Because bail hearings occur at an early stage of the case, judges generally have no information about the defendant other than his criminal record and the crime charged, nor do they usually have any information about rates of recidivism in the community or the factors affecting that rate.⁶⁵

Additionally, not even a review of the defendant's criminal record provides an accurate predictor of the effectiveness of conditions of release. As we will see below, while the record may in a general way be useful in predicting recidivism, the *severity* of the currently charged crime does not have any such predictive value, though the *nature* of the offense might. I say it *might*, because while we have some data showing the success rate of a few supervised pretrial release programs (SPR, the agencies that often monitor conditions of release⁶⁶), we do not know what the data means because we do

64. Other conditions of release include court orders to undergo psychiatric treatment, or alcohol or narcotics testing; continue with classes at a school or college; agree to work with a residential placement program; or simply meet with a supervisor in person five times a week. These sorts of conditions aim to help the defendant keep track of his court dates, and they may also help guard against future criminal behavior.

65. While investigating some of the factors affecting recidivism, I reviewed the 2006 failure-to-appear (FTA) data from the San Francisco Pretrial Diversion Program, which diverts some of those accused of misdemeanors. This is not data about re-offenders, of course. The defendants do not have a significant criminal history, and hence may be more amenable to conditions of release than other populations. In any event, my review was not statistically reliable, and I looked only at offense categories with a substantial number of defendants tracked by the pretrial program. My research showed that (i) for the bulk of drug-related offenses, a FTA rate of 17.8%; (ii) for battery, 16.67%; (iii) for burglary (house, auto) 17.25%; and (iv) for petty theft with a prior, 26.54%. My thanks to Director William Leong for his assistance in gathering this data.

66. In San Francisco County, for example, SPR interviews the defendant to assess whether a combination of programs, meetings, or other supervision augurs well for the defendant's ability to stay out of trouble and come to his court dates. This evaluation process usually takes two court days, at which point the court may release the defendant to SPR without posting money or a bond.

not know with which factors the success rate correlates. I have been unable to locate studies (a) comparing particular SPR programs' performance to any more generalized population (such as, for example, all prostitution or all petty theft defendants), or (b) specifying ascertainable criteria by which defendants are selected for the programs. For these reasons, nothing yet suggests that SPR programs are statistically any more effective in preventing crime than simply releasing defendants on OR without any conditions. This is not to say that judges should not take advantage of SPR programs, especially when they include drug testing and counseling,⁶⁷ but that absent control group studies, we have no idea if releasing defendants with those conditions truly accounts for the public safety factor or not.

These considerations suggest that releasing dangerous defendants on the condition that they abide by a series of requirements may provide no assurance of public safety. In any given case, it is usually impossible for the judge to know, based on the limited facts at his disposal, whether any series of release conditions can be effective. Accordingly, I now turn to the other way in which judges address public safety—setting monetary bail.

B. Protecting Public Safety: Setting Monetary Bail

Monetary bail is set primarily to protect public safety but, aside from the risk of flight, discussed above, another important statutorily mandated criterion is the seriousness of the offense with which the defendant is currently charged. Because this “severity of the offense” element is often used as the *sole* factor in setting bail, and because it confuses the analysis of the effect of setting bail to protect public safety, this note first discusses and distinguishes the “severity of the offense” factor in subsections one and two below, before finally turning to setting bail to protect public safety in subsection three.

1. Bail Schedules and the Severity of the Offense

When judges choose to set monetary bail, the controlling statutes mandate that their primary task is to determine the dollar amount that will best assure public safety.⁶⁸ This approach is premised on the notion that higher bail guards against a higher level of dangerousness, and lower bail is appropriate given a lower risk to the public—an approach ensconced in the use of bail schedules. State law requires each trial court to use these schedules,⁶⁹ which set bail amounts for various crimes.⁷⁰ When judges depart from the schedules by either

67. See, e.g., S. REP. NO. 98-147, at 19 (1983); H.R. REP. NO. 98-1121, at 10 (1984) (recidivism related to drug use).

68. See, e.g., CAL. PENAL CODE §§ 1270(a), 1275(a).

69. E.g., CAL. PENAL CODE § 1270.1 (Deering 2008) (requiring a hearing before a judge can depart from bail schedules).

70. The schedules consist of pages of crimes listed by their section number in the Penal Code, Vehicle Code, or Health & Safety Code (drug offenses), with a corresponding dollar

increasing or decreasing the bail amount, they are required to articulate specific reasons for doing so. These schedules set higher bail amounts for more serious crimes⁷¹ since they are rooted in the belief⁷² that more serious crimes contain higher penalties and hence it is more likely that (a) the defendant will flee, and (b) the defendant is dangerous and will re-offend while out on bail. In this way, the severity of the charges becomes the predominate factor in the decision whether to release a defendant on OR or set bail at a specific amount.⁷³

But the evidence does not support the proposition that the severity of the crime has any relationship either to the tendency to flee or to the likelihood of re-offending. In fact, the truth may be to the contrary. In a series of studies, Professor John Goldkamp and his colleagues reviewed the bail practices in a variety of courts. In 1985, they published a two-year study of Philadelphia municipal courts,⁷⁴ and in 1995, they published additional studies examining the bail practices in various cities and counties in Florida, Arizona, and Massachusetts.⁷⁵ These appear to be the most exhaustive empirical studies of bail practices in the United States. Goldkamp and his team examined the factors judges stated they most commonly considered when setting bail, including age, community ties, past criminal record, past failures to appear, prior arrest rates, severity of the crime, and gender. Goldkamp then determined which factors *actually* correlated with bail decisions, and discovered that those factors were *not* the ones the judges reported. Furthermore, and most pertinent for this note, Goldkamp's team collected data on bail failures (i.e., both defendants' failures to appear for court hearings and their rates of re-

amount. For example, for a violation of CAL. HEALTH & SAFETY CODE § 11350 (possession of controlled substance), bail would be set at \$15,000. See County of San Francisco, Felony Bail Schedule (2006), http://www.sfgov.org/site/uploadedfiles/courts/bail_schedule.pdf.

71. The concept of "more serious" is vague. While there is agreement that murder is more serious than petty theft, different counties rank offenses differently. See e.g., County of Orange, Bail Schedule (2006), <http://www.occourts.org/criminal/bailsched.pdf>; County of Los Angeles, Felony Bail Schedule, <http://lasuperiorcourt.org/Bail/> (last visited Apr. 1, 2008); County of San Francisco, Felony Bail Schedule (2007), *supra* note 71; San Diego Superior Court, Bail Schedule (2008), <http://www.sdcourt.ca.gov> (follow "Bail Schedule" hyperlink); San Bernardino County, Felony Bail Schedule (2008), <http://www.co.san-bernardino.ca.us/Courts/pdfs/misc/felbail.pdf>. For example, the Los Angeles bail schedules have the following as "presumptive bail": bribe of public officer: \$20,000; voluntary manslaughter: \$100,000; possession of weapon of mass destruction: \$500,000. Enhancements are then added, so that if a crime is also a hate crime, \$20,000 is added; if the defendant is armed with a firearm during the commission of a drug offense, \$30,000 is added, and so on. County of Los Angeles, Felony Bail Schedule.

72. E.g., GOLDKAMP 1985, *supra* note 32, at 70.

73. See generally GOLDKAMP 1985, *supra* note 32; see also W. LAFAVE, ET AL., 4 CRIMINAL PROCEDURE § 12.1(b) (3d ed. 2008) ("Of the various factors relevant to the bail decision, judges are inclined to give primary consideration to the seriousness of the offense charged, most likely because it is a factor which is clear-cut and easy to apply."); K.B. Turner, et al., *The Effect of Legal Representation on Bail Decisions*, 39 CRIM. LAW BULLETIN 2 (2003); Esmond Harnsworth, *Bail and Detention: An Assessment and Critique of the Federal and Massachusetts Systems*, 22 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 213, 235 (1996).

74. See generally GOLDKAMP 1985, *supra* note 32.

75. See generally GOLDKAMP 1995, *supra* note 31. HeinOnline, 13 Berkeley J. Crim. L. 14 2008

offending), and evaluated which factors correlated with those failures.

The 1995 study concluded 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.”⁷⁶ Goldkamp’s work confirmed not only his own earlier findings,⁷⁷ but the conclusions of other studies as well.⁷⁸ Ultimately, the study demonstrated that failure rates on bail actually correlate with other factors. For example, factors such as charges involving crimes against the person *reduce* the failure rate, while factors such as the defendant living alone, being accused of robbery, having prior failures to appear, and/or having prior felony convictions *increase* failure rate.⁷⁹ Moreover, the study found that the more times the defendant had been arrested in the preceding three years, the higher the failure rate.⁸⁰ Importantly, however, pretrial release decision making in the cited studies did not follow the evidence of such correlations. Instead, the study found that “pretrial-release decision making was rarely adequately explained by measurable factors of any kind.”⁸¹ In other words, the actual behavior of the judges in these studies did not correlate with any set of factors, including those announced by the judges themselves. The bail decisions appeared arbitrary.

76. *Id.* at 125 (emphasis omitted); see also *id.* at 122, 126, 159-64.

77. GOLDKAMP 1985, *supra* note 32, at 70 (“In fact, defendants charged with certain of the most serious offenses seldom recorded such failures on pretrial release.”). See also GOTTLIEB, *supra* note 35; S. REP. NO. 98-147.

78. JoAnn Arkfeld, *The Federal Bail Reform Act of 1984: Effect of the Dangerousness Determination on Pretrial Detention*, 19 PAC. L.J. 1435, 1444-45 (1988) (referring to studies by the National Bureau of Standards in 1970 and a Harvard study the next year confirming these results). The first study shows “little correlation exists between the type of crime for which the defendant was initially indicted and the severity of the second offense committed by the defendant while on release pending trial,” and the second study shows that “[f]actors often used in dangerousness predictions include the occupational status, educational background, marital status, drug or alcohol use, and prior criminal record of the defendant.” The Harvard Study concluded that these factors provide only a forty percent chance of accurately predicting dangerousness. Accordingly, the study found that a defendant arrested for a violent crime is no more likely to commit another violent crime while on bail than a defendant arrested for a misdemeanor. (Citations omitted.)

79. GOLDKAMP 1995, *supra* note 31, at 109-10; see also GOLDKAMP 1985, *supra* note 32, at 109 (prior record for last three years and prior failures to appear are indicia of likely failure; younger defendants are more likely to re-offend but are usually given lower bail). It remains unclear whether the lessons of the Goldkamp studies can be generalized. The legislative history of the 1984 Bail Reform Act suggests that both auto thefts and robberies have a high rate of reoccurrence when the defendant is out on bail—sixty-five percent and seventy percent, respectively. S. REP. NO. 98-147, at 28, 30.

80. GOLDKAMP 1995, *supra* note 31, at 107; see also GOTTLIEB, *supra* note 35; S. REP. NO. 98-147, *supra* note 30.

81. GOLDKAMP 1995, *supra* note 31, at 147 (emphasis omitted). I also note a study finding that the only factor correlated with judges’ bail decisions was the prosecutor’s recommendation. E.B. Ebbeson and V.J. Konecni, *Decision-Making and Information Integration in the Courts: The Setting of Bail*, 32 J. PERSONALITY & SOC. PSYCHOL. 805 (1975). As Judge Posner has noted, much has been written on recidivism, but the accuracy of the models is “only fair.” RICHARD POSNER, *THE PROBLEMS OF JURISPRUDENCE* 174 n.24 (1990).

This evidence—supported by other studies⁸²—suggests that the severity of the crime cannot be used as a proxy for the danger posed by the defendant if he were to be released on bail. Accordingly, the current practice by which judges simply follow the bail schedules is, to put it delicately, of uncertain utility.⁸³ This presents two questions: first, why do judges continue to rely principally on the severity of the offense when setting bail, and second, is that reliance appropriate?

2. *Severity of the Offense: The Search for a Rationale*

Bail schedules embody the notion that the severity of the offense *alone* properly dictates the bail amount.⁸⁴ Indeed, setting bail according to the severity of the offense *appears* to support, and simply rephrase, the public safety criterion: it seems more dangerous to release on bail an alleged murderer than an alleged shoplifter. But, as explored below, the “severity of the offense” factor has a different etiology. Thus, teasing out the legitimate impact of the “severity of the offense” element will allow us, in subsequent sections of this note, to focus solely on the public safety criterion, which must stand or fall on its own merits, unsupported by an appeal to the severity of the offense.

The doctrine of setting bail as a function of the severity of the offense is embodied in California’s constitution, which states that:

In fixing the amount of bail, *the court shall take into consideration the seriousness of the offense charged*, the previous criminal record of the defendant, and the probability of his or her appearing at the trial or hearing of the case.⁸⁵

The doctrine is picked up in both the state’s statutory scheme and case law:

The court in setting, reducing, or denying bail must primarily consider the public safety. Additionally, *the court considers the seriousness of the offense charged*, the defendant’s criminal record and the probability the defendant will appear for hearings or trial. As to the *seriousness of the offense charged*, the court, *inter alia*, considers the alleged injury to the victim, alleged threats to victims or witnesses, the alleged use of a firearm and the alleged use or possession of controlled substances.⁸⁶

To be sure, judges have long treated the severity of the offense as an independent and co-equal factor in setting bail, along with, for example, risk of

82. See studies cited in H. REP. 98-1121, at 11.

83. GOLDKAMP 1985, *supra* note 32, at 166 n.2 (survival of old bail schedules correlates with accepted but dubious wisdom that severity of charges is main factor in setting bail).

84. See *supra* note 71 and accompanying text. The statutes require the courts to set these schedules, but do not prescribe the bases for the figures set, nor is there any assurance that similar factors are considered by the various courts.

85. CAL. CONST. art. I, § 12 (2007) (“Declaration of Rights”) (emphasis added).

86. *In re Weiner*, 32 Cal. App. 4th 441, 444 (1995) (citing CAL. PENAL CODE § 1275) (emphasis added).
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flight. Courts had frequently sustained bail amounts even when defendants could not possibly afford them. This suggests that bail was not set only to ensure the defendant's appearance at trial; if that were the only justification, the bail amount would be set at a point at the extreme edge of affordability—i.e., just affordable—to the specific defendant. So it is that courts have said, for example, “It is well settled, even in cases involving bail after indictment and before conviction, that bail is not to be deemed excessive merely because the person under indictment cannot give the bail required of him.”⁸⁷ A variety of older cases have dismissed any suggestion that bail was excessive merely because it was unaffordable.⁸⁸

To be sure, we must distinguish cases in which affordable bail would have been too low to ensure the defendant's presence, and where, therefore, the court imposed high bail—not out of a desire to account for the severity of the charges, but rather to ensure the defendant's future appearance.⁸⁹ In these situations, the defendant is in effect denied bail “not because he cannot raise the money, but because without the money the risk of flight is too great.”⁹⁰ A limiting example of this is the indigent defendant who can only afford one dollar bail, but for whom the loss of a dollar is no incentive to return.⁹¹

High and unaffordable bail to assure presence aside, we still have an old doctrine, dating back to our English law antecedents⁹² and manifested today through the use of bail schedules, setting bail according to the severity of the crime. However, it is not apparent why the severity of an offense—entirely divorced from the impact on public safety or risk of flight—should determine bail. In fact, one study found that setting bail only as a function of the severity of the offense, divorced from the risk of re-arrest on a new charge and the

87. *In re Burnette*, 35 Cal. App. 2d 358, 360-61 (1939) (citing 3 CAL. JUR., at 1049, § 18). *Burnette* is cited as current law by CONTINUING EDUCATION OF THE BAR, CALIFORNIA CRIMINAL LAW: PROCEDURE AND PRACTICE § 5.25 (2007) [hereinafter *California Criminal Law*].

88. *E.g.*, *Ex parte Duncan*, 54 Cal. 75 (1879); *In re Williams*, 82 Cal. 183 (1889). More recently, courts have also dismissed charges that bail was excessive simply because unaffordable. *E.g.* *Hodgdon v. United States*, 365 F.2d 679 (8th Cir. 1966); *White v. Wilson*, 399 F.2d 596, 598 (9th Cir. 1968).

89. Indeed, that sort of high bail is contemplated by the *Stack* standard. See *supra* Part II.

90. *United States v. Mantecon-Zayas*, 949 F.2d 548, 550 (1st Cir. 1991), quoting *United States v. Jessup*, 757 F.2d 378, 389 (1st Cir. 1985); see also *United States v. McConnell*, 842 F.2d 105, 107-10 (5th Cir. 1988); *United States v. Wong-Alvarez*, 779 F.2d 583 (11th Cir. 1985); *United States v. Gotay*, 609 F. Supp. 156, 157 (S.D.N.Y. 1985); see generally Kevin Phillips, *Twenty-Sixth Annual Review of Criminal Procedure: Bail*, 85 GEO. L.J. 1072, 1088 (1997).

91. For further discussion of this issue, see *infra* Part III(B)(3)(b)(iii).

92. Kurt Metzmeier, *Preventive Detention: A Comparison of Bail Refusal Practices in the United States, England, Canada and Other Common Law Nations*, 8 PACE INT'L L. REV. 399, 413 (1996) (“English magistrates, from the Statute of Westminster in 1275 until the Bail Act of 1826, used the same primary factors to decide whether bail should be granted . . . Three principles, derived from the lists of bailable and non-bailable crimes, controlled bail decisions: the seriousness of the offense; the likelihood of the accused's conviction and the ‘outlawed’ status of the offender.”).

accompanying punishment, was irrational because such bail would not lead to any change in the expected behavior of the defendant.⁹³

Perhaps because there is such a paucity of cases under the Eighth Amendment's bail clause,⁹⁴ or because the notion of setting bail according to the seriousness of the offense is so widely accepted and now unquestioned, little is available to explain the ancient doctrine. Indeed, no California case since 1974 has expressly held that the doctrine alone is enough to set unaffordable bail.⁹⁵ So the conundrum: what is the proper role of the severity of the offense in setting bail, and how does that synchronize with the venerable mandate that bail is meant to ensure appearance at trial?

No California authority is available on this subject. But I suggest that the rationale is, in short, that the doctrine addresses the very practical *risk of being wrong* in setting bail. Judges have limited facts at their disposal when they set bail since the hearing takes place early in the proceedings, when most of the key information is known only to the defendant. Judges make mistakes. But mistakenly low bail in a petty theft case is acceptable in a way that mistakenly low bail in a rape case is not. And from society's viewpoint, the risk of error (i.e., the defendant is actually innocent) in detaining someone for rape is a reasonable risk in a way that detaining someone falsely accused of shoplifting is not. Accordingly, one scholar explained:

Traditionally, bail was set in accordance with the seriousness of the charge because of the principle of proportionality. This principle assumed that the higher the bail, the less able to pay it, and if any person was detained incorrectly, it would be more appropriate to detain them while facing serious criminal charges instead of lighter charges. The probability of unmerited detention was mitigated historically by the courts' reliance upon determinations of the weight of the evidence or the strength of the prosecution's case. Cases in which serious doubt existed as to the evidence supporting the defendant's guilt would result in low or no bail [i.e., a release on OR].⁹⁶

If this approach is correct, the severity of the offense is indeed not literally a separate, co-equal factor in setting bail, along with risk of flight and dangerousness; rather, it is an influence, a direction in time of uncertainty. The doctrine does not displace the traditional factors or supersede them; a judge

93. Lim Boon Tiong & Euston Quah, *Optimal Bail Setting: An Exploratory Model*, in LAW, SOCIAL SCIENCES AND PUBLIC POLICY: TOWARDS A UNIFIED FRAMEWORK 107 (Anthony Chin and Alfred Choi eds., Singapore University Press 1998).

94. *Galen v. County of Los Angeles*, 468 F.3d 563, 569 (9th Cir. 2006), *amended and superseded on other grounds by* *Galen v. County of Los Angeles*, 477 F.3d 652 (9th Cir. 2007) ("The opening clause of the Eighth Amendment, 'Excessive bail shall not be required,' is one of the least litigated provisions of the Bill of Rights." (citation omitted)).

95. Although a leading practice manual cites *Burnette* as current law, no case since 1974 has cited *Burnette* for the proposition that setting bail according to the seriousness of the offense is appropriate. *California Criminal Law*, *supra* note 87.

96. Harmsworth, *supra* note 73, at 239. HeinOnline 13 Berkeley J. Crim. L. 18 2008

should not set high bail simply because the crime is severe, but she might well increase the bail on severe crimes to account for uncertainty in the application of these other factors. Thus, where a judge is uncertain about a defendant's willingness to return to court, she may look at the severity of the offense and its concomitant potential punishment to determine bail. And the judge may be more reluctant to impose the schedule-mandated bail on one accused of a minor crime (since it would have the effect of incarcerating the defendant) than on one accused of a more serious offense.⁹⁷

As the balance of this note suggests, however, it is not useful to account for risk by evaluating the severity of the offense when the uncertainty is "danger to the public" rather than "flight risk." In the following sections, this note will demonstrate that public safety, although set by law as an independent factor in setting bail, does not itself justify setting bail at any particular dollar amount, either through bail schedules or otherwise.

3. *Setting Bail to Account for Public Safety*

We have seen above that the "severity of the offense" factor is not a proxy for a defendant's likelihood to re-offend. Now teased out as a separate criterion, we will see in this section that "danger to the public" usually does not justify setting bail at *any* amount.⁹⁸

With a few assumed facts, we can map out the options available to the defendant following his bail hearing and, thereby, identify the considerations judges should entertain at the hearing as they evaluate the risk of re-offending. Here we are concerned solely with setting bail to protect public safety; we assume that the judge does not mean to order preventive detention, and, hence, desires to set bail at some amount that the defendant can afford. Based on the discussion above, we also assume that the judge will not set bail according to the severity of the offense since doing so would be ineffective. Ultimately, the issue becomes whether allowing the defendant to post affordable bail would *in itself* deter future criminal behavior, apart and aside from the penalties already associated with the new crime.

a. *In Terrorem Effect of Bail*

As we have seen, judges operating without an explicit statutory scheme authorizing preventive detention have, nevertheless, often set bail artificially

97. We should make a further distinction here between the *severity* of the offense—the topic of this text and the statutorily set criterion—and the *type* of offense. As many reports have shown, failure rates on bail do in fact correlate with certain *types* of crimes, such as petty theft, drug-related crime, and so on. See, e.g., *supra* note 65 and accompanying text; S. REP. NO. 98-147. But these correlations do not track the severity of the crime and so do not justify the use of that criterion.

98. Indeed, as demonstrated above, that had been the federal understanding prior to the 1984 Bail Reform Act. HeinOnline -- 13 Berkeley J. Crim. L. 19 2008

high to protect public safety. For those judges who choose not to utilize *sub rosa* preventive detention and instead abide by the existing statutory framework, the law requires them to set bail at an amount having an *in terrorem*, or inhibiting, effect on the defendant tempted to commit yet another criminal act.⁹⁹ One central flaw in this framework, however, is that defendants do not forfeit bail when they commit a new offense; they forfeit bail only when they do not appear at a hearing. Consequently, the *in terrorem* effect of bail is significantly diminished since there is no direct link between committing a new offense and forfeiting bail.

Still, I take the statute as it stands. I assume that while defendants may (and very often do) fail to appear at court hearings even without having committed any new offenses, defendants are unlikely to commit a new offense and then return to court on the old case. Thus, bail in the first case will be forfeited. Further, it is likely that, for a defendant who commits a new offense, (i) the bail set on the new case will reflect a substantial enhancement over the standard bail on that offense, and (ii) the old bail will be replaced with a higher bail. Together, these consequences may have an inhibiting effect similar to forfeiture since they impose an economic penalty for committing a new crime. Nevertheless, as the balance of this note argues, even if the bail statutes were reformed to permit forfeiture to flow directly from the commission of a new offense, using the “public safety” criterion to set bail in the first place would still remain a dubious task.

b. Game Theory and the “Combined Reasonable Penalty”

The approach taken here is inspired by game theory,¹⁰⁰ which, in broad outline, is a branch of economics that analyzes the reciprocal behavior of

99. As far back as the 14th century, the notion of bail was expressly broad enough to include the posting of assets to guard against future criminal behavior, just as keeping a hostage would guard against a breach of another party’s promise to maintain good behavior. One scholar writes:

This is the most ancient jurisdiction that magistrates have . . . [T]hey can order the person who is accused of being likely to commit such crime to find bail . . . [and] keep the peace towards the person on whom the crime was likely to have been committed, and to the public generally, or in default of giving such bail they can then order him to be put in prison for some reasonable specified period . . . Here the rod is, as it were, held “in terrorem” over the evildoer, innocuous so long as he behaves well, but ready to descend at any moment if he breaks his promise of good behaviour, for if he does, his bail can be forfeited, and the amount levied by distress off his goods, whilst if one or more other good sureties have been joined with him in the bail then they will find it to be their interest to watch over him, and to restrain his bad temper, and thus, for their own sakes, they will try to keep him quiet and peaceable.

Fletcher Moore, *Magistrates’ Law and Suggested Increase of Jurisdiction and Powers*, 9 J. OF THE STAT. & SOC. INQUIRY SOC’Y OF IR. 671, 673 (1893), available at http://webird.tcd.ie/bitstream/2262/6677/1/jssisiVolIX671_679.pdf.

100. For more on game theory and the law, see e.g., DOUGLAS BAIRD ET AL., *GAME THEORY & THE LAW* (Harvard University Press 1994). I do not claim a rigorous exercise of the discipline here.

rational “players” confronted with a certain set of choices and desired outcomes.¹⁰¹ Game theory has been used to analyze a variety of legal problems, and its focus on the expected conduct of one person seeking to influence another makes it well-suited for reviewing bail hearings; after all, in these hearings the judge seeks to influence the future actions of the defendant.

The most familiar game theory example is the Prisoner’s Dilemma, in which the police tell two prisoners (the “players”), who are in separate rooms, that each must make a decision: if one but not the other testifies against the other, the testifying player will receive a relatively light sentence and the non-testifying player will receive a very harsh sentence. If neither testifies, both go free, and if both testify, each will receive a moderate sentence. A matrix can be made that illustrates the players’ choices and the corresponding consequences of those choices.

Applying this approach to the context of bail hearings, we can map out the hypothetical choices confronting the defendant (our first player) at the moment when, having been released on bail by the judge (our second player), he considers whether to commit a new (e.g., second) offense. The matrix of these choices assists us in deciding whether any bail amount the judge may set will influence the defendant’s behavior. In other words, we can evaluate the extent to which the bail set on the first offense is effective in discouraging the second.

We first review the considerations from the defendant’s point of view. We assume that a defendant who contemplates committing an offense while on bail will initially evaluate whether the odds of getting caught are high or low. If he determines that they are low, he will probably not be dissuaded by either the penalties of the new offense or the loss of bail he already posted. But if he determines that the odds of getting caught are high, then he evaluates (1) the price of the new offense’s penalty, (2) the price of the loss of posted bail (if he decides not to go to his next hearing) or the increased bail amount for the original offense (if he decides to go), and (3) the added consequence of possible incarceration if he cannot afford the new and presumably higher bail (and therefore cannot post bail for his release).¹⁰²

Now, future punishment can be threatened by increasing penalties over and above what would be imposed for any individual offense, and perhaps the

101. See generally Game Theory, STANFORD ENCYCLOPEDIA OF PHILOSOPHY, <http://plato.stanford.edu/entries/game-theory/> (last visited Mar. 5, 2008); John Nash, *Equilibrium Points in N-person Games*, 36 PROCEEDINGS OF THE NAT’L ACAD. OF THE USA 48 (1950); John Nash, *Non-Cooperative Games*, 54 THE ANNALS OF MATHEMATICS 286 (1951); JOHN NASH, THE ESSENTIAL JOHN NASH (Harold Kuhn and Sylvia Nasar, eds., Princeton University Press 2002); MARTIN OSBORNE, AN INTRODUCTION TO GAME THEORY 1-4 (Oxford University Press 2004); DREW FUDENBERG, GAME THEORY (MIT Press 1998).

102. The knowledgeable defendant who (correctly) believes that bail will not be set at a price he cannot afford will obviously give little weight to the third factor. This issue, based on a distinction between the first and subsequent times a defendant faces a bail hearing, is treated below.

defendant will refrain from a second offense if he knows this. Let us call this estimate of the increased penalty for multiple offenses the combined reasonable penalty, or CRP. For example, the CRP for a defendant out on bail for a simple assault (maximum one year in county jail) who contemplates committing a new offense such as petty theft (maximum one year in county jail) is two years in the county jail. This combined penalty of two years is the CRP.

Bail can be set to inhibit new offenses and address the issue of public safety only when (i) the CRP itself is not enough to dissuade a defendant from committing a new offense, (ii) the forfeitable bail is “significant” to the defendant, and (iii) the defendant thinks there is a good chance of getting caught for the second offense. The chart maps out these possibilities:

100 percent ↑ Odds of re-arrest on new crime ↓ 0 percent	Defendant cares about bail (but only if it is “significant”)	Defendant does not care about bail
	Defendant does not care about bail	Defendant does not care about bail
	Very Low ← CRP → Very High	

This chart captures the defendant’s various conclusions under the circumstances. First, he will not care about bail if he estimates that in any event he will not be caught. He will also not care about bail if the CRP is very high, because this penalty will alone dissuade future bad behavior, rendering bail concerns irrelevant.¹⁰³ However, the defendant will care about bail and be dissuaded from committing future bad acts *as a result of the bail set* when he believes that he is likely to be caught and the CRP is low; we may therefore call this corner of the chart the “sweet spot,” the one place where bail effectively protects public safety.

But this sweet spot is a very small spot indeed, for it is further constrained in that bail must be (i) significant, and (ii) set with precision. Furthermore, bail is (iii) relatively useless with indigent defendants; (iv) futile when there is

103. Sentencing laws in California are so complex that their deterrent value is weakened, and, therefore, impossible to quantify. JOAN PETERSILIA, CALIFORNIA POLICY RESEARCH CENTER, UNDERSTANDING CALIFORNIA CORRECTIONS 61-62 (2006). However, even the generalized knowledge that, in some way, sentencing on the second offenses is likely to be much worse than on the first is enough to push CRP strongly to the right of the chart.

substantial sentencing discretion for the second offense, as there is usually is; and (v) ineffective at subsequent bail hearings if it was accurately set at the first hearing. Each of these five factors is discussed below.

i. Significant Bail

To have a meaningful inhibiting effect, bail must be significant in two ways: first, its loss should appear to flow directly from the commission of the new offense, and second, it must be set at an amount important enough to the defendant that he does not want to risk losing it. However, judges are substantially constrained in setting significant bail because the statutory framework does not permit the automatic forfeiture of bail upon commission of a new crime.

Rather, as discussed above, the statutory scheme provides that bail is only forfeited when the defendant fails to appear for his subsequent court dates.¹⁰⁴ This is much like having only one bookend to hold up a row of books; the inhibitory effect of setting bail is seriously diluted. As a result, in this sense, bail would not be significant to the defendant's decision whether or not to commit new offenses after his original bail hearing.

Additionally, judges usually do not know enough about the defendant's financial resources to allow them to set meaningful, inhibitory bail—an amount located in the marginal area where it is just barely affordable and, therefore, its loss would be devastating. This may be thought of as a third axis for the chart above. If bail is not set at this razor's edge, it is neither significant nor effective because either the defendant can easily post it and thus cares little about its loss, or he cannot post it, and we have in effect preventive detention, which is not bail in any practical sense.

Moreover, this razor's edge is very thin indeed because defendants generally do not post the bail set but rather pay a ten percent premium and have a surety post the bond.¹⁰⁵ The premium is non-refundable, and so whether or not the defendant returns to court, the premium is lost.¹⁰⁶ As a result, to inhibit future illegality, the defendant must expect that on forfeiture of the bond, the surety will seek to recover from the defendant the total forfeited amount.¹⁰⁷ But the statutory scheme does not favor forfeiture¹⁰⁸: a forfeiture determination

104. CAL. PENAL CODE §§ 1269, 1305(a); *see also* CAL. PENAL CODE § 1278(a) (surety only guarantees appearance of defendant, *not* that defendant will be crime-free).

105. CAL. PENAL CODE §§ 1276, 1278.

106. *See* Schilb v. Krebel, 404 U.S. 357, 373 (1971) (posting premium alone provides no incentive to defendant).

107. There is evidence that these private efforts to locate fugitives can be effective. Eric Helland & Alexander Tabarrok, *The Fugitive: Evidence on Public Versus Private Law Enforcement from Bail Jumping*, 47 J. L. & ECON. 93, 109 (2004).

108. Forfeiture must be done on the record, in open court, as soon as it is evident that the defendant is not present as ordered, and the words must be precise: declaring bail “revoked,” for example, is not good enough. *People v. National Auto & Cas. Inc.*, 98 Cal. App. 4th 277, 282-87 (2000).

can be vacated either on surety's motion¹⁰⁹ or if the defendant comes into custody within 180 days of the forfeiture.¹¹⁰ Moreover, the 180-day period is often extended to give the surety more time to find the defendant.¹¹¹

In sum, these considerations make it difficult for judges to set bail at an amount that effectively addresses public safety. A defendant aware of the law will be inhibited as a result of the bail set only if he anticipates (i) eventually being caught (but more than 180 days after his release), (ii) a failure of the surety to have the forfeiture set aside, and (iii) action against him by the surety to collect the forfeited bail. In these relatively rare circumstances, where the defendant himself posts bail either as a cash bond or by putting up property as collateral, bail will certainly have more significance because the defendant may eventually be able to get his money or property back.

ii. *Precision of Bail Setting*

Obviously, the wealthier the defendant, the higher the bail must be to be effective—but the more room there is for error. For example, if significant bail is one million dollars, an error of \$100,000 one way or the other is not likely to matter much. Bail will still be significant. But where significant bail is, for example, \$1000, and the required ten percent premium is \$100, an error of \$500 is critical. These examples illustrate how in the high-volume misdemeanor courts, where the severity of the offenses is relatively low, bail schedules are correspondingly low, and the defendants' resources are often low, very small errors will render bail insignificant; in these cases, bail will almost always be either too high or too low. And it is precisely in misdemeanor cases, which involve low bail schedules and nearly indigent defendants, that high case loads force the judge to operate on the least amount of information about the defendants' personal and financial backgrounds. Consequently, the odds of setting significant bail in these circumstances are very low.

Moreover, it is precisely in misdemeanor courts that the issue of protecting public safety is most likely to be relevant to a bail determination, because the most severe crimes (which are not handled in misdemeanor courts) are not necessarily those in which re-offending is likely. Rather, it appears that less severe crimes such as prostitution, drug-related activity,¹¹² and petty theft are better harbingers of new offenses, requiring bail to be accurately set to inhibit new offenses. Setting significant bail is therefore most difficult in precisely those cases where it is most important.

(2002); CAL. PENAL CODE § 1305(a) (West 2008).

109. CAL. PENAL CODE §§ 1305(b), (c).

110. CAL. PENAL CODE §§ 1305(c)(1), (2).

111. CAL. PENAL CODE §§ 1305(i), 1305.4.

112. See e.g., sources cited in *United States v. Scott*, 450 F.3d 863, 895 n.6 (9th Cir. 2006) (Callahan, J., dissenting from denial of rehearing en banc). But cf., Harmsworth, *supra* note 73, at 238 (very mixed evidence that drugs play an important role in bail failure).

iii. *Poverty: The Limiting Factor*

No matter how precise, there comes a point where bail is pointless. For those defendants who are truly indigent, no bail will be meaningful because the value of affordable bail will approximate zero. In these cases, there is no such thing as “significant” bail because the defendants, by virtue of their poverty, simply do not participate in the economic life of society; they do not have the vested financial interests that underlie the very notion of bail because they have no collateral.¹¹³

These are among the most difficult bail situations, but they are very common in the misdemeanor courts, which primarily hear petty theft, vandalism, trespass (often by the homeless), and assault matters. In many of these cases, the defendant cannot afford \$100 bail, and he probably cannot even afford fifty dollars bail. But asking the defendant to post five or ten dollars bail—even with the concomitant risk of its loss on account of bail failure—will have no discernable deterrent effect over and above the deterrents already incident to re-arrest.

iv. *High CRP*

Prior offenses generally have a material impact on the subsequent punishment for committing a new crime. While some priors directly enhance a sentence, others may establish mandatory minimum sentences, elevate misdemeanors to felonies, or even eliminate probation as a sentencing option.¹¹⁴ California’s “three strikes” approach is the best known of these mechanisms.¹¹⁵

Some priors exact a different price: they can be used to impeach the defendant if she testifies, which may, practically speaking, bar her from testifying in the new case.¹¹⁶ Indeed, failure to appear may itself result in new charges.¹¹⁷ Additionally, pretrial diversion programs resulting in the dismissal of charges¹¹⁸ are available only to those who have not committed an offense within a time stipulated in the program schedules.¹¹⁹ We therefore find high

113. See *Vasquez v. Cooper*, 862 F.2d 250, 257 (10th Cir. 1988) (Logan, J., dissenting).

114. *California Criminal Law*, *supra* note 87, at § 24.1.

115. CAL. PENAL CODE § 667(a) (West 2007) (on commission of second eligible felony, the defendant must be sentenced to five years in prison in addition to sentence on new felony); CAL. PENAL CODE § 667(e) (West 2007) (with two or more eligible felonies, sentence can be life in prison).

116. *California Criminal Law*, *supra* note 87, at § 24.1.

117. CAL. PENAL CODE §§ 1320 (West 2007), 1320.5 (West 2007) (crime to fail to appear if done to evade process of the court).

118. These programs may be available to those charged with relatively minor offenses. If they successfully complete the program, which may include counseling, community service, or restitution to the victim, the charges are dismissed.

119. CAL. PENAL CODE § 1001.2(b) (West 2007) (diversion guidelines set by each county’s district attorney). In San Francisco, the period is five years.

CRP embedded throughout the statutory scheme—from the most minor infractions to the most serious felonies.

In California, the CRP is usually very high. The statutory scheme includes a wide variety of priorable offenses, so that the potential penalty for subsequent crimes dramatically increases after the first one of the same type. Thus, for example, while petty theft is punishable by six months in county jail,¹²⁰ “petty theft with a prior” is punishable by up to a year in county jail, or it can be charged as a felony with even more serious sentencing options.¹²¹

High CRP strongly favors the right side of the chart located above (where the defendant does not care about bail). Concomitantly, high CRP seriously diminishes the “sweet spot” since its size is inversely proportionate to judges’ ability to fashion truly deterrent sentences on subsequent offenses.¹²² Given the range of augmented sentencing available under California law, the CRP is rarely so low that the bail set on the first offense will ever be a deterrent.

Moreover, another factor increasing the CRP—and therefore further diminishing the sweet spot’s size—is that most sentences, especially those imposed early in the defendant’s career, are not the maximum possible. Instead, the majority of cases end in a plea bargain,¹²³ which allows the defendant to accept a sentence that is less than he expects he will receive after trial. Prosecutors have enormous flexibility in amending charges to enable a wide variety of enticing plea bargains, by, for example, offering a pretrial diversion program or probation where it might not have been otherwise available, or allowing the defendant to avoid some mandatory sentence or condition of probation. The powerful obverse of this is that the prosecution retains the ability to demand relatively higher penalties if the defendant re-offends while on bail, even if he commits exactly the same crime again.

For example, the defendant may be arrested for shoplifting from a department store. If this is her first offense, she may be charged with petty

120. CAL. PENAL CODE § 490 (West 2008).

121. CAL. PENAL CODE § 666 (West 2008).

122. There may be a caveat. We should distinguish automatic penalties, which flow inexorably from the commission of the second offense, such that the defendant is certain he will be forced to suffer the consequences, from more flexible penalties where the defendant knows he may not be sentenced to the maximum possible punishment, such as sentences which flow from a plea bargain. The first—like bail forfeiture—is obviously a more powerful deterrent. Interestingly, this seems to suggest that in a world of plea agreements and the imposition of less-than-maximum sentences, the CRP is lower than we might assume. However, as noted in subsection (iv), this very sentencing flexibility tends to strongly increase CRP. Furthermore, a similar *in terrorem* effect—indeed, a much stronger one, arguably—is provided if defendants are OR’d and admonished that if they pick up a new case they will be held in preventive detention thereafter.

123. JUDICIAL COUNCIL OF CALIFORNIA, ADMINISTRATIVE OFFICE OF THE COURTS, 2006 COURT STATISTICS REPORT, STATEWIDE CASELOAD TRENDS 53 tbl. 8, <http://www.courtinfo.ca.gov/reference/documents/csr2006.pdf> (ninety-seven percent of cases are resolved before trial, of which about twenty percent result in dismissals).
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theft¹²⁴ and be eligible for pretrial diversion.¹²⁵ She probably also could have been charged with a felony: second-degree burglary.¹²⁶ If she contemplates re-offending while out on bail, the CRP is not simply two consecutive pretrial diversion programs (the commission of the new crime will render her ineligible for diversion on the first offense), nor indeed a CRP of one year for the original petty theft and a second year for the new petty theft, totaling two years. Instead, the actual CRP is much higher—a half-year in the county jail for the first petty theft,¹²⁷ plus 16 months to three years in state prison for the second-degree burglary.¹²⁸ Thus, even if additional penalties are not in place because of the “priorability” of the initial offenses, precisely the same effect can routinely be expected. In short, high CRP renders bail ineffective, and the CRP in California is almost always very high.

v. *Repeat Bail Scenarios*

In repeat bail scenarios, the defendant who has been released on bail commits another crime, for which he is called in again for a new bail hearing. The hearing will require the judge to make an even more careful calculation of an appropriate bail amount, since, by definition, the first bail set was ineffective at preventing a new offense. As I explain below, however, determining this amount is virtually impossible since judges are generally unable to threaten defendants with the imposition of preventive detention in the event that they re-offend while out on bail.

Let us assume that at the first hearing, bail was set at an amount both significant and precise, CRP was low, and the defendant understood that the odds of re-arrest upon committing a new crime were fairly high. The defendant posted bail, committed another crime, and then failed to appear for his subsequent hearings in the initial case. He was then arrested. By the time of the second bail hearing, the judge will have reviewed four options: forfeit the first bail (in which case the defendant would lose the amount he posted), maintain the same bail amount, increase bail, or set a lower bail. Almost always, the judge has already forfeited bail in the first case, when the defendant failed to appear.¹²⁹ But even if the first bail is forfeited, the judge must still set bail on the new case, and the judge’s options thus reduce to the latter three choices. Usually, the judge will not impose the same bail amount since that amount had no deterrent effect previously. If the judge increases bail, that amount will not be “significant” because by definition the defendant cannot afford it (otherwise, the judge at the initial bail hearing would have imposed

124. CAL. PENAL CODE § 490 (West 1976).

125. See *supra* note 118 and accompanying text.

126. CAL. PENAL CODE §§ 459-60 (West 1991).

127. CAL. PENAL CODE § 490 (West 1976).

128. CAL. PENAL CODE § 461(2) (West 1985).

129. See *supra* Part III(B)(3)(a). HsinOnline -- 13 Berkeley J. Crim. L. 27 2008

that amount), and the judge would be effectively imposing preventive detention. Finally, taking the last option and lowering bail would be both ineffective and counterintuitive, because it would reward the defendant for having re-offended.

The conclusion is this: the more accurate the first bail—the more significant and precise it is—the less coherent it is to suggest that bail can be set at any meaningful amount a second time. Additionally, these scenarios demonstrate that setting bail at the first hearing to protect public safety is not possible unless the judge can credibly threaten preventive detention for all future offenses, which is not consistent with California law.

IV. CONCLUSION

A. Conflicting Constraints

In the development of law, rules of substance and procedure are laid down over time, like layers of sediment. While judges and lawyers are usually obligated to treat the entire accretion of these laws as a whole, the layers are often not all the result of similar assumptions and goals. Grafting a law into the fabric of an existing structure of rules does not always work.

This note has described the effect of such a graft, namely, the imposition of the “public safety” criterion on the existing structure of rules directing the criteria by which bail is set. I conclude that a judge cannot set bail for “public safety” in the same way as one might set bail to account for the risk of flight.

We have seen that bail set to account for public safety must, to be coherent and practical, conform to a series of constraints. It must be set under circumstances in which the CRP is low and the expectation of re-arrest is relatively high, and it must be set with precision—neither too low nor too high. But several obstacles arise. First, the CRP in California is almost always very high, and it seems improbable that a defendant believing that the risk of re-arrest is high would be both disposed to commit the new crime and then, after reflecting on the consequences of his bail status, decide not to commit the new offense. Second, the efficacy of bail designed to inhibit future crime is undermined by the fact that it cannot be forfeited solely because the defendant commits a new crime. Additionally, bail is virtually impossible to set at a significant amount for indigent defendants, who comprise a significant majority of offenders in misdemeanor cases, and bail is ineffective when there is substantial sentencing discretion for subsequent offenses. Finally, judges continue to set bail at amounts mandated by bail schedules, which are generally set according to the severity of the charges, despite evidence suggesting that the severity of the charges has little value in predicting whether a defendant will re-offend. These constraints, together with the data currently available, suggest

that there is no reason to believe that setting bail at any amount serves the interests of public safety.¹³⁰ And the increasingly common repeat bail scenario shows that even if all the constraints can be dealt with, the notion of setting bail to account for public safety will not survive past the first bail hearing.

B. Directions for Further Research

This note is based on both data and certain assumptions about reasonable behavior. But few empirical studies have been carried out since the 1980s, when the law on bail was last significantly reformed. The studies we do have suggest serious discrepancies between what lawyers arguing for bail and judges setting bail believe, on the one hand, and what judges do, on the other. The criminal justice system would benefit from further empirical work.

The point of the research I suggest below is to understand the factors that actually correlate with recidivism. This, in turn, would permit an intelligent reformation of the law to truly protect public safety, and it would enable judges to make more informed bail decisions as they evaluate the case-specific factors before them.

Among the studies I propose is one designed to determine the failure rate—by which I mean both failure to appear for hearings as well as new arrests while an older case is pending—sorted by (i) the type of the first crime, and (ii) the type of the new crime, showing how this failure rate correlates with factors such as the nature of the offense; the age and sex of the defendant; and the defendant's community ties, possible drug or alcohol addictions, employment history, criminal record, prior failures to appear, and so on. Because my review of old studies shows that correlations vary in different locales,¹³¹ these studies

130. See GOLDKAMP 1985, *supra* note 32, at 96 (“Any deterrent effect of bail on rearrest seems *a priori* less plausible, and thus the data do not seem to suggest much correspondence between the assignment of cash bail amounts and rearrest.”).

131. A British study found very high correlations between re-offending and the sometime overlapping groups of (a) youth, (b) those convicted of property offenses, and (c) those with a high number of prior convictions. For example, the re-offense rate for those convicted of burglary was just under eighty percent; for those convicted of drug related offenses, it was under forty percent. REPORT BY THE SOCIAL EXCLUSION UNIT, OFFICE OF THE DEPUTY PRIME MINISTER, REDUCING RE-OFFENDING BY EX-PRISONERS 14-15 (2002), <http://www.cesi.org.uk/kbdocs/reoff.pdf>. Reports from New Zealand and elsewhere tend to agree on the correlation with the youth and property offense factors, albeit with different percentage correlations, and also find correlations with crimes such as vehicle theft; some studies show a correlation with male offenders, others do not. ROBERT E. FITZGERALD & PETER MARSHALL, TOWARDS A MORE OBJECTIVE BASIS FOR BAIL DECISION MAKING 11-12 (Mar. 1999), <http://www.aic.gov.au/conferences/outlook99/fitzgera.pdf> (summarizing various studies). An interesting Texas study reviewed the apparently successful implementation of a new series of criteria in selecting bail, finding significant correlations between re-offending and the following factors: the original offense was a misdemeanor, it was alcohol- or drug-related, and, specifically, it was theft. STEVEN J. CUVELIER & DENNIS W. POTTS, A REASSESSMENT OF THE BAIL CLASSIFICATION INSTRUMENT AND PRETRIAL RELEASE PRACTICES IN HARRIS COUNTY, TEXAS, 29 (1997), <http://www.hctx.net/Cmp/Documents/59/Library/BCPP1996.pdf>. The relatively high numbers for theft are consistent with my own informal review. See *supra* note 65 and accompanying text. The empirical problem of recidivism is fundamentally complicated for at least two reasons. First, there does not appear to

should be done in many jurisdictions, revealing (i) the varying failure rates associated with different types of offenses, and (ii) whether, controlling for set factors, there is a significant difference in the failure rate of defendants on OR, those on various types of supervised pretrial release, and those released after posting cash and bail bonds.

Another helpful study would examine preventive detention hearings in both federal and California courts, describe the sorts of cases in which preventive detention is sought, identify the factors that led judges to issue such orders (including not only the factors expressly announced by the judge but also those factors statistically correlating with the issuance of pretrial detention orders), and determine whether—and which of—those persons released after such hearings committed new crimes while on bail.

If we truly and transparently wish to confront the issue of public safety, we should undertake these and other studies and have them inform potential statutory reform. If it appears that, as suggested here, public safety is not well served by setting bail at any particular dollar amount, legislative and rule-making authorities should consider whether public safety may be better addressed in other ways, such as by imposing additional penalties on repeat offenders (some examples include the three-strikes law and other measures discussed above that increase the CRP), authorizing the forfeiture of bail when a new crime is committed while the defendant is out on bail, or drawing from the federal model of preventive detention, together with the express protections of due process rights under that model.

be a generally accepted way to measure it in any given population or by offense type. *See, e.g.*, WHAT WORKS IN PROBATION 29 (Ros Burnett & Colin Roberts eds., Willan Publishing 2004). Secondly, the rates and correlative factors differ as between types of offenses, for example, as between extra-familial child molesters and incest offenders. DREW A. KINGSTON, RUNNING HEAD: PREDICTORS OF RECIDIVISM IN EXTRA FAMILIAL CHILD MOLESTERS 3, <http://courseweb.edteched.uottawa.ca/psy3171/personalwp/34%20Factors%20Associated%20with%20Recidivism%20among%20Intra-familial%20Child%20Molesters.pdf> (last visited Mar. 5, 2008). *See, e.g.*, Barbara Hart, *Battered Women and The Criminal Justice System*, 36 AMERICAN BEHAVIORAL SCIENTIST 624 (1993); DO ARRESTS AND RESTRAINING ORDERS WORK? 98-99 (Eve S. Buzawa & Carl G. Buzawa, eds., Sage Publications, Inc. 1996) (different recidivism rates for various types of assaults on women). *See generally* POSNER, *supra* note 81.