RECENT LEGISLATION

CRIMINAL LAW — BAIL REFORM — CALIFORNIA REPLACES MONEY-BAIL SYSTEM WITH PRETRIAL DETAINMENT SYSTEM. — S.B. 10, 2017–2018 Leg., Reg. Sess. (Cal. 2018) (enacted) (codified at CAL. GOV'T CODE § 27771 and scattered sections of CAL. PENAL CODE).

Courts assign money bail, the financial condition of pretrial release, because they believe that the practice prevents flight and protects communities.[1] In practice, however, bail often also means de facto pretrial detention for indigent defendants,[2] which unjustly provides prosecutors with a captive audience and significant leverage with which to incentivize guilty pleas and longer sentences.[3] This practice is why the campaign to end money bail continues to build nationally.[4] Criminal justice and racial justice organizations have used a variety of organizing tools to elevate the campaign, demanding that no one be held in custody because of their inability to pay. National concerns about the injustices of money bail are exemplified in California. There, community advocates allege that the existing bail industry is predatory and that California's bail system puts people in cages based on their ability to pay rather than their risk of flight or dangerousness.[5]

On August 28, 2018, in response to calls to end money bail, California enacted Senate Bill No. 10[6] (S.B. 10), which eliminates bail in the state court system and replaces all bail procedures with new rules for determining pretrial detainment.[7] The new law first mandates pretrial risk assessments for all people detained on felony charges.[8] The bill does not lay out any specific requirements regarding the performance and content of the risk assessments. Second, it creates new departments in local

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[1] Curtis E.A. Karnow, *Setting Bail for Public Safety*, 13 BERKELEY J. CRIM. L. 1, 3 (2008).

[2] *See* Recent Case, Brangan v. Commonwealth*, 80 N.E.3d 949 (Mass. 2017)*, 131 HARV. L. REV. 1497, 1497 (2018).

[3] *See* Angela Roberts et al., *Plea Deals Punish the Innocent in Baltimore Police Scandal*, U.S. NEWS (June 7, 2018), https://www.usnews.com/news/best-states/maryland/articles/2018-06-07/plea-deals-punish-the-innocent-in-baltimore-police-scandal [https://perma.cc/2JSM-AAU5]; *see also* Jocelyn Simonson, *Bail Nullification*, 115 MICH. L. REV. 585, 589 (2017); Crystal S. Yang, *Toward an Optimal Bail System*, 92 N.Y.U. L. REV. 1399, 1422 n.88, 1423 (2017).

[4] *See, e.g.*, *Join the Movement. #EndMoneyBail*, COLOR OF CHANGE, https://act.colorofchange.org/sign/join-the-movement-end-money-bail [https://perma.cc/R8SP-MCS6]; *Who Are We*, NAT'L BAIL OUT, http://nationalbailout.org/about/ [https://perma.cc/6UWV-WAFJ].

[5] *Essie Justice Group Withdraws Support for SB 10*, ESSIE JUST. GROUP (Aug. 14, 2018), https://essiejusticegroup.org/2018/08/essie-justice-group-withdraws-support-for-sb-10/ [https://perma.cc/6TTB-4R55].

[6] S.B. 10, 2017–2018 Leg., Reg. Sess. (Cal. 2018) (enacted) (codified at CAL. GOV'T CODE § 27771 and scattered sections of CAL. PENAL CODE).

[7] *Id.*

[8] *Id.* § 4.

courts called Pretrial Assessment Services, which gather and transmit to the court information pertaining to the defendant's "risk to public safety or risk of failure to appear," perform risk assessments based on a court's adopted risk assessment instrument, and issue recommendations for detainment or release.[9] Third, it establishes detainment guidelines for arrestees based on their classification as low, medium, or high risk.[10] Finally, it grants localities significant discretion over the standards for prearraignment detainment of "medium-risk" arrestees and over jurisdictional risk assessment tools, the results of which inform detainment decisions.[11] Despite these changes, this new law merely replaces an unconstitutional money-bail system with an unconstitutional pretrial detainment system. While the California money-bail system violated the Due Process Clause,[12] the new law violates the Equal Protection Clause by arbitrarily infringing on individuals' right to bodily integrity through a patchwork regime, the standards of which treat similarly situated citizens of the same state very differently based on their physical location.

Prior to the new law, bail in California was similar to that of most other states: charges were filed against the defendant, a judge determined whether they would be afforded bail, and then families either paid to free their loved ones at any time or found a bail bondsman who posted the full amount while the families paid a nonrefundable fee.[13] Under the new law, there are only two opportunities where an arrestee is considered for release: prearraignment and at arraignment. The new law dictates that Pretrial Assessment Services will release "low-risk" arrestees prearraignment, without review by the court, and with the least restrictive nonbail conditions.[14] "Medium-risk" arrestees who do not meet certain preconditions that exclude them from consideration for prearraignment release[15] are eligible for release at either stage. Pretrial Assessment Services can release medium-risk arrestees prearraignment "pursuant to the local rule of court," which determines review, release, and eligibility standards for medium-risk arrestees.[16] These rules can vary widely by locality because each jurisdiction can "expand the list of offenses and factors" that bar prearraignment release of medium-risk

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[9] *Id.* (adding CAL. PENAL CODE § 1320.9(a)(1)–(3), (c)).

[10] *Id.* (adding CAL. PENAL CODE § 1320.10(b)–(c), (e)(1)).

[11] *Id.* (adding CAL. PENAL CODE §§ 1320.7(k), 1320.11(a)).

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

[13] HUMAN RIGHTS WATCH, "NOT IN IT FOR JUSTICE": HOW CALIFORNIA'S PRETRIAL DETENTION AND BAIL SYSTEM UNFAIRLY PUNISHES POOR PEOPLE 27–29 (2017), https://www.hrw.org/sites/default/files/report_pdf/usbail0417_web_0.pdf [https://perma.cc/Z7VB-RALY]; Note, *Bail Reform and Risk Assessment: The Cautionary Tale of Federal Sentencing*, 131 HARV. L. REV. 1125, 1126–27 (2018).

[14] Cal. S.B. 10 § 4 (enacted) (adding CAL. PENAL CODE § 1320.10(a)–(b)).

[15] *Id.* (adding CAL. PENAL CODE § 1320.10(e)).

[16] *Id.* (adding CAL. PENAL CODE § 1320.10(c)).

arrestees.[17] The bill also empowers courts to release "medium-risk" arrestees prearraignment, although courts are required to give the Pretrial Assessment Services's recommendation report significant weight.[18] At prearraignment and arraignment for "medium-risk" arrestees, the bill also establishes an automatic, rebuttable "presumption that no condition . . . of pretrial supervision will reasonably assure . . . safety" if the person is accused of violence or threats of violence, intimidation or "threatened retaliation against a witness or victim of the current crime," violating parole, or violating another pretrial release condition.[19] This presumption will leave many indigent defendants burdened with the responsibility of justifying their own release prearraignment, before they have been assigned counsel at all, or at arraignment, when they face their last chance at release and have had minimal time with their court-appointed attorneys.[20]

The law grants localities significant discretion over the breadth of "medium-risk" designations at the prearraignment stage and discretion over which risk assessment instrument they use. To check these local processes, the Judicial Council[21] is assigned a number of responsibilities. It is accountable for compiling and maintaining a list of validated pretrial risk assessment tools (in consultation with Pretrial Assessment Services and other stakeholders), "[p]rescrib[ing] the proper use of pretrial risk assessment information by the court when making pretrial release and detention decisions," "[d]escrib[ing] the elements of" risk assessment validation, "[p]rescrib[ing] standards for review, release, and detention by Pretrial Assessment Services," and "[p]rescrib[ing] the parameters of the local rule of court."[22] Local courts report data annually to the Judicial Council, which will report data to the governor and the legislature every other year.[23] The Judicial Council also convenes a panel of experts that will "designate . . . risk levels based upon the scores or levels provided by the instrument for use by Pretrial Assessment Services" in each local court.[24]

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[17] *Id.* (adding CAL. PENAL CODE § 1320.11(a)). Local rules of court are, however, limited in that they cannot exclude the release of all medium-risk defendants. *Id.*

[18] *Id.* (adding CAL. PENAL CODE § 1320.13(c)).

[19] *Id.* (adding CAL. PENAL CODE § 1320.13(i)).

[20] *See I've Been Arrested. What Happens Now?*, SAN DIEGO COUNTY: OFF. PUB. DEFENDER, https://www.sandiegocounty.gov/content/sdc/public_defender/arrested.html [https://perma.cc/WB9G-Q4KT] (explaining that a public defender is appointed at the arraignment).

[21] The Judicial Council is a policymaking body for California courts. JUDICIAL COUNCIL OF CAL., JUDICIAL COUNCIL GOVERNANCE POLICIES 1 (2017), http://www.courts.ca.gov/documents/JCGovernancePolicies.pdf [https://perma.cc/UK9S-9NEX]. Of the thirty-one members of the Judicial Council, twenty-three are judges or former judges. *Judicial Council Members*, CAL. CTS., http://www.courts.ca.gov/4645.htm [https://perma.cc/N46D-8DNY].

[22] Cal. S.B. 10 § 4 (enacted) (adding CAL. PENAL CODE § 1320.24(a)(1)–(4), (e)(1)).

[23] *Id.* (adding CAL. PENAL CODE § 1320.24(d), (e)(5)).

[24] *Id.* (adding CAL. PENAL CODE §§ 1320.24(e)(7), 1320.25(a)).

Finally, the bill prevents Pretrial Assessment Services and courts from releasing arrestees prearraignment altogether if they have been designated "high risk" or if they have been *charged* with a serious or violent felony or if "at the time of arrest, [they] were pending trial or sentencing in a felony matter."[25]

Following the prearraignment stage, the law gives "medium-risk" and "high risk" arrestees detained prearraignment the opportunity for release at arraignment. At arraignment, Pretrial Assessment Services gives the court its recommendations for release and the information that it used to make that assessment, including the arrestee's risk score and anything relevant to determining the arrestee's public safety risk or likelihood of failing to appear.[26] In addition, the state, the defendant, and the alleged victim, who is mandatorily notified at this stage, can make their arguments.[27] The court then uses this information, along with any additional information presented by the prosecution, defense counsel, or any alleged victims, to determine whether the arrestee should be detained or released.[28]

Offsetting the two opportunities for release, S.B. 10 also boosts prosecutorial power over detention by allowing preventive detention hearings. Preventive detention hearings are conducted pursuant to a prosecutorial motion seeking detention of a defendant pending trial that can be filed at arraignment or any point thereafter.[29] The bill does not afford the defendant a similar right to file a motion for liberation pending trial if detained. The court must hold these hearings promptly to reconsider a release determination.[30] Between filing and the hearing, the law empowers the court to detain arrestees if the court both finds a substantial likelihood that detention will be necessary to protect the public and prevent flight and "state[s] the reasons for detention on the record."[31] At the hearing, a rebuttable presumption that pretrial supervision is necessary holds if the charged crime is a violent felony, the defendant was allegedly armed, or the defendant is assessed as "high risk."[32] To use the presumption to detain a "high risk" defendant, the court must also find that they were convicted of a serious or violent felony, that they committed the charged crime while pending sentencing

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[25] *Id.* (adding CAL. PENAL CODE § 1320.13(b)). Serious felonies include most violent crimes and major drug crimes, as well as any felony punishable by death or life imprisonment. *See* CAL. PENAL CODE § 1192.7(c)(1) (West 2018).

[26] Cal. S.B. 10 § 4 (enacted) (adding CAL. PENAL CODE § 1320.15(a)–(d)).

[27] *Id.* (adding CAL. PENAL CODE § 1320.16(a), (c)).

[28] *Id.* (adding CAL. PENAL CODE § 1320.17).

[29] *Id.* (adding CAL. PENAL CODE § 1320.18(a)).

[30] *Id.* (adding CAL. PENAL CODE § 1320.19(a)–(b)).

[31] *Id.* (adding CAL. PENAL CODE § 1320.18(d)).

[32] *Id.* (adding CAL. PENAL CODE § 1320.20(a)(1)–(2)).

on a violent crime, that they intimidated a witness, or that they were on postconviction supervision at the time of arrest.[33]

While S.B. 10 pays lip service to ending the systemic problems inherent in the money-bail system,[34] the system it creates raises similar concerns due to its arbitrary classifications based on location of arrest and inadequate protection from bias in risk assessment tools. Rather than being an improvement, this new system is just as unconstitutional as the old money-bail system, albeit under the Equal Protection Clause rather than the Due Process Clause. The right to bodily integrity is fundamental and merits protection from arbitrary classification.[35] S.B. 10 implicates the right to bodily integrity in the pretrial detainment context and, in practice, is out of step with the Equal Protection Clause in that it allows for a patchwork statewide system that treats citizens of the same state very differently based on their specific location. Further and more accountable reform efforts will be necessary to cure these persistent constitutional defects.

S.B. 10 "[e]nd[s] [c]ash [b]ail,"[36] but it also creates a system potentially as unconstitutional as the money-bail setup that bail-reform advocates attacked. Instead of facing bail, detainees face a "legal default of incarceration,"[37] where people will be held in jail because of their assigned risk level instead of their inability to pay. It is for this reason that a number of criminal justice advocacy organizations rescinded their support for S.B. 10[38] and that bail-industry leaders and nonprofits teamed up to collect 500,000 signatures to place S.B. 10 on the November 2020 ballot and get the bill put on hold.[39]

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[33] *Id.* (adding CAL. PENAL CODE § 1320.20(a)(2)(A)–(D)).

[34] *See* Udi Ofer, *We Can't End Mass Incarceration Without Ending Money Bail*, ACLU (Dec. 11, 2017, 4:30 PM), https://www.aclu.org/blog/smart-justice/we-cant-end-mass-incarceration-without-ending-money-bail [https://perma.cc/W9QK-9VKP].

[35] *See* United Pac. Ry. Co. v. Botsford, 141 U.S. 250, 251 (1891) ("No right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law."); *see also* Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261, 269 (1990); Ingraham v. Wright, 430 U.S. 651, 673–75 (1977); Skinner v. Oklahoma *ex rel.* Williamson, 316 U.S. 535, 541 (1942); Stephanie Weiler, Comment, *Bodily Integrity: A Substantive Due Process Right to Be Free from Rape by Public Officials*, 34 CAL. W. L. REV. 591, 596 (1998).

[36] John Raphling, *California Ended Cash Bail — But May Have Replaced It with Something Even Worse*, THE NATION (Sept. 24, 2018), https://www.thenation.com/article/california-ended-cash-bail-but-may-have-replaced-it-with-something-even-worse/ [https://perma.cc/NF6M-BB7H].

[37] *Essie Justice Group Withdraws Support for SB 10*, *supra* note 5.

[38] *See, e.g.*, *id.*; Press Release, ACLU of S. Cal., ACLU of California Statement: Governor Brown Signs Bail Reform Legislation Opposed by ACLU (Aug. 28, 2018), https://www.aclusocal.org/en/press-releases/aclu-california-statement-governor-brown-signs-bail-reform-legislation-opposed-aclu [https://perma.cc/MX6N-WA6W].

[39] Sheyanne N. Romero, *Human Rights Advocates, Bail Industry Leaders Fight to Stop No Cash Bail Law*, VISALIA TIMES-DELTA (Dec. 28, 2018, 2:05 PM), https://www.visaliatimesdelta.com/story/news/2018/12/28/human-rights-advocates-bail-industry-leaders-fight-overturn-sb10/2415570002/ [https://perma.cc/PM9A-LVXP]. Many criminal justice advocates supported an earlier

S.B. 10 creates a system that separately classifies citizens of the same state on the basis of physical jurisdiction. The bill allows localities to unilaterally determine two factors that can radically vary arrestee access to release under the regime: the breadth of prearraignment detainment for "medium-risk" arrestees and the use of risk assessment instruments.[40] Pretrial, and even prearraignment, detainment has significant effects on individual outcomes. For example, detention of low- and medium-risk defendants for more than two days is strongly correlated with new arrests after release.[41] For "medium-risk" arrestees specifically, anywhere between two and fourteen days of detention provides a significant increase in likelihood of new arrest after release.[42] Further, detainment, even if it is prearraignment, creates a significant threat to jobs, rent payments, family and social connections, child custody, and any other caregiving recipients.[43] S.B. 10 undermines the opportunity for prearraignment release by placing broad discretion at the local level to define "medium risk."[44] In permitting localities to expand prearraignment detainment as broadly as they would like, the law creates a class of "medium-risk" arrestees, some of whom will be released prearraignment because of where they were arrested, and another class, also deemed "medium risk," that will not be released prearraignment because of how "medium risk" happens to be defined where they were arrested.

Risk assessment tools contribute to the arbitrariness of the classification by location both on their own and within the statutory framework. On their own, risk assessment instruments are often inaccurate across a variety of variables.[45] To that point, many argue that risk assessment–tool scores should not be used to help determine whether a person should be detained because they have significant empirical

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version of the bill in the first place because it required that the risk assessment tools be "equally accurate across all racial groups, ethnic groups, and genders" and be tested for "predictive bias, and disparate results by race, ethnicity, and gender." S.B. 10, 2016–2017 Leg., Reg. Sess., § 29 (Cal. 2017); *see, e.g.*, *Essie Justice Group Withdraws Support for SB 10*, *supra* note 5.

40 Cal. S.B. 10 § 4 (enacted) (adding CAL. PENAL CODE §§ 1320.7(k), 1320.11(a)).

41 CHRISTOPHER T. LOWENKAMP, MARIE VANNOSTRAND & ALEXANDER HOLSINGER, ARNOLD FOUND., THE HIDDEN COSTS OF PRETRIAL DETENTION 10–11 (2013).

42 *See id.* at 11.

43 *See* Note, *supra* note 13, at 1128.

44 *See* Cal. S.B. 10 § 4 (enacted) (adding CAL. PENAL CODE § 1320.11(a)).

45 *See* Julia Angwin & Jeff Larson, *Bias in Criminal Risk Scores Is Mathematically Inevitable, Researchers Say*, PROPUBLICA (Dec. 30, 2016, 4:44 PM), https://www.propublica.org/article/bias-in-criminal-risk-scores-is-mathematically-inevitable-researchers-say [https://perma.cc/X6UT-A5QW] (finding that risk assessment tools are twice as likely to inaccurately label Black people as high risk over white people); *see also* R. Karl Hanson & Philip D. Howard, *Individual Confidence Intervals Do Not Inform Decision-Makers About the Accuracy of Risk Assessment Evaluations*, 34 LAW & HUM. BEHAV. 275, 280 (2010) (finding that confidence intervals for the recidivism outcome for a single case will be uninformative when the outcome is dichotomous (either zero or one)).

limitations and often reflect systemic biases that render their outcomes arbitrary as to the individual being considered for release.[46]

But the S.B. 10 framework itself exacerbates this arbitrariness because the validated risk assessment instruments mandated by the system offer no guarantee of uniform outcomes across jurisdictions — a shortcoming that could contribute to biased outcomes. Each person arrested is equally subject to a risk-level evaluation, which is heavily informed by the result of a risk assessment instrument, but the new law permits each jurisdiction to select their instrument from a list of validated instruments determined by the Judicial Council.[47] S.B. 10 requires the Judicial Council to "address the identification and mitigation of any implicit bias in assessment instruments,"[48] but does not mandate outcome uniformity in the review process.[49] Further, the law requires the Council to convene a panel of seven experts to designate risk levels, but only one is required to have expertise in the potential impact of bias in risk assessment instruments.[50] As such, the state has created a regime where the tools it offers localities are not necessarily uniform and where the choice of instrument by locality may not be uniform, allowing a huge component of pretrial assessment to widely vary across jurisdictions. As a result, similarly situated citizens of California will find radically divergent levels of restriction of their right to bodily integrity on the basis of an arbitrary difference: where they happen to be when they are arrested.

Without uniform standards for risk assessment instruments and "medium-risk" prearraignment release, a person charged with a hit-and-run in Pasadena might immediately leave the jail and exercise their freedom to bodily autonomy. Meanwhile another person in Compton might be deprived of that same right, held without bail for months pretrial solely because the "medium-risk" prearraignment restrictions in Compton are broader or because the risk assessment instrument selected by the Compton jurisdiction is stricter than the one adopted in Pasadena. As such, S.B. 10 creates a pretrial detention scheme that treats similarly situated defendants in a state differently. It allows different jurisdictions to give different evaluations of risk and jeopardizes equal access to the right to bodily integrity along arbitrary lines.

Where the implementation of the California money-bail system is unconstitutional under the Due Process Clause because it commits poor

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[46] *See, e.g.*, CTR. ON RACE, INEQUALITY, & THE LAW AT NYU LAW & ACLU, WHAT DOES FAIRNESS LOOK LIKE? CONVERSATIONS ON RACE, RISK ASSESSMENT TOOLS, AND PRETRIAL JUSTICE 17 (2018); *"Risk Assessment" Policy Statement*, C.R. CORPS, https://www.civilrightscorps.org/resources/7B7FS7wRTSKnWMXSqR9Y [https://perma.cc/2EV4-QWHH].

[47] Cal. S.B. 10 § 4 (enacted) (adding CAL. PENAL CODE §§ 1320.7(k), 1320.24(a)(1)).

[48] *Id.* (adding CAL. PENAL CODE § 1320.24(a)(2)).

[49] *See id.* (adding CAL. PENAL CODE § 1320.24(a)(2)).

[50] *See id.* (adding CAL. PENAL CODE §§ 1320.24(e)(7), 1320.25(b)).

folks to de facto pretrial detention,[51] the new California pretrial detention law is unconstitutional under the Equal Protection Clause because it detains people based on where they were arrested. Courts have identified the right to bodily integrity as fundamental.[52] Freedom of bodily integrity is roughly commensurate with an individual's right to autonomy over decisions about their own body. One source of the fundamental nature of the right to bodily integrity is the normative principle that all people be considered equal.[53] This element of the right undergirds the impermissibility of arbitrary treatment of such rights. As a result, the Court does not substantiate arbitrary restrictions that implicate fundamental rights if the distinction is "unreasoned."[54]

Just as states cannot deprive poor people of the access to criminal appeals when their bodily integrity is at stake without reason, neither can states permit variable jurisdictional rules that provide differential access to pretrial liberty based solely on location of arrest. In *Griffin v. Illinois*,[55] the Court remarked that there was no rational relationship between a "defendant's guilt or innocence" and their ability to pay costs in advance of trial.[56] Under S.B. 10, there is similarly no rational relationship between the location of arrest and safety and flight — the purported interests underlying pretrial detention decisions.

Even if the Court does not always apply strict scrutiny to cases where the freedom of bodily integrity is at issue in the substantive due process context, the Court has a robust history of assessing the deprivation of rights it deems to be fundamental, including procreation[57] and voting,[58] stringently under the Equal Protection Clause. The Court has required some kind of heightened government justification in numerous

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

[52] Christyne L. Neff, *Woman, Womb, and Bodily Integrity*, 3 YALE J.L. & FEMINISM 327, 337 (1991) ("Courts have consistently respected the principle of bodily integrity and zealously promoted it as sacred, inviolable, inalienable, and fundamental.").

[53] *See* Skinner v. Oklahoma *ex rel.* Williamson, 316 U.S. 535, 541 (1942); *cf.* Bush v. Gore, 531 U.S. 98, 104 (2000) (per curiam) (describing the "equal weight accorded to each vote and the equal dignity owed to each voter").

[54] Rinaldi v. Yeager, 384 U.S. 305, 310 (1966); *see* Mayer v. City of Chicago, 404 U.S. 189, 197 (1971) (rebuking restricted access to criminal procedures based on who is able to pay); Griffin v. Illinois, 351 U.S. 12, 17 (1956) (plurality opinion) (standing for the proposition that the state cannot arbitrarily allow appeals for the wealthy while constructively preventing them for the poor); Meyer v. Nebraska, 262 U.S. 390, 399–400 (1923) ("[L]iberty may not be interfered with . . . by legislative action which is arbitrary . . . ."). Given that the Court has decisively denied wealth as a suspect classification for the purposes of equal protection, Kadrmas v. Dickinson Pub. Sch., 487 U.S. 450, 458 (1988), the heightened scrutiny merited in these cases must be based on the implication of a fundamental right.

[55] 351 U.S. 12.

[56] *Id.* at 17–18 (plurality opinion).

[57] *See Skinner*, 316 U.S. at 541 ("Marriage and procreation are fundamental to the very existence and survival of the race.").

[58] *Bush*, 531 U.S. at 104 ("[T]he right to vote as the legislature has prescribed is fundamental . . . .").

cases where state actions have treated similarly situated people differently with respect to their personal liberty.[59] To survive the court's scrutiny when a fundamental right is at issue, a compelling government interest is required. A compelling government interest for the purposes of equal protection cannot be justified solely by efficiency, as the "desire for speed is not a general excuse for ignoring equal protection guarantees."[60] With respect to pretrial detention, there may be no constitutional right to a particular process, but once a state creates a system "as the means to implement its power to" restrict pretrial freedoms, the state has an obligation to allow access to the process in a nonarbitrary manner.[61] S.B. 10 provides leeway for risk assessment tools to include race and gender data — or to use location as a proxy for race — and to quantify individuals' risk levels based on generalized statistics related to identity and location rather than criminal conduct. As a result, the system will permit the fundamental right to bodily integrity to be allocated inequitably for similarly situated people.

Because S.B. 10 allows for application of different processes based solely on location of offense — which is in no way related to state interests of increasing safety and decreasing flight — it does not survive under the Equal Protection Clause. The government is permitted to treat citizens differently, even where a fundamental right is implicated, if "the infringement is narrowly tailored to serve a compelling state interest."[62] The efficacy of the government's justification for infringement depends on how the Court reads the constitutional magnitude of the right at issue and whether the government's actions seemed reasonably tied to the governmental interest.[63]

The constitutional magnitude of the freedom to bodily integrity is significant to the Court.[64] And California's justification for infringing on this right arbitrarily based on location is likely to be specious. If the penological interests are preventing flight and further crime, then scattered risk assessment and prearraignment release standards with unpre-

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[59] *See, e.g.*, *id.* at 104; Boddie v. Connecticut, 401 U.S. 371, 375 (1971); *Griffin* 351 U.S. at 17.

[60] *Bush*, 531 U.S. at 108. While the Court in *Bush* attempted to limit the case to its particular facts, it did so in dicta (defined as "[a] proposition in a case that is not holding"). Michael Abramowicz & Maxwell Stearns, *Defining Dicta*, 57 STAN. L. REV. 953, 953 (2005). Under this definition, the Court's qualifying statement about limiting the holding to the facts of the case is not a necessary predicate to the Court's holding or the reasoning supporting it. And, even if the Court did limit *Bush*, its logic is still persuasive.

[61] *Bush,* 531 U.S. at 104; *see also Griffin*, 351 U.S. at 21 (Frankfurter, J., concurring in the judgment) (discussing the lack of a right to particular process); Eileen McDonagh, *The Next Step After* Roe*: Using Fundamental Rights, Equal Protection Analysis to Nullify Restrictive State-Level Abortion Legislation*, 56 EMORY L.J. 1173, 1179 (2007).

[62] Reno v. Flores, 507 U.S. 292, 301–02 (1993).

[63] Washington v. Glucksberg, 521 U.S. 702, 768 (1997) (Souter, J., concurring in the judgment).

[64] *See* Skinner v. Oklahoma *ex rel.* Williamson, 316 U.S. 535, 541 (1942).

dictable outcomes by locality are neither narrowly tailored nor reasonably related to the government interest. In fact, under the new law, the distinction between detainee and free person in California could easily be made devoid of any difference related to public safety or flight — the liberty of a person charged with a nonviolent felony would be informed by the location of arrest, past failure to appear, a risk assessment–instrument score based on an instrument that is very likely inaccurate and possibly de facto discriminatory, and "[a]ny supplemental information reasonably available that directly addresses the arrested person's . . . risk of failure to appear."[65]

While the need for bail reform is evident, and adjudicatory efficiency for pretrial defendants is a reasonable legislative interest, this new California law threatens the freedom of too many criminal defendants arbitrarily based on their location. When the bill was originally introduced, its stated intent was to "safely reduce the number of people detained pretrial, while addressing racial and economic disparities in the pretrial system, and to ensure that people are not held in pretrial detention simply because of their inability to afford money bail."[66] These changes were directly responsive to the allegations that money bail unconstitutionally incarcerates the poor and that it disproportionately burdens Black and Latinx communities in California. Moreover, the original bill dictated some modicum of uniformity in the way that the enacted bill does not. As enacted, the bill creates a patchwork system that confers a great deal of discretion to localities and risks being arbitrarily applied based on location of arrest. Indeed, this new system is just as discriminatory as the old money-bail system, just based on a new metric — location — rather than inability to pay. Courts must recognize that this arbitrariness, which is legally impermissible, can too easily permit a morally egregious standard that serves to cloak racialized and classist outcomes in the criminal legal system with purportedly "objective" assessment inputs like risk scores from risk assessment instruments and local rules of court determined by a panel of expert judges. The California legislature must remember that "[i]n our society[,] liberty is the norm [while] detention prior to trial . . . is the carefully limited exception."[67] Because the new scheme implicates similarly significant constitutional concerns as the old money-bail system, the fight for just bail reform must continue.

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[65] Cal. S.B. 10 § 4 (enacted) (adding CAL. PENAL CODE § 1320.9(a)(3)).
[66] S.B. 10, 2016-2017 Leg., Reg. Sess., § 2 (Cal. 2016).
[67] United States v. Salerno, 481 U.S. 739, 755 (1987).