RECENT CASES

CRIMINAL LAW — MONEY BAIL — CALIFORNIA SUPREME COURT HOLDS DETENTION SOLELY BECAUSE OF INABILITY TO PAY BAIL UNCONSTITUTIONAL. — *In re Humphrey*, 482 P.3d 1008 (Cal. 2021).

Across the nation, people are arrested and detained pretrial solely because they lack the money to pay bail.[1] Although many state constitutions grant individuals a right to be released on bail except in the most serious cases, "courts use unaffordable bail conditions to detain people deemed too dangerous or flight prone to release."[2] Recently, in *In re Humphrey*,[3] the Supreme Court of California held that detaining a person pretrial solely because they cannot afford bail violates due process and equal protection.[4] Consequently, California courts must consider ability to pay when setting bail, and courts cannot set unaffordable bail that would result in pretrial detention unless there is clear and convincing evidence that no other condition would reasonably protect the government's interests in public or victim safety or court appearance.[5] *Humphrey* provided a significant substantive protection for indigent persons who might otherwise be jailed because of their poverty. However, the decision left unresolved core questions about the role of public safety in California's bail scheme — a result that may limit the holding's practical impact on reducing the hardships posed by bail and pretrial detention in the State of California.

On May 23, 2017, sixty-three-year-old Kenneth Humphrey followed seventy-nine-year-old Elmer J. into his apartment in the senior home in which they both lived, threatened him, threw his phone to the ground, demanded money, and stole $7 and a bottle of cologne.[6] Humphrey was arrested for first-degree residential robbery and burglary against, injury of, and misdemeanor theft from an elder adult.[7] At his arraignment,

---

[1] Nationally, more than two-thirds of jail inmates (approximately half a million on any given day) are detained awaiting trial. *See* Megan Stevenson & Sandra G. Mayson, *Pretrial Detention and Bail*, *in* 3 REFORMING CRIMINAL JUSTICE 21, 21 (Erik Luna ed., 2017); *see also* WENDY SAWYER & PETER WAGNER, PRISON POL'Y INITIATIVE, MASS INCARCERATION: THE WHOLE PIE 2020 (2020), https://www.prisonpolicy.org/reports/pie2020.html [https://perma.cc/U7X3-RDMG]. In 2009, ninety percent of persons with felony charges detained pretrial would have been released if they could have afforded to post their bail. Stevenson & Mayson, *supra*, at 22–23.

[2] Sandra G. Mayson, *Detention by Any Other Name*, 69 DUKE L.J. 1643, 1663 (2020).

[3] 482 P.3d 1008 (Cal. 2021).

[4] *Id.* at 1012; *see id.* at 1016–19.

[5] *Id.* at 1013.

[6] *Id.*; *see In re* Humphrey, 228 Cal. Rptr. 3d 513, 518 (Ct. App. 2018).

[7] *Humphrey*, 482 P.3d at 1013.

Humphrey requested release on his own recognizance,[8] but at the prosecutor's request,[9] the trial court set a $600,000 money bail — without considering Humphrey's inability to pay that sum.[10] Humphrey filed a motion for a formal bail hearing to review the order.[11] At the hearing, the prosecutor argued that robbery is "a serious and violent felony," so the court would need to find "unusual circumstances" to deviate from the prescribed bail amount.[12] The prosecutor maintained that the high money bail was appropriate because Humphrey's substance abuse was "a great public safety risk" and the fact that Humphrey faced a lengthy sentence under California's three-strikes law made him a "flight risk."[13] The trial court found there were "public safety and flight risk concerns" and denied release on Humphrey's own recognizance or supervised release, but reduced bail to $350,000 on the condition that he participate in a substance abuse treatment program.[14] Humphrey appealed, filing a habeas corpus petition that argued that conditioning release on an amount of money bail that one cannot pay is "the functional equivalent of a pretrial detention order."[15]

The California Court of Appeal reversed and remanded the case for bail proceedings that would take into account Humphrey's ability to pay.[16] It noted that article I, section 12 of the California Constitution "establishes a person's right to obtain release on bail from pretrial custody" except in certain cases of capital crimes, violent or sexual felonies, and serious threats of violence.[17] Moreover, it held that:

---

[8] *Id.* Humphrey cited his age, community ties, unemployment, limited finances, history of complying with court orders, and the minimal value of the items stolen in the theft. *Id.*

[9] The prosecutor recommended following California's bail schedule. *Id.* For a critique of standardized bail schedules, see Lindsey Carlson, *Bail Schedules: A Violation of Judicial Discretion?*, CRIM. JUST., Spring 2011, at 12.

[10] *Humphrey*, 482 P.3d at 1014, 1016.

[11] *Id.* at 1014. Humphrey also attached a 2013 study of racial discrimination in the San Francisco pretrial system, details about his acceptance into a substance abuse treatment program, and information about his education and community involvement. *Id.*

[12] *Id.*

[13] *Id.*

[14] *Id.* Humphrey's public defender objected that Humphrey could not afford to pay $350,000 so would end up detained pretrial and unable to attend such a program. *In re* Humphrey, 228 Cal. Rptr. 3d 513, 522 (Ct. App. 2018). Yet the court did not comment on this result. *Id.*

[15] *Humphrey*, 482 P.3d at 1014.

[16] *Humphrey*, 228 Cal. Rptr. 3d at 545.

[17] *Id.* at 523 (quoting *In re* York, 892 P.3d 804, 807 (Cal. 1995)); *see id.* at 523 n.9 ("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." (quoting CAL. CONST. art. I, § 12)).

> [T]he due process and equal protection clauses of the Fourteenth Amendment require the court to make two additional inquiries and findings before ordering release conditioned on the posting of money bail — whether the defendant has the financial ability to pay the amount of bail ordered and, if not, whether less restrictive conditions of bail are adequate to serve the government's interests . . . .[18]

Imposing unaffordable bail that resulted in Humphrey's detention unjustifiably circumvented those inquiries and was thus unconstitutional.[19] On remand, the trial court imposed nonfinancial conditions and released Humphrey.[20] Neither party appealed, but the Supreme Court of California granted review on its own motion in order to address "the constitutionality of money bail" in California and "the proper role of public and victim safety in making bail determinations."[21]

The California Supreme Court affirmed.[22] Writing for the court, Justice Cuéllar held that "conditioning freedom solely on whether an arrestee can afford bail is unconstitutional."[23] In the bail context, an individual's due process liberty interest in freedom from detention and equal protection right not to be detained solely because of indigency converge.[24] This case presented a novel application of the Fourteenth Amendment, so the court reasoned by analogizing to two United States Supreme Court cases from other contexts: *Bearden v. Georgia*[25] and *United States v. Salerno*.[26] In *Bearden*, the Supreme Court held that Georgia had violated the Fourteenth Amendment when it revoked Danny Bearden's probation based on his failure to pay restitution and court fines, because it did so without first finding either that Bearden had the ability to pay and was refusing to do so or that no alternative measures would meet the State's penological interests.[27] If Georgia's interests could be met without imprisonment, it would violate substantive due process and equal protection to jail Bearden solely because his poverty left him unable to pay, despite his bona fide efforts.[28]

---

[18] *Id.* at 525. These inquiries require individualized findings. *Id.* at 538.

[19] *See id.* at 529.

[20] *Humphrey*, 482 P.3d at 1015. The conditions included electronic monitoring, a stay-away order, and a substance abuse treatment program. *Id.*

[21] *Id.*; *see* Humphrey (Kenneth) on H.C., 417 P.3d 769, 769 (Cal. 2018).

[22] *Humphrey*, 482 P.3d at 1022.

[23] *Id.* at 1012.

[24] *See id.* at 1018.

[25] 461 U.S. 660 (1983).

[26] 481 U.S. 739 (1987).

[27] *See Humphrey*, 482 P.3d at 1017 (citing *Bearden*, 461 U.S. at 672); Olivia C. Jerjian, *The Debtors' Prison Scheme: Yet Another Bar in the Birdcage of Mass Incarceration of Communities of Color*, 41 N.Y.U. REV. L. & SOC. CHANGE 235, 244 (2017).

[28] *See Bearden*, 461 U.S. at 672–73.

The *Humphrey* court explained that in the bail context, the state's compelling interest is not to punish[29] but rather "to ensure the defendant appears at court proceedings and to protect the victim, as well as the public, from further harm."[30] Nonetheless, *Bearden*'s reasoning similarly applied: "[I]f a court does not consider an arrestee's ability to pay, it cannot know whether requiring money bail in a particular amount is likely to operate as the functional equivalent of a pretrial detention order."[31] And detention "solely because" of one's inability to pay is an unconstitutional infringement on an individual's due process and equal protection rights against wealth-based detention.[32]

To complement this hybrid due process and equal protection rationale,[33] the court also invoked *United States v. Salerno*, in which the U.S. Supreme Court upheld the federal Bail Reform Act of 1984.[34] In *Salerno*, the Court established that pretrial "liberty is the norm, and detention . . . the carefully limited exception."[35] The Bail Reform Act met this standard by authorizing detention in the name of public safety only "for a specific category of extremely serious offenses."[36] Thus, the *Humphrey* court emphasized, individuals retain a fundamental due process right to pretrial liberty that is not contingent on financial position[37] and can be overridden only in narrowly tailored cases.[38]

Following these conclusions, the court provided a "sketch [of] the general framework" for imposing money bail in California.[39] California

---

[29] Bail is imposed pretrial, prior to any finding of guilt. *See* Stevenson & Mayson, *supra* note 1, at 24.

[30] *Humphrey*, 482 P.3d at 1018. Originally, bail meant taking responsibility for a person appearing in court and paying only if they did not show, but modern money bail systems typically require an upfront deposit. *See* LÉON DIGARD & ELIZABETH SWAVOLA, VERA INST. OF JUST., JUSTICE DENIED: THE HARMFUL AND LASTING EFFECTS OF PRETRIAL DETENTION 3 (2019), https://www.vera.org/downloads/publications/Justice-Denied-Evidence-Brief.pdf [https://perma.cc/VAA5-ZCLC].

[31] *Humphrey,* 482 P.3d at 1018.

[32] *Id.* at 1017 (quoting *Bearden*, 461 U.S. at 661); *see id.* at 1018.

[33] *See id.* at 1019 n.5. The Supreme Court has generally refrained from applying heightened scrutiny to cases of wealth discrimination, but it has appeared to apply such scrutiny in "hybrid cases" like *Bearden* where there are both equal protection and substantive due process interests at play. *See* M.L.B. v. S.L.J., 519 U.S. 102, 120 (1996); *see also* Kellen Funk, *The Present Crisis in American Bail*, 128 YALE L.J.F. 1098, 1113–20 (2019) (noting how the *Bearden* line of cases applied strict scrutiny without using that language and how many courts are rightfully doing the same when extending such principles to pretrial contexts); Brandon L. Garrett, *Wealth, Equal Protection, and Due Process*, 61 WM. & MARY L. REV. 397, 402, 425 (2019).

[34] Pub. L. No. 98-473, tit. II, ch. I, §§ 202–210, 98 Stat. 1976, 1976–87 (codified as amended in scattered sections of 18 U.S.C.); *see* United States v. Salerno, 481 U.S. 739, 741 (1987).

[35] *Salerno*, 481 U.S. at 755.

[36] *Humphrey*, 482 P.3d at 1021 (quoting *Salerno*, 481 U.S. at 750).

[37] *See id.* at 1018.

[38] *See id.* at 1019 (describing detention on public or victim safety grounds as constitutionally permissible "within certain parameters" (citing *Salerno*, 481 U.S. at 750–51; United States v. Fidler, 419 F.3d 1026, 1028 (9th Cir. 2005))).

[39] *Id.*

courts may still impose money bail, but only if (a) the court has considered whether nonfinancial conditions may reasonably protect public and victim safety and assure court appearance, and (b) the court considers the individual's ability to pay when setting the bail amount.[40] Courts may set bail at a level that will result in the person's detention only if there is clear and convincing evidence that no other conditions of release could reasonably protect the state's interests in public and victim safety or court appearance.[41] In Humphrey's case, "the trial court . . . failed to consider Humphrey's ability to afford $350,000 bail (and, if he could not, whether less restrictive alternatives could have protected public and victim safety or assured his appearance in court)."[42] So, the court affirmed the appellate court's decision to grant Humphrey a new bail hearing.[43] All the other justices concurred with no separate opinions.[44]

In *Humphrey*, the California Supreme Court established an important protection for indigent persons in California by extending the reasoning of *Bearden* and *Salerno* to the pretrial money bail context. However, the briefing, oral argument, and lower appellate opinion also discussed two important questions about the appropriate relationship between money bail and public safety: first, whether money bail in California rationally provides any incentive not to commit a crime pretrial, and second, whether California's state constitution provides a right to bail that limits courts' ability to detain persons pretrial on public safety grounds. The *Humphrey* opinion skirted these issues and in doing so limited its full potential to reduce the hardships posed by bail and pretrial detention in California.[45]

Before addressing the limitations of the decision, it is important to note the huge strides the California Supreme Court made in preventing persons from being jailed pretrial simply because of their poverty.[46]

---

[40] *Id.* at 1020.

[41] *Id.*

[42] *Id.* at 1013.

[43] *Id.*

[44] *See id.* at 1022.

[45] In 2015, there were 40,543 individuals detained pretrial in California. VERA INST. OF JUST., INCARCERATION TRENDS IN CALIFORNIA 1 (2019), https://www.vera.org/downloads/pdfdownloads/state-incarceration-trends-california.pdf [https://perma.cc/8N4Z-P4YV].

[46] California joins a small but growing number of jurisdictions affording such protections. *See Humphrey*, 482 P.3d at 1018; ODonnell v. Harris County, 892 F.3d 147, 161 (5th Cir. 2018) (holding unconstitutional "detainment solely due to a person's indigency because the financial conditions for release are based on predetermined amounts beyond a person's ability to pay and without any 'meaningful consideration of other possible alternatives'" (quoting Pugh v. Rainwater, 572 F.2d 1053, 1057 (5th Cir. 1978))); Brangan v. Commonwealth, 80 N.E.3d 949, 957 (Mass. 2017) ("[W]e are persuaded that a judge must consider a criminal defendant's financial resources in setting bail."). Most jurisdictions do not afford such protections. *See* Mayson, *supra* note 2, at 1663 (arguing in favor of extending the due process protections for outright denials of bail to unaffordable bail, but noting that few courts have done so).

This protection is quite valuable in light of the well-documented, detrimental impact of pretrial detention,[47] the race and class inequities of the bail system,[48] and the pressures innocents face to plead guilty when they cannot afford bail.[49] The state does have compelling interests in setting pretrial conditions "to ensure the defendant appears at court proceedings and to protect the victim, as well as the public, from further harm."[50] But in California's pre-*Humphrey* system, many indigents languished in California's jails even though they posed no safety or flight risk, whereas others who may have posed such risks were released because they could pay their money bond.[51] *Humphrey* rejected that approach by holding that a court must first consider whether *nonfinancial* release conditions may reasonably satisfy the state's interests.[52] If they cannot, then the court *must consider ability to pay*, so that a court does not issue bail amounts that are functionally detention orders for less-resourced individuals but which permit release for those with the ability to pay.[53]

Humphrey takes away a court's ability to set unaffordable bail as a way to functionally implement a detention order when it could not meet the requirements of an *explicit* detention order. *Humphrey* extends the same substantive and procedural standards required for pretrial detention under article I, section 12 of the California state constitution — a showing of "clear and convincing evidence" of a threat of serious harm or flight risk[54] and "clear and convincing evidence that no

---

[47] The U.S. Supreme Court has long recognized that "time spent in jail awaiting trial has a detrimental impact on the individual. It often means loss of a job; it disrupts family life; and it enforces idleness." Barker v. Wingo, 407 U.S. 514, 532 (1972). Recent empirical work corroborates this impact. *See, e.g.*, Paul Heaton et al., *The Downstream Consequences of Misdemeanor Pretrial Detention*, 69 STAN. L. REV. 711, 711 (2017) ("[D]etained defendants are 25% more likely than similarly situated releasees to plead guilty, are 43% more likely to be sentenced to jail, and receive jail sentences that are more than twice as long on average.").

[48] *See generally*, *e.g.*, BERNADETTE RABUY & DANIEL KOPF, PRISON POL'Y INITIATIVE, DETAINING THE POOR (2016), https://www.prisonpolicy.org/reports/DetainingThePoor.pdf [https://perma.cc/2SKJ-4XQN]; THE BAIL PROJECT, AFTER CASH BAIL: A FRAMEWORK FOR REIMAGINING PRETRIAL JUSTICE (2020), https://bailproject.org/wp-content/uploads/2020/02/the_bail_project_policy_framework_2020.pdf [https://perma.cc/9Y7F-6KZS].

[49] *See* Heaton et al., *supra* note 47, at 715–17; Megan T. Stevenson, *Distortion of Justice: How the Inability to Pay Bail Affects Case Outcomes*, 34 J.L. ECON. & ORG. 511, 512–13 (2018).

[50] *Humphrey*, 482 P.3d at 1018.

[51] *See id.* at 1016. Pointing out this incongruity is not meant to suggest that a court's determination that a person poses a safety or flight risk should necessarily justify detention. For critiques of risk-based systems, including algorithmic risk assessment tools, see, for example, Brandon Buskey, *Wrestling with Risk: The Questions Beyond Money Bail*, 98 N.C. L. REV. 379 (2020); and Note, *Bail Reform and Risk Assessment: The Cautionary Tale of Federal Sentencing*, 131 HARV. L. REV. 1125, 1132–34 (2018).

[52] *Id.* at 1020. For a discussion of critiques of nonfinancial conditions, see Jenny E. Carroll, *Beyond Bail*, 73 FLA. L. REV. 143, 172–76 (2021).

[53] *See Humphrey*, 482 P.3d at 1018.

[54] *Id.* at 1019.

other conditions of release could reasonably protect those interests"[55] — and the Fourteenth Amendment to orders of unaffordable bail that *cause* individuals to be detained pretrial. It is an "open secret" that courts in right-to-bail states often use unaffordable bail to evade the state's constitutional restrictions on pretrial detention.[56] *Humphrey*'s holding has the potential to bring an end to that practice and revitalize the right to release in a significant number of cases involving no threat of serious violence or in which nonfinancial conditions would suffice.

There are, however, two aspects left open by the *Humphrey* opinion that may limit the transformative potential of its holding. First, *Humphrey*'s sketch of California's bail framework suggests that where no nonfinancial condition can protect the government's interests, a court may conclude that money bail is "reasonably necessary" to assure public and victim safety or court appearance.[57] It may then set *affordable* bail based on an individual's ability to pay, charged offense, and criminal record.[58] The typical rationale for money bail is that it incentivizes persons released pretrial to return to court to retrieve the money they posted as bail.[59] But, as even the District Attorney acknowledged in *Humphrey*, money bail in California cannot possibly serve as an incentive for noncriminal behavior because, under California law, the person can retrieve their bail money even if they commit a new offense while released.[60] Other jurisdictions have rejected that money bail can ever be a reasonable way to secure public safety,[61] yet the California Supreme Court chose not to reckon with this in *Humphrey*. Instead, it left in place a legal fiction with real consequences for those who are forced to pay bail under its

---

[55] *Id.* at 1020. In determining what *reasonably* protects the state's interests, the court recognizes that absolute certainty is unattainable and courts should focus on the risks "that are reasonably likely to occur." *Id.* at 1021.

[56] Mayson, *supra* note 2, at 1663; *see* Jordan Gross, *Devil Take the Hindmost: Reform Considerations for States with a Constitutional Right to Bail*, 52 AKRON L. REV. 1043, 1093 (2018) ("Traditional bail needs money-bail to preserve the option of setting unpayable bail to protect public safety.").

[57] *Humphrey*, 482 P.3d at 1020.

[58] *Id.*

[59] Empirical work challenges this assumption, finding that money bail has negligible impact, especially for low-risk offenders. *See* Insha Rahman, *Undoing the Bail Myth: Pretrial Reforms to End Mass Incarceration*, 46 FORDHAM URB. L.J. 845, 859–62 (2019); *see also* ODonnell v. Harris County, 251 F. Supp. 3d 1052, 1132 (S.D. Tex. 2017), *aff'd in part, rev'd in part*, 892 F.3d 147 (5th Cir. 2018).

[60] *See* Opening Brief on the Merits at 23, *Humphrey*, 482 P.3d 1008 (No. S247278) ("Monetary bail, though, bears no rational relationship to protecting public and victim safety in California because the bail amount cannot be forfeited once a defendant commits a new offense." (citing, inter alia, CAL. PENAL CODE § 1305(a)(l) (West 2021))).

[61] *See, e.g.*, *ODonnell*, 251 F. Supp. 3d at 1119–20 (detailing extensive trial record showing secured money bail does not meaningfully assure appearance or public safety); Brangan v. Commonwealth, 80 N.E.3d 949, 963 (Mass. 2017) ("[A] judge may not consider a defendant's alleged dangerousness in setting the amount of bail . . . ."). Much academic literature supports the same conclusion. *See, e.g.*, Rahman, *supra* note 59, at 862–66; Stevenson & Mayson, *supra* note 1, at 29.

rationale.[62] It will be up to petitioners to argue that within *Humphrey*'s framework, there is no rational basis for a court to conclude that money bail is reasonably necessary to assure public or victim safety.

Second, the court left open the possibility that the right to bail provided by article I, section 12 of California's state constitution was abrogated by article I, section 28(f)(3).[63] Section 28 introduces broader victim and public safety considerations into the bail determination.[64] The State argued that the court should interpret section 28 to mean that defendants who otherwise have a right to bail under section 12 — because they neither are charged with capital crimes nor present clear and convincing evidence of a substantial likelihood of inflicting great bodily harm on release[65] — can nevertheless be detained as long as a court finds they "present a risk to victim or public safety by a preponderance of the evidence."[66] This construction would both lower the evidentiary standard and expand section 12's narrow exemptions to encompass *any* public or victim safety risk. Yet the Court of Appeal chose not to address this argument,[67] and the Supreme Court skirted it as well.[68] A future embrace of such a view of section 28 would abrogate the currently very limited standard for permissible pretrial detention. As such, it would significantly undercut the protection against pretrial detention provided by *Humphrey* by making it easier for courts to justify pretrial detention explicitly without needing to rely on unaffordable bail.

---

[62] "Affordable" bail may still impose hardship. *See* RABUY & KOPF, *supra* note 48, at 3 ("The median bail bond amount in this country represents eight months of income for the typical detained defendant."); *see also* THE BAIL PROJECT, *supra* note 48, at 8 (noting that 40% of Americans report being unable to cover a $400 unexpected expense and bail amounts are regularly higher). Additionally, the risks falling under "public safety" span a huge range of nonviolent behaviors, such as Humphrey's substance abuse, which the prosecutor in this case argued was a public safety risk. *See Humphrey*, 482 P.3d at 1014.

[63] *See* CAL. CONST. art. I, § 28(f)(3) ("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 safety of the victim, 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." (emphasis added)).

[64] *See id.* For competing interpretations of sections 12 and 28, compare Opening Brief on the Merits, *supra* note 60, at 26–48, with Respondent's Brief on the Merits at 30–53, *Humphrey*, 482 P.3d 1008 (No. S247278).

[65] *See* CAL. CONST. art. I, § 12.

[66] *In re* Humphrey, 228 Cal. Rptr. 3d 513, 543 (Ct. App. 2018). This logic fits within a worrisome trend of governments responding to efforts to end money bail by expanding the categories of permissible pretrial detention. *See* Alexa Van Brunt & Locke E. Bowman, *Toward a Just Model of Pretrial Release: A History of Bail Reform and a Prescription for What's Next*, 108 J. CRIM. L. & CRIMINOLOGY 701, 753–61 (2018) ("Judges may simply replace the money bond system with one in which release (and detention) decisions are predicated on empirically-based risk-assessment models, and the level of pretrial detention is affected only marginally, if at all." *Id.* at 753.).

[67] *Humphrey*, 228 Cal. Rptr. 3d at 544.

[68] Although the Supreme Court had requested briefing on the question, Humphrey (Kenneth) on H.C., 417 P.3d 769, 769 (Cal. 2018), it "le[ft] for another day the question of how [the] two constitutional provisions . . . can or should be reconciled," *Humphrey*, 482 P.3d at 1021 n.7.