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## Private Interest, Public Sphere: Eliminating the Use of Commercial Bail Bondsmen in the Criminal Justice System

Thanithia Billings

*Boston College Law School*, [thanithia.billings@bc.edu](mailto:thanithia.billings@bc.edu)

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# PRIVATE INTEREST, PUBLIC SPHERE: ELIMINATING THE USE OF COMMERCIAL BAIL BONDSMEN IN THE CRIMINAL JUSTICE SYSTEM

**Abstract:** The decision to grant bail is the first contact that a judge has with a defendant. If a defendant is unable to pay the set bail amount, this inability affects nearly every aspect of the defendant's case from beginning to end. Despite attempts to ensure insolvency does not solely determine pretrial detention, the current bail system, in many cases, ensures just that. Special interest groups, specifically the bail bond industry, oppose any reform efforts that aim to decrease the use of money in the administration of bail. Defendants unable to afford a bail bondsman can spend weeks, months, and sometimes years detained while awaiting their day in court. Law and public policy compels courts to secure bail only to the extent that it will guarantee a defendant's appearance in court. This Note argues that in order to accomplish this, two important changes must occur. First, commercial bail bonds should be eliminated in favor of a system in which cash bail is not the default method of securing pretrial release. Second, all states should establish and maintain pretrial services agencies that aid courts in making bail determinations.

## INTRODUCTION

By 2007, Florida's Broward County had seen an explosion in its jail population, resulting in illegal levels of overcrowding.<sup>1</sup> To address this overcrowding problem, the county would need to spend between \$60 and \$70 million to build a new jail.<sup>2</sup> Rather than committing this large sum to building a new jail,

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<sup>1</sup> See Brian Haas, *Study on Jail Overcrowding in Broward Spreads Blame*, SUN SENTINEL (Ft. Lauderdale) (Feb. 17, 2007), [http://articles.sun-sentinel.com/2007-02-17/news/0702160715\\_1\\_average-daily-jail](http://articles.sun-sentinel.com/2007-02-17/news/0702160715_1_average-daily-jail) [<https://perma.cc/3N7T-EG2T>] (detailing the consistent overcrowding of Broward County jails and placing blame on a justice system that leaves defendants in jail for long periods of time). With a history of overcrowded jails, a federal decree requires Broward County to provide a bed for every prisoner or risk fines. See Larry Lebowitz, *Jail Crowding Heads to Court*, SUN SENTINEL (Ft. Lauderdale) (July 14, 1998), [http://articles.sun-sentinel.com/1998-07-14/news/9807140016\\_1\\_jail-lawsuit-jail-doors-prisoners](http://articles.sun-sentinel.com/1998-07-14/news/9807140016_1_jail-lawsuit-jail-doors-prisoners) [<https://perma.cc/G4JB-R2GK>] (describing the 1995 federal order).

<sup>2</sup> See Haas, *supra* note 1 (detailing the consistent overcrowding of Broward County jails); see also David M. Reutter & Mel Motel, *Bail Bond Companies Profit While Poorest Defendants Remain in Jail*, PRISON LEGAL NEWS (Sept. 15, 2012), <https://www.prisonlegalnews.org/news/2012/sep/15/bail-bond-companies-profit-while-poorest-defendants-remain-in-jail/> [<https://perma.cc/78N3-3TUZ>] (noting that the cost of building a new jail was estimated to be approximately \$70 million); Scott Wyman, *Pretrial Releases to Be Expanded*, SUN SENTINEL (Ft. Lauderdale) (Jan. 16, 2008), [http://articles.sun-sentinel.com/2008-01-16/news/0801150478\\_1\\_pretrial-release-new-jail-release-program](http://articles.sun-sentinel.com/2008-01-16/news/0801150478_1_pretrial-release-new-jail-release-program)

the Broward County Commission instead doubled the budget of pretrial release services, or pretrial services agencies (“PSAs”), in order to reduce the amount of prisoners in the jail through pretrial release.<sup>3</sup>

Within a year of this decision, Broward County’s jail population decreased significantly.<sup>4</sup> As a result of the decreased population, the county was able to not only refrain from building a new jail but also close a wing of one of its existing jails.<sup>5</sup> The expansion of PSAs saved taxpayers millions of dollars in one year.<sup>6</sup> Criminal justice organizations in Broward County hailed the program as a success.<sup>7</sup>

In 2009, however, the Broward County Commission voted to significantly scale back the use of PSAs.<sup>8</sup> The bail bond industry was at the root of this decision.<sup>9</sup> In the year preceding the vote to scale back PSAs, bail bond compa-

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[<https://perma.cc/YP4Y-XHB7>] (noting that a new jail would cost \$60 million to build and \$30 million per year to run).

<sup>3</sup> See Laura Sullivan, *Bondsman Lobby Targets Pretrial Release Programs*, NPR (Jan. 22, 2010), <http://www.npr.org/templates/story/story.php?storyId=122725849> [<https://perma.cc/R7DV-A8Y3>] (explaining the actions of a bail bondsman lobby to eliminate pretrial services agencies (“PSAs”) in Broward County and how lobbies in other states are undertaking similar measures); Wyman, *supra* note 2 (describing the expansion of pretrial release services). Pretrial release services review a defendant’s background and present circumstances and make recommendations for release to a judge. See Wyman, *supra* note 2. Some criteria that they consider are the nature of the defendant’s charges, criminal history, past court appearances, and mental health issues. *Id.* Some conditions of release are supervision via home visits, electronic monitoring, GPS monitoring, and drug testing. *Id.*

<sup>4</sup> See Reutter & Motel, *supra* note 2, at 36 (calling Broward County’s expansion of PSAs “an amazing success”); see also Russell Nichols, *States Struggle to Regulate the Bond Industry*, GOVERNING (Apr. 2011), <http://www.governing.com/topics/public-justice-safety/States-Struggle-to-Regulate-the-Bond-Industry.html> [<https://perma.cc/BP6Q-DACD>] (exploring the effects of the expansion of Broward County’s PSAs).

<sup>5</sup> See Nichols, *supra* note 4 (noting that the county was able to save \$20 million by expanding PSAs); Sullivan, *supra* note 3 (stating that the commission was able to avoid building a new jail by expanding PSAs).

<sup>6</sup> See Nichols, *supra* note 4. Closing the wing of the existing jail saved \$20 million in operating costs. See *id.* Additionally, the PSAs cost about \$7 a day per defendant to operate whereas housing inmates in jail costs about \$115 a day per inmate. See *id.*

<sup>7</sup> See *id.*; see also Reutter & Motel, *supra* note 2, at 36 (describing the expansion of PSAs as “an amazing success”); Bob Norman, *Broward County Bail Bondsmen Want to Kill Pretrial Intervention, and the County Commission Is Willing to Help*, BROWARD PALM BEACH NEW TIMES (Dec. 18, 2008, 4:00 AM), <http://www.browardpalmbeach.com/news/broward-county-bail-bondsmen-want-to-kill-pretrial-intervention-and-the-county-commission-is-willing-to-help-6312109> [<https://perma.cc/8SGK-DFAY>] (exploring how the expansion of PSAs acted as a solution to overcrowded jails and helped Broward County comply with a 1995 federal order to provide a bed for every prisoner).

<sup>8</sup> See Norman, *supra* note 7 (detailing the circumstances that led the commission to scale back its previous decision to expand PSAs).

<sup>9</sup> See *id.*; see also Nichols, *supra* note 4 (exploring the involvement of the bail bond industry with the Broward County Commission and expansion of PSAs). Bail bondsmen from Broward County were opposed to the expansion of PSAs because it decreased their customer base. See *id.* Additionally, they claimed that operation of PSAs was expensive for taxpayers whereas their services cost taxpayers nothing. See *id.*

nies donated thousands of dollars to county commissioners' campaigns.<sup>10</sup> Additionally, they hired a lobbyist to push the commissioners to decrease funding for PSAs and to encourage them to pass an ordinance decreasing the categories of prisoners that were eligible for release through PSAs.<sup>11</sup> Two years after voting to expand PSAs, the commission passed an ordinance that substantially muted the effect of PSAs.<sup>12</sup> Some criminal justice professionals decried the decision and claimed that the ordinance would result in thousands of prisoners sitting in jail unable to afford their set bail.<sup>13</sup>

The inability to pay bail is not unique to Broward County, and in fact, millions of prisoners throughout the United States are currently incarcerated because they are unable to pay their bail.<sup>14</sup> On Rikers Island in New York City, nearly forty percent of jailed individuals are incarcerated because they cannot

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<sup>10</sup> See Reutter & Motel, *supra* note 2, at 36 (stating that Broward County bail bond companies donated \$23,000 to county commissioners); see also Buddy Nevins, *As Broward Commission Races Take Shape, LaMarca, Keechel Fear Nasty Re-Run*, FL. BULLDOG (Feb. 5, 2014, 6:17 AM), <http://www.floridabulldog.org/2014/02/as-broward-commission-races-take-shape-lamarca-keechel-fear-nasty-re-run/> [<https://perma.cc/CMF5-SJK9>] (detailing the link between one commissioner and the bail bond industry following the commissioner's vote to curb the county's use of PSAs). Ken Keechel, a commissioner who voted in favor of reducing the use of PSAs, received the support of the bail bond industry in his reelection bid. See *id.* Wayne Speath, the president of Brandy Bail Bonds, hosted a fundraiser for Keechel, and Keechel received thousands of dollars from contributors who self-identify as a part of the bail bond industry. See *id.*

<sup>11</sup> See Norman, *supra* note 7 (detailing the hiring of a lobbyist by the Broward County Bail Bondsman Association). Ron Book, the lobbyist hired by the association, was also a lobbyist for the Broward County Commissioners. See *id.*; see also Nichols, *supra* note 4; Reutter & Motel, *supra* note 2, at 36.

<sup>12</sup> See Nichols, *supra* note 4 (describing the effect of the ordinance); Reutter & Motel, *supra* note 2, at 37 (arguing that passage of the ordinance resulted in thousands of people being stuck in Broward County jails because they could not afford to pay a bail bondsman and pretrial release services were no longer available).

<sup>13</sup> See Reutter & Motel, *supra* note 2, at 37. Howard Finkelstein, a Broward County public defender, claims that lobbying by bail bondsmen resulted in poor defendants remaining in jail. See *id.* In reference to the motivations of the bail bondsmen, Finkelstein supplied, "[y]ou're doing it for your own good, that's fine, but then you shouldn't have a seat at the table when public policy is made." See *id.*

<sup>14</sup> See Press Release, N.Y. Civil Liberties Union, *New York City Takes Important Step Toward Ending Destructive Cash Bail System* (July 8, 2015), <http://www.nyclu.org/news/new-york-city-takes-important-step-toward-ending-destructive-cash-bail-system> [<https://perma.cc/SQV9-Q9CR>] [hereinafter Civil Liberties Union Press Release] (noting that nearly forty percent of Rikers' prison population remains in jail solely because they cannot afford bail); see also Ali Montag, *How You Can Get Stuck in Jail Without Being Guilty*, CNBC, (Aug. 3 2015, 9:46 AM), <http://www.cnbc.com/2015/08/03/bail-bonds-the-cost-of-freedom.html> [<https://perma.cc/G644-XYZT>] (stating that forty percent of detainees at New York's Rikers Island cannot afford bail); Shane Bauer, *Here's What Sandra Bland's Death Says About Our Broken Bail System*, MOTHERJONES.COM (Jul. 27, 2015, 2:56 PM), <http://www.motherjones.com/politics/2015/07/sandra-bland-bail-bond-system> [<https://perma.cc/QJN3-M84M>] (detailing apparent suicide of defendant who could not afford \$500 bail bond); Jennifer Gonnerman, *Before the Law*, NEW YORKER (Oct. 6, 2014), <http://www.newyorker.com/magazine/2014/10/06/before-the-law> (exploring three years defendant spent in jail because he could not afford bail after being accused of stealing book bag).

afford bail.<sup>15</sup> States like New Jersey and California have similar or higher levels of pretrial detainees who cannot afford their set bail.<sup>16</sup> The inability to post bail can substantially impact the life of an arrested individual, resulting in loss of income and in some instances, the loss of jobs, housing, and custody of children.<sup>17</sup> With national attention focused on the criminal justice system, these unsettling statistics have made national headlines.<sup>18</sup>

Over the past fifty years, there have been several attempts at widespread bail reform.<sup>19</sup> Several major cities and some states are leading reform efforts in this area.<sup>20</sup> These various reform efforts have focused on ensuring that defendants who represent a danger to the community are detained prior to trial and that insolvency is not the only factor that determines whether a defendant stays

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<sup>15</sup> See Civil Liberties Union Press Release, *supra* note 14.

<sup>16</sup> See April M. Short, *In America, Innocent Until Proven Guilty? Not for Most People Who Are Stuck in Jail*, TRUTHOUT (Dec. 29, 2013, 3:38 PM), <http://www.truth-out.org/news/item/20914-in-america-innocent-until-proven-guilty-not-for-most-people-who-are-stuck-in-jail> [https://perma.cc/9GY2-3NJW]. In California, 60 to 70% percent of the inmates in jail are pretrial defendants. See *id.* In New Jersey, about 40% of the jail population is eligible to post bail but cannot afford to do so. See *id.*; see also Press Release, Drug Policy Alliance, *First-of-Its-Kind New Report Finds New Jersey Jails Packed with Pretrial Inmates Unable to Pay Often Nominal Bail Amounts* (Apr. 8, 2013), <http://www.drugpolicy.org/news/2013/04/first-its-kind-new-report-finds-new-jersey-jails-packed-pretrial-inmates-unable-pay-oft> [https://perma.cc/P3QN-CXUM] (stating that on any given day, nearly 75% of the 15,000 individuals in New Jersey jails are awaiting trial rather than serving a sentence).

<sup>17</sup> See Rachel Lu, *Go Directly to Jail, We'll Collect \$2,000*, FEDERALIST (Oct. 21, 2015), <http://thefederalist.com/2015/10/21/go-directly-to-jail-well-collect-2000> [https://perma.cc/FX7K-B9K6] (noting that the ability to pay bail can be the difference between a defendant keeping their job or losing it, and can save a defendant's children from foster care or result in loss of custody).

<sup>18</sup> See Daniela Altimari, *Malloy Proposes Reforming State's Bail System*, HARTFORD COURANT (Nov. 5, 2015, 6:22 PM), <http://www.courant.com/politics/hc-bail-bond-reform-20151105-story.html> [https://perma.cc/A2CZ-TK8E] (discussing the Connecticut governor's intention to overhaul the state's bail system); Shailla Dewan, *Court by Court, Lawyers Fight Policies That Fall Heavily on the Poor*, N.Y. TIMES (Oct. 23, 2015), [http://www.nytimes.com/2015/10/24/us/court-by-court-lawyers-fight-practices-that-punish-the-poor.html?\\_r=0](http://www.nytimes.com/2015/10/24/us/court-by-court-lawyers-fight-practices-that-punish-the-poor.html?_r=0) [https://perma.cc/HAS6-DVK4] (exploring lawsuits brought in small cities focused on unconstitutional bail schedule practices); Darren Hutchinson, *There's Never Been a Better Time for Bail Reform*, WASH. POST (July 20, 2015), <https://www.washingtonpost.com/posteverything/wp/2015/07/20/theres-never-been-a-better-time-for-bail-reform/> [https://perma.cc/J35Y-87P3] (discussing the national reform movement and how prolonged pretrial detention due to one's inability to make bail affects the justice system).

<sup>19</sup> See Bail Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1976; District of Columbia Court Reform and Criminal Procedure Act of 1970, Pub. L. No. 91-358, 84 Stat. 473; Federal Bail Reform Act of 1966, Pub. L. No. 89-465, 80 Stat. 214.

<sup>20</sup> See N.J. STAT. ANN. §§ 2A:162-15 to -22 (West Supp. 2015); Rick Rojas, *New York City to Relax Bail Requirements for Low-Level Offenders*, N.Y. TIMES (July 8, 2015), <http://www.nytimes.com/2015/07/09/nyregion/new-york-city-introduces-bail-reform-plan-for-low-level-offenders.html> [https://perma.cc/RF62-S2FX] (detailing New York City's proposed bail reform); see also Daniela Altimari, *Gov. Malloy Proposes Elimination of Bail for Some Offenders*, HARTFORD COURANT (Jan. 28, 2016, 7:50 PM), <http://www.courant.com/politics/hc-second-chance-malloy-20160128-story.html> [https://perma.cc/2H7V-7MQG].

in jail prior to trial.<sup>21</sup> Despite attempts to ensure that a defendant's lack of funds does not solely determine pretrial detention, the current bail system, in many cases, ensures just that.<sup>22</sup> Special interest groups, specifically the bail bond industry, oppose reform efforts that aim to decrease the use of money as a way to secure pretrial release.<sup>23</sup> As a result, defendants unable to pay the full amount of bail or a percentage of the bail to a bail bondsman or the court, in some jurisdictions, can spend weeks, months, and sometimes years detained while awaiting their day in court.<sup>24</sup>

This Note argues that in order for bail to be administered fairly and justly, two important changes must occur.<sup>25</sup> First, commercial bail bonds should be eliminated in favor of a system in which cash bail is not the default method of securing pretrial release.<sup>26</sup> Second, all states should establish pretrial services agencies that aid courts in making bail determinations.<sup>27</sup>

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<sup>21</sup> See NAT'L CONFERENCE ON BAIL AND CRIMINAL JUSTICE, PROCEEDINGS AND INTERIM REPORT 297 (1965). In May of 1964, U.S. Attorney General Robert Kennedy convened the National Conference on Bail and Criminal Justice to analyze and discuss specific and workable alternatives to monetary bail. See *id.* at xiv. The conference discussed pretrial topics involving release on recognizance, release on police summons, setting high money bail bonds to prevent pretrial release for public safety purposes ("preventative detention"), pretrial release based on money or other conditions generally, and pretrial release of juveniles. *Id.* at 296; see also 18 U.S.C §§ 3141–3156 (2012) (amending the 1966 Act to include consideration the of danger of a defendant in the determination of bail).

<sup>22</sup> See Nick Pinto, *The Bail Trap*, N.Y. TIMES MAG. (Aug. 13, 2015), <http://www.nytimes.com/2015/08/16/magazine/the-bail-trap.html> [<https://perma.cc/43QJ-5XJN>] (describing the evolution of bail from an emancipatory measure to "a trap door" for defendants who are unable to afford their set bail amount); see also Dan Kopf, *America's Peculiar Bail System*, PRICEONOMICS (May 26, 2015), <http://priceonomics.com/americas-peculiar-bail-system/> [<https://perma.cc/46HZ-U9N7>] (describing bail as a "regressive tax" for poor defendants); Short, *supra* note 16 (noting that forty percent of people in New Jersey's jails are eligible for bail but cannot afford bail).

<sup>23</sup> See Shane Bauer, *Inside the Wild, Shadowy, and Highly Lucrative Bail Industry*, MOTHER JONES (2014), <http://www.motherjones.com/politics/2014/06/bail-bond-prison-industry> [<https://perma.cc/J2BN-ET7Y>] (noting that prior to lobbying by the bail bondsman lobby, commercial bail made up twenty-three percent of pretrial releases nationally but now makes up forty-nine percent); Sullivan, *supra* note 3 (explaining the actions of the bail bondsmen's lobby to eliminate PSAs in Broward County and how lobbies in other states are undertaking similar measures); see also *supra* notes 1–13 and accompanying text (describing the efforts of a bail bondsman association to defund and decrease the efforts of Broward County's PSAs that rely on alternatives to cash bail to secure pretrial release).

<sup>24</sup> See OPEN SOC'Y JUSTICE INITIATIVE, THE SOCIOECONOMIC IMPACT OF PRETRIAL DETENTION 16 (2011) (listing the national pretrial population at 476,000 in 2011); Shima Baradaran, *The State of Pretrial Detention*, in THE STATE OF CRIMINAL JUSTICE 2011, at 187, 190 (Myrna S. Raeder ed., 2011) (estimating that there are 500,000 total pretrial detainees in the United States). Between October 1, 2003, and September 30, 2004, federal defendants who were detained pretrial because they could not afford bail and whose cases were eventually terminated spent an average of 71.2 days in jail. BUREAU OF JUSTICE STATISTICS, COMPENDIUM OF FEDERAL JUSTICE STATISTICS, 2004, at 55 tbl.3.11 (Dec. 2006).

<sup>25</sup> See *infra* notes 178–216 and accompanying text.

<sup>26</sup> See *infra* notes 191–204 and accompanying text.

<sup>27</sup> See *infra* notes 205–216 and accompanying text.

Part I of this Note provides a brief history of bail in the United States.<sup>28</sup> Part II details previous bail reform efforts.<sup>29</sup> Part III reviews the current bail policies of cities and states in the United States and explores how PSAs have been used to eliminate reliance on commercial bail bonds and incorporate alternative release methods.<sup>30</sup> Part IV argues that all states should abolish commercial bail bonds in favor of a pretrial release system centered around PSAs.<sup>31</sup>

## I. AN OVERVIEW OF BAIL IN THE UNITED STATES

American courts have used bail since as early as the 1600s.<sup>32</sup> Bail has evolved from merely a mechanism to secure a defendant's pretrial release into a mechanism intended to secure the subsequent appearance of the defendant, taking into account the flight risk of a defendant and his or her potential dangerousness.<sup>33</sup> This evolution was accomplished through the passage of distinct pieces of federal legislation that reflected changes also occurring on the state level.<sup>34</sup> This Part presents an overview of the use of bail in the United States.<sup>35</sup> Section A explores the impact of bail decisions on the criminal justice process.<sup>36</sup> Section B details the mechanics of bail.<sup>37</sup>

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<sup>28</sup> See *infra* notes 32–77 and accompanying text.

<sup>29</sup> See *infra* notes 78–101 and accompanying text.

<sup>30</sup> See *infra* notes 107–177 and accompanying text.

<sup>31</sup> See *infra* notes 178–216 and accompanying text.

<sup>32</sup> See Caleb Foote, *The Coming Constitutional Crisis in Bail: I and II*, 113 U. PA. L. REV. 959, 967 (1965). In 1641, Massachusetts passed its Body of Liberties, creating an unequivocal right to bail for non-capital cases and rewriting the list of capital cases. See *id.* at 975. In 1682, Pennsylvania adopted a provision in its constitution that was more liberal than Massachusetts, by stating that “all prisoners shall beailable by Sufficient Sureties, unless for capital Offenses, where proof is evident or the presumption great.” See June Carbone, *Seeing Through the Emperor’s New Clothes: Rediscovery of Basic Principles in the Administration of Bail*, 34 SYRACUSE L. REV. 517, 531 (1983) (quoting 5 AMERICAN CHARTERS 3061 (F. Thorpe ed., 1909)). Bail is “security such as cash, a bond, or property . . . required by a court for the release of a criminal defendant who must appear in court at a future time.” See *Bail*, BLACK’S LAW DICTIONARY (10th ed. 2014).

<sup>33</sup> See Carbone, *supra* note 32, at 517 (articulating factors considered in bail determinations and how the determinations reflect the flight risk and dangerousness of the defendants).

<sup>34</sup> Compare Federal Bail Reform Act of 1966 (creating a presumption of release on a defendant’s own recognizance for pretrial release in noncapital cases), with Bail Reform Act of 1984 (amending the Federal Bail Reform Act of 1966 to create a presumption of detention for certain crimes due to the presumptive flight risk and dangerousness of a defendant).

<sup>35</sup> See *infra* notes 32–77 and accompanying text.

<sup>36</sup> See *infra* notes 38–64 and accompanying text.

<sup>37</sup> See *infra* notes 65–77 and accompanying text.

### A. Impact of Bail Decisions on the Criminal Justice Process

In the United States, approximately 780,000 individuals are incarcerated in local jails without an actual conviction.<sup>38</sup> Although they may eventually be found not guilty, these defendants still face the damaging effects of an often-prolonged period of incarceration.<sup>39</sup> Determining bail is usually the first decision made by a judge and has a significant effect on the outcome of a case.<sup>40</sup>

Subsection 1 reviews the effects that bail decisions have on the outcome of criminal cases.<sup>41</sup> Subsection 2 provides an overview of what factors most affect bail decisions.<sup>42</sup>

#### 1. Pretrial Detention's Effects on Justice & Outcome

Pretrial bail decisions influence every subsequent step in the criminal justice process.<sup>43</sup> Defendants that cannot afford their set bail continue to be detained.<sup>44</sup> Research has shown that offenders who are detained during pretrial proceedings are more likely to be convicted, are less likely to have their charges reduced, and are likely to have longer sentences than those who were released before trial.<sup>45</sup> Pretrial detention also increases the likelihood that a de-

<sup>38</sup> See Peter Wagner & Leah Sakala, *Mass Incarceration: The Whole Pie*, PRISON POLICY INITIATIVE (2014), <http://www.prisonpolicy.org/reports/pie.html> [<https://perma.cc/6H76-KFGT>]; see also GERHARD FALK, *THE AMERICAN CRIMINAL JUSTICE SYSTEM: HOW IT WORKS, HOW IT DOESN'T, AND HOW TO FIX IT 2* (2010) (stating that the number of Americans in local jails is 780,000); Solomon Moore, *Prison Spending Outpaces All But Medicaid*, N.Y. TIMES (Mar. 2, 2009), <http://www.nytimes.com/2009/03/03/us/03prison.html> [<https://perma.cc/75H9-9JH6>] (describing the spending for housing 780,000 prisoners in jails across the United States).

<sup>39</sup> See OPEN SOC'Y JUSTICE INITIATIVE, *supra* note 24, at 3 (articulating the lingering societal effects of prolonged pretrial detention); Samuel R. Wiseman, *Pretrial Detention and the Right to Be Monitored*, 123 YALE L.J. 1344, 1346–47 (2014) (describing the effects of pretrial detention).

<sup>40</sup> See Montag, *supra* note 15 (exploring how bail decisions can result in reduced outcomes during pretrial detentions). See generally Marian R. Williams, *The Effect of Pretrial Detention on Imprisonment Decisions*, CRIM. JUST. REV., Autumn 2003, at 299 (exploring how pretrial detention affects case disposition for pretrial detainees).

<sup>41</sup> See *infra* notes 43–55 and accompanying text.

<sup>42</sup> See *infra* notes 56–64 and accompanying text.

<sup>43</sup> See Kopf, *supra* note 22 (examining how the inability to secure bail leads to pretrial detention); Robert Lewis, *No Bail Money Keeps Poor People Behind Bars*, WNYC (Sept. 19, 2013), <http://www.wnyc.org/story/bail-keeps-poor-people-behind-bars/> [<https://perma.cc/SK7L-63DJ>] (describing the process by which people attempt to secure enough money for bail).

<sup>44</sup> See Adam Liptak, *Illegal Globally, Bail for Profit Remains in U.S.*, N.Y. TIMES, Jan. 29, 2008, at A1.

<sup>45</sup> See generally MARY PHILLIPS, N.Y.C. CRIMINAL JUSTICE AGENCY, INC., BAIL, DETENTION, AND FELONY CASE OUTCOMES (2008) [hereinafter PHILLIPS, BAIL, DETENTION, AND FELONY] (exploring the differences in outcomes for felony defendants that have been detained pretrial and those who have not been detained); MARY PHILLIPS, N.Y.C. CRIMINAL JUSTICE AGENCY, INC., PRETRIAL DETENTION AND CASE OUTCOMES, PART I: NONFELONY CASES (2007) [hereinafter PHILLIPS, PRETRIAL DETENTION] (exploring the differences in outcomes for nonfelony defendants that have been detained pretrial and those who have not been detained).

fendant will plead guilty.<sup>46</sup> Therefore, the bail decision process can have significantly adverse effects on defendants who have not been released before trial.<sup>47</sup>

The difference in case outcomes has been seen in both felony and non-felony cases.<sup>48</sup> In felony cases, the overall conviction rate is 68%.<sup>49</sup> Among defendants detained longer than a week, this rate rises to 85% and for defendants who were detained for less than a day the rate drops to 59%.<sup>50</sup> For non-felony cases, the overall conviction rate is 58%; that rate rises to 92% for defendants who were detained and drops to 50% for defendants who were not detained.<sup>51</sup>

Bail outcomes also affect the likelihood of a jail or prison sentence after conviction.<sup>52</sup> For felony cases, the incarceration rate is 57%.<sup>53</sup> For pretrial detainees, this rate rises to 87% compared to 20% for defendants who were not detained prior to trial.<sup>54</sup> For nonfelony cases, the incarceration rate is 32%, whereas among these cases, the incarceration rate for pretrial detainees is 84% but in the case of defendants that were not pretrial detainees, the incarceration rate is only 10%.<sup>55</sup>

## 2. Factors That Affect Bail Decisions

Ideally, bail decisions will release defendants under the least onerous conditions available and eliminate pretrial failures such as failure to appear or

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<sup>46</sup> See HUMAN RIGHTS WATCH, *THE PRICE OF FREEDOM: BAIL AND PRETRIAL DETENTION OF LOW INCOME NONFELONY DEFENDANTS IN NEW YORK CITY 2* (2010) (noting that the threat of pretrial confinement prompts defendants to plead guilty and give up their right to trial); Steven Clarke & Susan Kurtz, *The Importance of Interim Decisions to Felony Trial Court Dispositions*, 74 J. CRIM. L. & CRIMINOLOGY 476, 478 (1983); Pinto, *supra* note 22 (arguing that the current bail system encourages defendants who cannot afford bail to plead guilty).

<sup>47</sup> See Pinto, *supra* note 22 (demonstrating the disparity in outcomes for defendants who are detained prior to trial). Pretrial detention is the highest predictor of conviction when controlling for all other related factors. See *id.* According to a 2012 report by the New York City Criminal Justice Agency, only half of defendants in nonfelony cases were convicted if they were not subjected to pretrial detention compared to ninety-two percent of defendants who were subject to pretrial detention. See *id.*

<sup>48</sup> Compare PHILLIPS, *BAIL, DETENTION, AND FELONY*, *supra* note 45, at 2–6 (investigating the relationship between bail decisions and outcomes in felony cases), with PHILLIPS, *PRETRIAL DETENTION*, *supra* note 45, at 25–29 (exploring how bail affects case outcomes in nonfelony cases).

<sup>49</sup> See PHILLIPS, *BAIL, DETENTION, AND FELONY*, *supra* note 45, at 5.

<sup>50</sup> See *id.*

<sup>51</sup> See PHILLIPS, *PRETRIAL DETENTION*, *supra* note 45, at 25, 28.

<sup>52</sup> See PHILLIPS, *BAIL, DETENTION, AND FELONY*, *supra* note 45, at 5; PHILLIPS, *PRETRIAL DETENTION*, *supra* note 45, at 35.

<sup>53</sup> See PHILLIPS, *BAIL, DETENTION, AND FELONY*, *supra* note 45, at 5.

<sup>54</sup> See *id.*

<sup>55</sup> See PHILLIPS, *PRETRIAL DETENTION*, *supra* note 45, at 38.

violations of the conditions of pretrial release.<sup>56</sup> These decisions require judges to weigh the rights of the defendant against the safety of the community.<sup>57</sup> When making bail decisions, judges often base their decisions on input from members of the community and the criminal justice system.<sup>58</sup> Such input theoretically ensures that decisions are consistent with knowledge about the risks posed by the defendant and the potential effect of his or her release on the community.<sup>59</sup>

Concerns about crime control and community safety, however, have reinforced particular labels about crime and criminality.<sup>60</sup>

For instance, multiple studies have assessed whether race and ethnicity affect decisions to grant bail and to release defendants before trial, finding that race and ethnicity play a significant role in bail decisions.<sup>61</sup> These analyses have found that racial disparities are significant and have been stable over time.<sup>62</sup>

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<sup>56</sup> See 18 U.S.C. § 3142 (2012) (mandating that a defendant subject to conditions of bail must be given “the least restrictive further condition, or combination of conditions” to assure his or her reappear-ance in court and the safety of the community); JOHN CLARK, A FRAMEWORK FOR IMPLEMENTING EVIDENCE-BASED PRACTICES IN PRETRIAL SERVICES 3 (2008) (describing factors for a judge to consider when making bail decisions).

<sup>57</sup> See CLARK, *supra* note 56, at 3 (describing how pretrial services assess flight risk and dangerousness to the community prior to making a bail recommendation to a judge); see also 18 U.S.C. §§ 3141–3150 (allowing courts to use potential danger to the community as a factor in considering conditions of release).

<sup>58</sup> See MARY PHILLIPS, A DECADE OF BAIL RESEARCH IN NEW YORK CITY 57 (2012) (acknowledging the large role a prosecutor’s bail recommendation plays on a judge’s bail determination). Controlling for other relevant factors related to bail determination, a prosecutor’s bail request was the strongest predictor of a judge’s bail determination. See *id.*; see also CLARK, *supra* note 56, at 28 (noting that consideration is given to the effects that conditions imposed on a defendant will have on other members of the community).

<sup>59</sup> See CLARK, *supra* note 56, at 3 (noting that pretrial services officers gather information to effectuate the best bail decision for defendants). See generally Scott Spivak, *Prosecutor’s Role in Bail Reform*, N.Y. LAW J., Mar. 6, 2013, at 6 (exploring the role of a prosecutor’s bail recommendation).

<sup>60</sup> See George S. Bridges et al., *Crime, Social Structure and Criminal Punishment: White and Nonwhite Rates of Imprisonment*, 34 SOC. PROBLEMS 345, 351 (1987) (noting that factors other than those enumerated for a judge to consider often drive decisions within the criminal justice system).

<sup>61</sup> See Marvin D. Free, Jr., *Race and Presentencing Decisions in the United States: A Summary and Critique of the Research*, 27 CRIM. JUST. REV. 203, 221 (2002) (exploring how race affects pre-trial decisions).

<sup>62</sup> See Traci Schlesinger, *Racial and Ethnic Disparity in Pretrial Criminal Processing*, 22 JUST. Q. 170, 187 (2005) (“Judges use racialized attributions to fill in the knowledge gaps created by limited information on cases and defendants. Through this process, racial and ethnic stereotypes become pertinent ‘knowledge’ that direct criminal justice decisions.”); Christine Tartaro & Christopher M. Sedelmaier, *A Tale of Two Counties: The Impact of Pretrial Release, Race and Ethnicity upon Sentencing Decisions*, 22 CRIM. JUST. STUD. 203, 218 (2009) (arguing that the race and ethnicity of a defendant often act as shorthand for perceived dangerousness and flight risk when no other information is available for bail decisions); see also K.B. Turner & James B. Johnson, *A Comparison of Bail Amounts for Hispanics, Whites, and African Americans: A Single County Analysis*, 30 AM. J. CRIM. JUST. 35, 50 (2005) (finding that higher bail amounts for Latino defendants were perhaps attributable to negative stereotypes); John Wooldredge, *Distinguishing Race Effects on Pre-Trial Re-*

Though race and socioeconomic status play a significant role in bail decisions, severity of the offense and prior record seem to be the strongest predictors of pretrial release decisions.<sup>63</sup> Additionally, factors indicating the likelihood of conviction, such as blameworthiness and the need to protect the community, significantly influence whether a suspect will be granted release, and if so, what amount of bail will be set.<sup>64</sup>

### B. The Mechanics of Bail

When a person is arrested, a judge determines whether to offer pretrial release by setting bail.<sup>65</sup> Typically, a judge will set an amount of money that must be paid to the court before the defendant can be released.<sup>66</sup> When setting bail, a judge has wide discretion to consider and weigh a myriad of factors.<sup>67</sup> Examples of such factors are the severity of the crime or the defendant's connection to the community.<sup>68</sup> In some jurisdictions, however, judges have much less discretion and a bail schedule is predetermined.<sup>69</sup>

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*lease and Sentencing Decisions*, 29 JUST. Q. 41, 67 (2012) (noting that at an initial court appearance, a judge's "attempt to assess an offender's risk for flight and dangerousness to the community with little available information" could lead to "considerations of criminal stereotypes").

<sup>63</sup> See JOHN GOLDKAMP & MICHAEL R. GOTTFREDSON, POLICY GUIDELINES FOR BAIL: AN EXPERIMENT IN COURT REFORM 15 (1985) (demonstrating that prior record and severity of crime significantly predict bail determination); JENNIFER HEDLUND & KATHLEEN BANTLEY, THE DEVELOPMENT OF GUIDELINES FOR FINANCIAL BOND RECOMMENDATIONS 3 (2009) (indicating that the severity of the charged offense was the most significant predictor of the amount of bail set); Curtis E.A. Karnow, *Setting Bail for Public Safety*, 13 BERKELEY J. CRIM. L. 1, 10 (2008) (noting that severity of the charged offense is often the most decisive factor in a judge's bail determination).

<sup>64</sup> See Brian Montopoli, *Is the U.S. Bail System Unfair?*, CBS NEWS (Feb. 8, 2013, 1:20 PM), <http://www.cbsnews.com/news/is-the-us-bail-system-unfair/> [<https://perma.cc/EK75-GJL8>] (discussing the bail process and the mechanics of the system of bail); *Bail Basics: What Bail Is, How It Works*, MASS. COURT SYS., <http://www.mass.gov/courts/selfhelp/criminal-law/bail-basics.html> [<https://perma.cc/XY34-F4UT>] (describing the bail process and noting the determining factors of bail).

<sup>65</sup> See Montopoli, *supra* note 64 (discussing the bail process and the mechanics of bail); *In Court Bail Process*, MASS. COURT SYS., <http://www.mass.gov/courts/selfhelp/criminal-law/in-court-bail.html> [<https://perma.cc/VLD9-VU6D>] (describing the process of bail determination in Massachusetts).

<sup>66</sup> See Karnow, *supra* note 63, at 3 (describing the procedure by which a judge makes a bail determination); *In Court Bail Process*, *supra* note 65 (articulating how the bail process occurs in Massachusetts court proceedings).

<sup>67</sup> See Karnow, *supra* note 63, at 3 (describing the factors that judges use when deciding what to set as the conditions of release).

<sup>68</sup> See *id.* The judge will also take into account the defendant's prior criminal record as well as any past instances in which the defendant failed to appear in court. See *id.* Other factors include flight risk and the defendant's potential danger to the community. See *id.*

<sup>69</sup> See Lindsey Carlson, *Bail Schedules: A Violation of Judicial Discretion?*, CRIM. JUST., Spring 2011, at 12 (exploring the use of bail schedules and how they operate to curtail judicial discretion); see, e.g., CAL. R. CT. 4.102 (laying out standard bail amounts for certain offenses in California).

After the amount of bail has been set, a defendant can give cash, a bond, or property to a court to cover the amount of bail and secure pretrial release.<sup>70</sup> If the defendant subsequently fails to appear in court, the court may keep the bail amount and issue a warrant for the defendant's arrest.<sup>71</sup> If, however, the defendant appears in court as required, the bail amount will be returned at the conclusion of the case.<sup>72</sup>

There are several different methods to secure release.<sup>73</sup> The most common method of release in the United States involves commercial bail bondsmen.<sup>74</sup> The arrested individual will pay the bail bondsmen a fee, usually a percentage of the entire bail amount.<sup>75</sup> The bail bondsmen will then pay the entire amount of bail to the court to secure the individual's release.<sup>76</sup> Unlike other methods of securing pretrial release, even if the defendant meets his or her requisite appearances in court, and even if the defendant is ultimately found not guilty, the bail bondsman keeps the fee.<sup>77</sup>

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<sup>70</sup> See Kopf, *supra* note 22 (examining factors of the United States' bail system that make it unique from that of other countries); Lewis, *supra* note 43 (describing the use of property and money to secure the release of a detained defendant).

<sup>71</sup> See 18 U.S.C. § 3146 (2012) (noting that the punishment for failure to appear before court as required is forfeiture of any property given to secure release); Montopoli, *supra* note 64 (explaining the consequences of posting bail and then failing to attend subsequent court appearances).

<sup>72</sup> See Montopoli, *supra* note 64 (explaining the return of bail process at the end of a case); *In Court Bail Process*, *supra* note 65 (stating that bail is returned at the end of a trial if the defendant attends all required court hearings and trials).

<sup>73</sup> See, e.g., PA. RULE CRIM. P. 524 (describing the types of bail bonds available to secure pretrial release). Release on recognizance, unsecured bonds, and secured bonds are examples of methods of securing pretrial release. See *id.* Release on recognizance is "the pretrial release of an arrested person who promises, usually in writing but without supplying a surety or posting bond, to appear for trial at a later date." *Release on Recognizance*, BLACK'S LAW DICTIONARY (10th ed. 2014). An unsecured bond is "a bond that holds a defendant liable for a breach of the bond's conditions (such as failure to appear in court), but that is not secured by a deposit of or lien on property." *Unsecured Bail Bond*, BLACK'S LAW DICTIONARY (10th ed. 2014).

<sup>74</sup> See Karnow, *supra* note 64, at 4 (noting that bail bondsmen are used as a method to secure pretrial release); Kopf, *supra* note 22 (exploring the place of bail bondsmen in the U.S. bail system).

<sup>75</sup> See Karnow, *supra* note 64, at 4 (explaining role of bail bondsmen and how they are compensated); Kopf, *supra* note 22 (exploring the role of bail bondsmen in the U.S. bail system).

<sup>76</sup> See Karnow, *supra* note 64, at 4 (describing how bail bondsmen secure the release of detained a defendant); Kopf, *supra* note 22 (demonstrating the role of bail bondsmen in assuring the release of a detained defendant).

<sup>77</sup> See Karnow, *supra* note 64, at 4 (noting that the fee paid to bail bondsmen is not returned to a defendant at the conclusion of a case); Kopf, *supra* note 22 (stating that a bail bondsman does not return the fee paid to them by a detained defendant).

## II. AN OVERVIEW OF PREVIOUS BAIL REFORM EFFORTS IN THE UNITED STATES

Over the years, the U.S. bail system has been the target of much criticism and many reform efforts.<sup>78</sup> A 1927 study, *The Bail System in Chicago*, publicized the inequities of the bail system and explored the possibility of using alternatives to commercial bail to effectuate pretrial release.<sup>79</sup> The study concluded that the system neither guaranteed security to the community nor safeguarded the rights of defendants.<sup>80</sup> The study recommended increased use of summons to avoid unnecessary arrests, and fact-finding investigations at the time of arrest so that bail determinations could be tailored to each individual situation.<sup>81</sup>

In a series of decisions in the 1950s, the U.S. Supreme Court established some limits and protections in the use of bail.<sup>82</sup> In 1951, in *Stack v. Boyle* and *Carlson v. Landon*, the U.S. Supreme Court established that bail cannot be excessive in violation of the Eighth Amendment, and that courts are not mandated to set a bail amount.<sup>83</sup> Federal and state legislatures may determine bail's parameters and what categories of crimes are entitled to bail.<sup>84</sup> When legislatures permit the use of bail bonds, however, there must be an individualized determination using standards designed to set the bail bond at "an amount rea-

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<sup>78</sup> See James Pinkerton & Lauren Caruba, *Tough Bail Policies Punish the Poor and the Sick*, *Critics Say*, HOUSTON CHRONICLE (Dec. 28, 2015, 1:17 PM), <http://www.houstonchronicle.com/news/houston-texas/houston/article/Tough-bail-policies-punish-the-poor-and-the-sick-6721984.php> [<http://perma.cc/AH9H-VARB>] (describing problems with the bail system at Harris County Jail in Texas); Margaret Talbot, *The Case Against Cash Bail*, NEW YORKER (Aug. 25, 2015), <http://www.newyorker.com/news/news-desk/the-case-against-cash-bail> [<https://perma.cc/AH9H-VARB>] (arguing for an elimination of cash bail as a way to address the problem of high incarceration rates). See generally JUSTICE POLICY INST., FOR BETTER OR FOR PROFIT: HOW THE BAIL BONDING INDUSTRY STANDS IN THE WAY OF FAIR AND EFFECTIVE PRETRIAL JUSTICE (2012) (arguing that the bail bond industry is an impediment to a fair and just system of bail administration).

<sup>79</sup> See generally ARTHUR L. BEELEY, *THE BAIL SYSTEM IN CHICAGO* (1966). A 1929 study found that bail amounts were based solely on the alleged offense and that about twenty percent of the defendants were unable to post bail. *Id.* at 23. The author of that study also noted that professional bondsmen played too important a role in the administration of the criminal justice system and reported a number of abuses by bondsmen, including their failure to pay the court for forfeited bonds in the case of defendants who fail to appear in court. See *id.*

<sup>80</sup> See *id.*

<sup>81</sup> See *id.*

<sup>82</sup> See *Carlson v. Landon*, 342 U.S. 524, 545–46 (1952) (holding that the Eighth Amendment does not prevent Congress from defining the classes of cases in which bail will be allowed); *Stack v. Boyle*, 342 U.S. 1, 3 (1951) (examining the constitutionality of seemingly excessive bail set by a trial court).

<sup>83</sup> See *Carlson*, 342 U.S. at 546–47 (noting that it is within Congress's powers to limit the types of crimes for which courts are entitled to set bail); *Stack*, 342 U.S. at 3 (interpreting the Eighth Amendment to mean that bail may not be set greater than necessary to ensure the presence of a defendant at trial and possibly to establish an underlying right to bail).

<sup>84</sup> See *Carlson*, 342 U.S. at 546–47

sonably calculated” to insure the defendant’s return to court.<sup>85</sup> When the purpose of a bail bond is only to prevent flight, the monetary amount must be set only as high as is necessary to meet that goal.<sup>86</sup>

In 1966, Congress reacted to criticisms similar to those in the 1927 Chicago study, and passed the Federal Bail Reform Act of 1966.<sup>87</sup> Generally, the 1966 Act provided that non-capital defendants were to be released pending trial on their personal recognizance unless a judicial officer determined that such release did not adequately ensure a defendant’s appearance at trial.<sup>88</sup> In those cases, the 1966 Act mandated that a judge choose the least restrictive alternatives from a list of conditions designed to secure a defendant’s appearance.<sup>89</sup> In contrast, the 1966 Act set the bail of defendants charged with a capital offense through a different standard that took into account public safety.<sup>90</sup> For capital defendants, judges could also consider concerns regarding a defendant’s potential danger to the community in addition to the likelihood of a defendant’s flight.<sup>91</sup>

Despite passage of the 1966 Act, the bail reform movement declined considerably by the late 1960s.<sup>92</sup> Few of the early pretrial continued to operate, and those that did faced minimal financial support from the government.<sup>93</sup> Because there was no mechanism for gathering background information on defendants detailed in the 1966 Act, in 1974, Congress created ten pilot pretrial agencies within the federal courts to provide judges with the information nec-

<sup>85</sup> See *Stack*, 342 U.S. at 3–4 (noting that bail’s function is limited and can only be set to ensure the presence of a defendant at court appearances).

<sup>86</sup> See *id.*

<sup>87</sup> See Federal Bail Reform Act of 1966, Pub. L. No. 89-465, 80 Stat. 214. The 1966 Act contained the following provisions: (1) a presumption in favor of releasing non-capital defendants on their own recognizance; (2) conditional pretrial release with conditions imposed to reduce the risk of failure to appear; and (3) review of bail bonds for defendants detained for twenty-four hours or more. *Id.*

<sup>88</sup> See *id.* § 3146 (2012) (explaining the conditions of release in noncapital cases).

<sup>89</sup> See *id.*

<sup>90</sup> See *id.* § 3148 (describing the conditions of release in capital cases).

<sup>91</sup> See *id.* After passage of the Federal Bail Reform Act of 1966, many states passed similar statutes. See WAYNE H. THOMAS, JR., *BAIL REFORM IN AMERICA* 162 (1976). By 1971, at least thirty-six states had enacted statutes authorizing the release of defendants on their own recognizance. See *id.*

<sup>92</sup> See *id.* at 161–70 (exploring the effects of the 1966 Act on bail administration).

<sup>93</sup> See *id.* at 5. An example of an early failure of PSAs is a case against the Harris County, Texas, Pretrial Release Agency, in which a federal court acted to remedy “severe and inhumane overcrowding of inmates” at the Harris County jail. See *Alberti v. Sheriff of Harris Cty.*, 406 F. Supp. 649 (S.D. Tex. 1975). Despite early success, the federal court found the county’s PSA to be “foundering” and “ineffective” in 1975. See *id.* at 651. Several reasons contributed to the failure of the agency, such as harassment and sabotage by commercial bail bondsmen, inefficient physical placement, and the agency’s inadequate budget and personnel. See *id.* To help resolve the agency’s shortcomings, the court ordered it to adopt an objective point system for evaluating release on recognizance. See *id.* The court intended the new system to adopt a meaningful objective standard to determine release decisions. See *id.* at 653.

essary to make release decisions.<sup>94</sup> As a result of this pilot program, Congress passed the Pretrial Services Act of 1982, which established pretrial services agencies in federal district courts.<sup>95</sup>

Although pretrial services programs somewhat grew after the 1966 Act, a new debate over the administration of bail began.<sup>96</sup> Heightened public concern over crimes committed by defendants released on bail ushered in a new era in bail reform.<sup>97</sup> In 1984, Congress passed the Comprehensive Crime Control Act of 1984.<sup>98</sup> Chapter I of that Act contained the Bail Reform Act of 1984, which amended the 1966 Act to include a requirement that judicial officers consider the potential danger of a defendant in order to address “the alarming problem of crimes committed by persons on release.”<sup>99</sup> The 1984 Act was the last major piece of legislation to address the administration of bail at the federal level.<sup>100</sup> Many states adopted similar statutes.<sup>101</sup>

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<sup>94</sup> See JOHN CLARK & D. ALAN HENRY, U.S. DEP’T OF JUSTICE, PRETRIAL SERVICES PROGRAMMING AT THE START OF THE 21ST CENTURY: A SURVEY OF PRETRIAL SERVICES PROGRAMS 2 (2003). The agencies, following and expanding on approaches initially developed by pretrial services projects in state court systems, developed strong support from judges and magistrates in the pilot districts. *See id.*; *see also* 18 U.S.C. §§ 3141–3151 (2012).

<sup>95</sup> *See* Pretrial Services Act of 1982, Pub. L. No. 97-267, Sect. 2, 96 Stat. 1136 (codified at 18 U.S.C. § 3152).

<sup>96</sup> *See* PRETRIAL SERVS. RESOURCE CTR., THE SUPERVISED PRETRIAL RELEASE PRIMER 5 (1999) (describing the bail reform movement that occurred in the 1970s after passage of the 1966 Act).

<sup>97</sup> *See id.* Under the 1966 Act, only defendants charged with capital offenses could be detained if the court found that “no one condition or combination of conditions will reasonably assure that the person will not flee or pose a danger to any other person or the community.” *See* 80 Stat. at 215–16; *see also* PRETRIAL SERVS. RESOURCE CTR., *supra* note 96, at 5. Judges were not authorized to consider danger to the community for any other bailable defendants. *See id.*

<sup>98</sup> *See* Bail Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1976.

<sup>99</sup> *Id.* The 1984 Act mandates “pretrial release of the person on personal recognizance, or upon execution of an unsecured appearance bond in an amount specified by the court . . . unless the judicial officer determines that such release will not reasonably assure the appearance of the person as required or will endanger the safety of any other person or the community.” *See* 83 Stat. at 1977. The Act further provides that if, after a hearing, “the judicial officer finds that no condition or combination of conditions will reasonably assure the appearance of the person and the safety of any other person and the community, such judicial officer shall order the detention of the person before trial.” *Id.* The Act also creates a rebuttable presumption toward confinement when the person has committed certain delineated offenses, such as crimes of violence or serious drug crimes. *See id.*

<sup>100</sup> *See* 18 U.S.C. §§ 3141–3151. The 1984 Act faced a challenge in the U.S. Supreme Court in 1987 in *United States v. Salerno*, in which a defendant challenged the constitutionality of the provision allowing courts to consider dangerousness in making its bail determination. *See* 481 U.S. 739 (1987). The Court determined that the 1984 Act did not violate the Due Process Clause of the Fifth Amendment, nor the Excessive Bail Clause of the Eighth Amendment to the U.S. Constitution. *See id.* at 755. Passage of the 1984 Act changed the landscape of bail administration. *See* GOV’T ACCOUNTING OFFICE, CRIMINAL BAIL: HOW BAIL REFORM IS WORKING IN SELECTED DISTRICT COURTS I (1987). The 1984 Act was not necessarily revolutionary in the ideas that it put forward. *See id.* Many statutes had already been implemented on the state level. *See id.* The Act instead legitimized states’ actions as the path that pretrial detention would be taking in the United States. *See id.* After passage of the Act, the amount of pretrial detainees increased. *See id.* A higher percentage of the defendants detained

Though widespread bail reform efforts have not resulted in legislative changes similar to that of the 1966 Act and the 1984 Act, recent court decisions demonstrate that bail reform efforts are very much ongoing.<sup>102</sup> These efforts often focus on ensuring that indigent defendants are not held in pretrial detention merely because they cannot afford to pay bail.<sup>103</sup> This position has recently been bolstered by an amicus curiae brief submitted by the U.S. Department of Justice (“DOJ”) in support of the plaintiff in *Walker v. City of Calhoun, Georgia*.<sup>104</sup> In the brief, the DOJ argues that bail practices that “allow for the pretrial release of only those who can pay, without accounting for the ability to pay, unlawfully discriminate based on indigence.”<sup>105</sup> Such a sweeping statement point to a tide of change within the realm of bail reform.<sup>106</sup>

### III. HOW BAIL BONDSMEN AFFECT THE U.S. JUSTICE SYSTEM

The rise of the industry of commercial bail bondsmen coincided with a rise in bail amounts.<sup>107</sup> This increase in bail amounts also led to a higher percentage of defendants who were unable to afford bail and who remained in jail

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pretrial were detained due to their perceived level of danger to the community. *See id.* Additionally, the amount of crimes committed by defendants out of jail on a bail bond decreased. *See id.*

<sup>101</sup> *See* John S. Goldkamp, *Danger and Detention: A Second Generation of Bail Reform*, 76 J. CRIM. L. & CRIMINOLOGY 1, 15 (1985) (noting that prior to passage of the 1984 Act, twenty-three states already considered dangerousness in bail decisions and eleven states joined them after the 1984 Act).

<sup>102</sup> *See* *Walker v. City of Calhoun, GA*, No. 4:15-CV-0170-HLM, 2016 WL 361612, at \*10 (N.D. Ga. Jan. 28, 2016) (noting that any bail law that does not consider the ability to pay violates Fourteenth Amendment); *United States v. Flowers*, 946 F. Supp. 2d 1295, 1301 (M.D. Ala. 2013) (arguing that any sentence that is imposed solely because of indigence is unconstitutional); *State v. Blake*, 642 So. 2d 959, 968 (Ala. 1994) (declaring bail law unconstitutional that, on its face, discriminated against the indigent).

<sup>103</sup> *See* Editorial, *Bail Reform for Indigent Suspects*, N.Y. TIMES (Oct. 2, 2015), [http://www.nytimes.com/2015/10/03/opinion/bail-reform-for-indigent-suspects.html?\\_r=0](http://www.nytimes.com/2015/10/03/opinion/bail-reform-for-indigent-suspects.html?_r=0) [<https://perma.cc/44QA-FV6U>] (arguing that bail reform in general and more specifically in the case of indigent defendants); Jason Salzman, *Advocates Push Bail Reform to Stop “Penalizing People for Being Poor.”*, REWIRE (Oct. 2, 2011), <https://rewire.news/article/2015/10/02/advocates-push-bail-reform-stop-penalizing-people-poor/> [<https://perma.cc/Q8F9-46Q8>] (detailing bail reform efforts in Colorado centered around indigent defendants).

<sup>104</sup> *See generally* Brief for the United States as Amicus Curiae Supporting Plaintiff-Appellee, *Walker v. City of Calhoun, GA*, No. 16-19521-HH (11th Cir Aug. 18, 2016) (detailing DOJ’s argument for affirmation of lower court’s decision to declare treatment of indigent plaintiff unconstitutional).

<sup>105</sup> *Id.* at 18.

<sup>106</sup> *See infra* note 103 and accompanying text (detailing reform efforts centered around indigent defendants).

<sup>107</sup> *See* F.E. DEVINE, COMMERCIAL BAIL BONDING: A COMPARISON OF COMMON LAW ALTERNATIVES 26 (1991) (exploring the rise of bail amounts and the bail bondsman industry in the United States).

until the completion of their case.<sup>108</sup> With jail overcrowding identified as a widespread problem, cities and states in the United States have explored ways in which they can decrease the jail population.<sup>109</sup> In light of the high proportion of jailed defendants who are merely awaiting trial and cannot afford bail, cities and states are investigating how bail is administered in an effort to decrease the number of people incarcerated.<sup>110</sup>

This Part discusses how bail administration impacts the criminal justice system.<sup>111</sup> Section A reviews the rise of the bail bonding industry and its effect on bail administration.<sup>112</sup> Section B compares bail administration in states that have banned commercial bail bondsmen and states that have not.<sup>113</sup>

### A. *The Rise of Bail Bondsmen and Their Effect on Bail*

As early as the 1920s, the U.S. commercial bail bond profession flourished as a result of arbitrarily high bail amounts and a growing number of defendants who were unable to pay these high amounts.<sup>114</sup> By 1963, courts began to question a system that was based on secured bonds and dominated by commercial bail bondsmen.<sup>115</sup> The corrupt and sometimes abusive practices of bail bondsmen became the focus of inquiries.<sup>116</sup>

<sup>108</sup> See *id.* Other countries from common law traditions did not see this rise in bail bondsmen, due mostly to moving away from monetary bail. See *id.* Additionally, these countries, with the exception of the Philippines, banned profiting from bail bonds, which, of course, did not allow for an increase in the number of bail bondsmen. See *id.*

<sup>109</sup> LEGISLATIVE ANALYST OFFICE, *Reducing Prison Overcrowding in California* (Aug. 5, 2011), [http://www.lao.ca.gov/reports/2011/crim/overcrowding\\_080511.aspx](http://www.lao.ca.gov/reports/2011/crim/overcrowding_080511.aspx) [https://perma.cc/3U79-BPW9] (providing a status report on efforts to reduce jail overcrowding in California); *Prison Overcrowding Walks 'Alabama Down Road to Federal Intervention,' Lawmaker Says*, ALA. MEDIA (June 29, 2015, 5:18 PM), [http://www.al.com/news/index.ssf/2015/06/prison\\_overcrowding\\_walks\\_alab.html](http://www.al.com/news/index.ssf/2015/06/prison_overcrowding_walks_alab.html) [https://perma.cc/2KNM-5CMZ] (exploring the overcrowding of jails in Alabama and the possibility of intervention from the federal government).

<sup>110</sup> See Marcia Johnson & Luckett Anthony Johnson, *Bail: Reforming Policies to Address Overcrowded Jails, the Impact of Race on Detention, and Community Revival in Harris County, Texas*, 7 NW. J.L. & SOC. POL'Y 42 (2012) (exploring how bail policies can be reformed to alleviate overcrowded prisons); Rebecca Davis O'Brien & Michelle Hackman, *No-Bail Programs Aim to Relieve Jail Overcrowding*, WALL ST. J. (July 8, 2015), <http://www.wsj.com/articles/no-bail-programs-aim-to-relieve-jail-overcrowding-1436402595> [http://perma.cc/Z59D-4PX6].

<sup>111</sup> See *infra* notes 107–177 and accompanying text.

<sup>112</sup> See *infra* notes 114–132 and accompanying text.

<sup>113</sup> See *infra* notes 133–177 and accompanying text.

<sup>114</sup> See Shadd Maruna et al., *Putting a Price on Prisoner Release: The History of Bail and a Possible Future of Parole*, 14 PUNISHMENT & SOC'Y 315, 325–26 (2014) (describing the rise of the bail bonding industry and highlighting conditions that have allowed the industry to prosper over time); THOMAS, *supra* note 91, at 11–12 (analyzing the rise of commercial bail bondsmen).

<sup>115</sup> See THOMAS, *supra* note 91, at 13 (describing bail reform efforts resulting from the rise of commercial bail bondsmen).

<sup>116</sup> See *id.* at 15–16; see also NAT'L CONFERENCE ON BAIL AND CRIMINAL JUSTICE, *supra* note 21, 240–46 (describing an Illinois bail reform plan that was a direct result of an investigation into the corrupt practices of the Illinois bail bonding industry).

Increased judicial reliance on personal recognizance bonds and PSAs for supervision of released defendants created friction between these agencies and the commercial bail bonding industry.<sup>117</sup> To this day, this tension drives proposed legislation on the administration of bail.<sup>118</sup> In recent years, the struggle between commercial bail bondsmen and PSAs has taken place mostly in state legislatures, with intense fights in several states.<sup>119</sup>

During the mid-1990s, commercial bail bond organizations, including the National Association of Bail Insurance Companies and various state bail organizations, worked with the American Legislative Exchange Council (“ALEC”) to create an initiative titled “Strike Back!”<sup>120</sup> Strike Back was an aggressive and concerted effort to eliminate pretrial services agencies and release on personal recognizance bond to promote the interests of the commercial surety industry.<sup>121</sup>

Due in large part to campaigns led by bail bond industry lobbyists, some states have passed legislation that imposes burdensome administrative report-

<sup>117</sup> See SPURGEON KENNEDY & D. ALAN HENRY, PRETRIAL SERVS. RES. CTR., COMMERCIAL SURETY BAIL: ASSESSING ITS ROLE IN THE PRETRIAL RELEASE AND DETENTION DECISION 2 (1996).

<sup>118</sup> See Bruce Murphy, *Bail Bond Bill Will Create Debtor's Prisons*, URBAN MILWAUKEE (May 21, 2013, 12:45 PM), <http://urbanmilwaukee.com/2013/05/21/murphys-law-bail-bond-bill-will-create-debtors-prisons/> [<https://perma.cc/G6VN-5LMJ>] (arguing that legislation reintroducing commercial bail bondsmen into Wisconsin would result in an increased population of defendants remaining in prison due to an inability to afford bail); Marilyn Odendahl, *Dispute Over Bail Bonds Likely to Produce a Legislative Solution*, THEINDIANALAWYER.COM (July 31, 2013), <http://www.theindianalawyer.com/dispute-over-bail-bonds-likely-to-produce-a-legislative-solution/PARAMS/article/32025> [<https://perma.cc/ND7B-24BX>] (describing the tension between bail bondsmen and judges over the use of bail bonds that allow defendants to be released without the use of bail bondsmen).

<sup>119</sup> See Tamara Dietrich, *Bail Bill Would Punish Defendants for Not Being Poor*, DAILYPRESS (Feb. 2, 2010), [http://articles.dailypress.com/2010-02-02/news/dp-local\\_tamara\\_0203feb03\\_1\\_pretrial-defendants-bank-account](http://articles.dailypress.com/2010-02-02/news/dp-local_tamara_0203feb03_1_pretrial-defendants-bank-account) [<https://perma.cc/GS8U-9G3M>] (exploring a Virginia law that would limit the use of pretrial services agencies to only indigent defendants). In Virginia, the for-profit bail bond industry unsuccessfully lobbied for passage of a bill that would significantly limit judicial discretion by requiring financial bonds in every criminal case unless the defendant was identified as indigent, and reduce state funding for Virginia's pretrial services programs. See *id.* In Georgia, for-profit bail bonding interests successfully backed a bill that reduced the types of defendants who may be released to a pretrial services program with electronic monitoring. See H.B. 306, 150th Gen. Assemb., Reg. Sess. (Ga. 2009); PROF'L BAIL AGENTS OF THE U.S., 2009 PBUS MIDYEAR MEETING 3 (2009) (discussing Representative Len Walker's efforts to push through legislation on behalf of Georgia's bail agents).

<sup>120</sup> See MICHAEL J. GILBERT & DAVID SCHICHOR, PRIVATIZATION OF CRIMINAL JUSTICE: PAST PRESENT AND FUTURE 320 (2001) (examining the effectiveness of the Strike Back! campaign in specific states). American Legislative Exchange Council (“ALEC”) is an organization consisting of “state legislators and conservative policy advocates” including corporations and trade associations such as the National Association of Bail Insurance Companies and the American Bail Coalition.

<sup>121</sup> See *id.*; see also Mark Kiesling & Kevin Corcoran, *Lobbyists Pose as Reformers*, NORTHWEST INDIANA TIMES (Mar. 29, 1998), [http://www.nwitimes.com/uncategorized/lobbyists-pose-as-reformers/article\\_46a8c63b-b79d-5015-a107-0132104e6129.html](http://www.nwitimes.com/uncategorized/lobbyists-pose-as-reformers/article_46a8c63b-b79d-5015-a107-0132104e6129.html) [<https://perma.cc/3UE9-3UB2>] (exploring the role of lobbyists involved in the Strike Back! campaign)

ing requirements on PSAs.<sup>122</sup> Critics of this legislation argue that it is designed to displace pretrial services programs by imposing harsh administrative burdens upon them such as stringent reporting standards. These same reporting standards are not required of commercial bail bondsmen despite both entities essentially serving the same function: securing the release of pretrial defendants.<sup>123</sup> These legislative attacks on pretrial services organizations are part of a national strategy promulgated by ALEC.<sup>124</sup>

In 2008, Florida passed a law, entitled the Citizens' Right to Know Act, which mirrored the language of ALEC's proposed legislation of the same name.<sup>125</sup> The law requires pretrial services programs to create reports on a weekly basis detailing information on each defendant they process.<sup>126</sup> The law was passed on the premise that pretrial services programs needed greater transparency and accountability to the public by way of weekly reporting and tracking of results.<sup>127</sup> The Citizens' Right to Know Act is an example of ALEC's strategy of using legislation to prevent government agencies from reducing reliance on commercial bail bonding through the use of PSAs.<sup>128</sup>

These efforts are not specific to state-level legislation, such as the efforts of the bail bondsman industry in Broward County, Florida.<sup>129</sup> A federal version

<sup>122</sup> See AM. LEGISLATIVE EXCH. COUNCIL, CITIZENS' RIGHT TO KNOW: PRETRIAL RELEASE ACT (2014), <http://www.alec.org/model-policy/citizens-right-to-know-pretrial-release-act/> [<https://perma.cc/V229-X8XU>] (proposed language for bail reform legislation drafted by ALEC).

<sup>123</sup> See Nichols, *supra* note 4 (exploring state efforts to regulate the bail industry).

<sup>124</sup> See *id.* In the past, ALEC has supported efforts such as defeat of the Equal Rights Amendment and support of tobacco advertising. See *id.* ALEC has a justice reform platform, and part of that platform revolves around the passage of laws related to the bail bonding industry. See *id.*

<sup>125</sup> See FLA. STAT. ANN. § 907.043 (West Supp. 2012); see also MELANIE LEDGERWOOD, ACCREDITED SUR. & CAS. CO., PRETRIAL RELEASE AND CITIZENS' RIGHT-TO-KNOW ACT (n.d.), <https://www.accredited-inc.com/pdf/summaries/Surety-Initiative-Template-Guide.pdf> [<https://perma.cc/7QJM-PTEX>] (detailing the policy of the Citizens' Right to Know Act and reasons for its passage in Florida).

<sup>126</sup> See FLA. STAT. ANN. § 907.043. Pretrial release programs are defined as "an entity, public or private, that conducts investigations of pretrial detainees, makes pretrial release recommendations to a court, and electronically monitors and supervises pretrial defendants. However, the term 'pretrial release program' shall not apply to the Department of Corrections." *Id.*

<sup>127</sup> See AM. LEGISLATIVE EXCH. COUNCIL, ALEC IN FLORIDA (2012), [https://feaweb.org/\\_data/files/ALEC/alecinfoorida.pdf](https://feaweb.org/_data/files/ALEC/alecinfoorida.pdf) [<https://perma.cc/7GFW-4U8F>] (detailing ALEC's influence in Florida, including passage of the Citizens' Right to Know bill).

<sup>128</sup> See *id.*; Reutter & Motel, *supra* note 2. Such reports would include:

a list of each charge filed against each individual accepted into a pretrial release program . . . a list of all prior criminal convictions of each individual accepted into a pretrial release program . . . a list of the court appearances required of each individual accepted into a pretrial release program . . . [and] a list of each instance during the reporting period on which an individual accepted into a pretrial release program . . . failed to appear at a scheduled court appearance.

See H.R. 1885, 112th Cong. (2011)

<sup>129</sup> See Liptak, *supra* note 44 (detailing the county-level involvement of the bail bond industry and its interaction with pretrial release programs); see also *supra* notes 1–12 and accompanying text

of the Citizen's Right to Know Act was introduced in May 2011.<sup>130</sup> The legislation would require any state or local pretrial release programs that receive federal funding to issue monthly reports to the U.S. Department of Justice.<sup>131</sup> The bill has been referred to the House Subcommittee on Crime, Terrorism, and Homeland Security, but Congress has taken no further action.<sup>132</sup>

### B. How Bail Bondsmen Affect Bail Administration

Subsection 1 reviews the bail practices of states that have eliminated the use of commercial bail bondsmen.<sup>133</sup> Subsection 2 reviews the bail practices of states that still use commercial bail bondsmen as a method of pretrial release.<sup>134</sup> Subsection 3 highlights the practice of PSAs in Washington, D.C., which has practically eliminated the use of commercial bail bondsmen.<sup>135</sup>

#### 1. Bail in States Without Bail Bondsmen

Only four states—Wisconsin, Illinois, Oregon, and Kentucky—have eliminated the use of commercial bail to secure pretrial release for the accused.<sup>136</sup> In doing so, the states exclude private, for-profit businesses from this form of involvement in the justice system.<sup>137</sup>

Wisconsin eliminated corporate sureties and sureties for profit for criminal bail bonds in 1979.<sup>138</sup> In place of a general bail system centered on commercial bail bonding, Wisconsin has a bail system based on release on recogni-

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(describing the successful efforts of the bail bond industry in Broward County to defund and eliminate pretrial services agencies).

<sup>130</sup> See H.R. 1885; see also *American Bail Coalition*, SOURCEWATCH, [http://www.sourcewatch.org/index.php/American\\_Bail\\_Coalition#ALEC\\_and\\_ABC.27s\\_Legislative\\_Agenda](http://www.sourcewatch.org/index.php/American_Bail_Coalition#ALEC_and_ABC.27s_Legislative_Agenda) [<https://perma.cc/734L-Y3DT>] (describing the legislative efforts that the American Bail Coalition and ALEC support).

<sup>131</sup> See H.R. 1885.

<sup>132</sup> See *id.*; see also Reutter & Motel, *supra* note 2 (discussing ALEC's support of the bail bond lobby).

<sup>133</sup> See *infra* notes 136–154 and accompanying text.

<sup>134</sup> See *infra* notes 155–167 and accompanying text.

<sup>135</sup> See *infra* notes 168–177 and accompanying text.

<sup>136</sup> See 725 Ill. Comp. Stat. Ann. 5/110-13 (West 1964); KY. REV. STAT. ANN. § 431.510 (Lexis Nexis 2010); OR. REV. STAT. § 135.245 (2015); WIS. STAT. § 969.12 (2013–14); see also *Stephens v. Bonding Ass'n of Ky.*, 538 S.W.2d 580, 584 (Ky. Ct. App. 1976) (refraining from nullifying a law prohibiting commercial bail bonding in Kentucky); *Kahn v. McCormack*, 299 N.W.2d 279, 283 (Wis. Ct. App. 1980) (holding a statute effectively banning commercial bail in Wisconsin constitutional).

<sup>137</sup> See KENNEDY & HENRY, *supra* note 117, at 9 (noting that the greatest cost of commercial bail practices is courts' delegation of power to private interests).

<sup>138</sup> See WIS. STAT. § 969.12; Bruce Murphy, Opinion, *The Wisconsin Budget's Private Bail Bond System Spells the Return of Debtor's Prison*, ISTHMUS (June 13, 2013), <http://isthmus.com/opinion/opinion/the-wisconsin-budgets-private-bail-bond-system-spells-the-return-of-debtors-prison/> [<https://perma.cc/EU68-82NV>] (noting that Wisconsin's system was created by law in 1979).

zance, unsecured appearance bonds, and secured bonds paid to the court.<sup>139</sup> When deciding conditions of release, judges must set reasonable conditions designed to ensure appearance in court, and protect members of the community from serious bodily harm and witnesses from intimidation.<sup>140</sup> If cash bail is imposed, it must be only in an amount found necessary to ensure the appearance of a defendant.<sup>141</sup>

In Wisconsin, professional justice associations almost universally oppose the return of commercial bail bonding to the state.<sup>142</sup> These typically adversarial organizations unite as unlikely allies in their rejection of the return of commercial bail to Wisconsin.<sup>143</sup> In their view, there is no demonstrable need for commercial bail and the return of the industry would come with great costs to Wisconsin—both financial and moral.<sup>144</sup> Instead of commercial bail, focus has

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<sup>139</sup> See WIS. STAT. § 969.02.

<sup>140</sup> *Id.* at § 969.01; see Kate Lind, *Should Wisconsin Allow Commercial Bail in Pretrial Release?*, WIS. POL'Y RES. INST. REP. (2013), <http://www.wpri.org/WPRI/Reports/2013/Should-Wisconsin-Allow-Commercial-Bail-in-Pretrial-Release.htm#> [<https://perma.cc/5WBG-V8Q6>] (explaining the conditions of pretrial release in Wisconsin).

<sup>141</sup> See WIS. STAT. § 969.01.

<sup>142</sup> See Murphy, *supra* note 138 (arguing that a 2013 budget bill that returned commercial bail bond to Wisconsin was driven by special interest groups and rejected by justice system associations). When legislators tried to pass a bill in 2011 that returned commercial bail bondsmen to Wisconsin, the bill was opposed by the Wisconsin District Attorneys Association, the Wisconsin Association of Criminal Defense Attorneys Association, all forty-seven Milwaukee County judges, all ten of the state's chief circuit judges, and the Wisconsin Sheriffs and Deputy Sheriffs Association. See *id.*

<sup>143</sup> See *Governor Vetoes Provisions Permitting Commercial Bail in Wisconsin Budget Bill*, SUR. & FID. ASS'N OF AM. (July 1, 2013), <http://www.surety.org/news/130805/Governor-Vetoes-Provisions-Permitting-Commercial-Bail-in-Wisconsin-Budget-Bill.htm> [<https://perma.cc/M43A-GQQX>] (detailing Governor Scott Walker's veto of a 2013 Wisconsin budget bill that would have authorized the establishment of a pilot program for commercial bail bonds). When deciding whether to allow commercial bail bondsmen in Wisconsin, Governor Scott Walker faced pressure from the law enforcement community to veto bail provisions in a budget bill. See *id.* The Governor used his veto power to remove the bail provisions from the bill. See *id.*

<sup>144</sup> See Patrick Marley, *Bail Bondsmen, Lake Michigan Among Special-Interest Items in Budget Plan*, J. SENTINEL (Wis.) (June 5, 2013), <http://www.jsonline.com/news/statepolitics/bail-bondsmen-lake-michigan-among-special-interest-items-in-budget-plan-b9927006z1-210231371.html> [<https://perma.cc/C9W8-3F45>] (noting that Wisconsin's judges, prosecutors, and law enforcement agencies are united against allowing commercial bail bondsmen back into Wisconsin). When asked about commercial bail bonding, Milwaukee Police Chief Edward Flynn stated, "It's not something professional law enforcement recommends, it's not something the judiciary recommends and it's not (something) anybody who has a role in the criminal justice (system) recommends. I don't understand the motivation." *Id.*; see also Jason Stein & Patrick Marley, *Republican Lawmakers May Try to Resurrect Bail Bonding*, J. SENTINEL (Wis.) (May 18, 2013), <http://www.jsonline.com/news/statepolitics/republican-lawmakers-may-try-to-resurrect-bail-bonding-k19vhej-208017101.html> [<https://perma.cc/3G68-KTLN>] (describing bipartisan opposition to the prospect of commercial bail bondsmen operating in Wisconsin).

largely shifted to developing pretrial services that carefully monitor release of the accused and that can largely guarantee reappearance in court.<sup>145</sup>

Other bail systems, such as Kentucky's, rely on pretrial programs.<sup>146</sup> To replace the for-profit bail system in Kentucky, the state chose to use pretrial programs.<sup>147</sup> Like most pretrial programs, courts in Kentucky determine whether defendants are entitled to pretrial release or bail by factors such as: flight risk, likelihood of the defendant to appear in court, and likelihood to be a danger to others.<sup>148</sup> If pretrial release is granted, the defendant is released on his or her own recognizance, or ordered to participate in a GPS monitoring program.<sup>149</sup>

Unlike most pretrial programs, Kentucky's pretrial programs function under the presumption that defendants are innocent until proven guilty and deserve a reasonable opportunity not to be kept in jail until tried.<sup>150</sup> Additionally, the state grants assistance to those defendants who are not granted pretrial release.<sup>151</sup> Those who have bail imposed upon them are permitted, absent certain factors, a credit of \$100 per day as payment toward the amount set for each day, or a portion of the day, that the defendant is to spend in jail before trial commences.<sup>152</sup> When there has been sufficient credit accrued to satisfy the

<sup>145</sup> See JUSTICE INITIATIVES INST., JUDGING BY THE EVIDENCE: FAIR AND EFFECTIVE PRETRIAL JUSTICE IN WISCONSIN (2013), <http://www.jiininstitute.org/s/JII-Article-Bail-Bonding-Pretrial-06192013.pdf> [<https://perma.cc/NFD7-FYAU>].

<sup>146</sup> See KY. REV. STAT. ANN. § 431.510 (Lexis Nexis 2010) (prohibiting the use of commercial bail bondsmen to secure pretrial release); ABA CRIMINAL JUSTICE SECTION, STATE POLICY IMPLEMENTATION PROJECT 2 (2011), [http://www.americanbar.org/content/dam/aba/administrative/criminal\\_justice/spip\\_handouts.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/criminal_justice/spip_handouts.authcheckdam.pdf) [<https://perma.cc/S74G-GATA>] (describing the history of pretrial release in Kentucky and noting the state's abolishment of commercial bail bondsmen and implementation of a PSA); *Interview Process & Release Alternatives*, KY. COURT OF JUSTICE, <http://courts.ky.gov/courtprograms/pretrialservices/Pages/interviewrelease.aspx> [<https://perma.cc/3RYD-VHXQ>] (noting that Kentucky was the first state to abolish commercial bail bondsmen and create a pretrial release program).

<sup>147</sup> See *Interview Process & Release Alternatives*, *supra* note 146. In place of a for-profit bail system, the Kentucky General Assembly created the Pretrial Services Agency in 1976 as a division of the Administrative Office of the Courts. See *id.*

<sup>148</sup> See KY. REV. STAT. ANN. § 431.510. Pretrial officers interview every defendant within twelve hours of arrest. See *Interview Process & Release Alternatives*, *supra* note 146. These officers serve all 120 Kentucky counties and are available for service 24 hours a day, 7 days a week. See *id.* In addition to a detailed personal interview, the officers conduct a criminal background check and a risk assessment before making a recommendation to the court regarding conditions of release. See *id.*

<sup>149</sup> See KY. REV. STAT. ANN. § 431.067 (Lexis Nexis Supp. 2015).

<sup>150</sup> See Shima Baradaran, *Restoring the Presumption of Innocence*, 72 OHIO ST. L.J. 723, 734 (2011) (exploring the presumption of innocence in pretrial restraints on liberty); see also *The Legal Precedents Outlawing Bounty Hunter and Bail Bondsman Jobs in Kentucky*, BOUNTYHUNTEREDU.ORG, <http://www.bountyhunteredu.org/kentucky/> [<https://perma.cc/2PHW-HWBS>] (describing statutory provisions that outlawed the commercial bail industry).

<sup>151</sup> See KY. REV. STAT. ANN. § 431.066.

<sup>152</sup> See *id.*

bail, the defendant is released on his or her own recognizance.<sup>153</sup> If the defendants can pay ten percent of the bail amount, in cash or by property bond, the bail amount is returned to the defendant as long as they are not charged with failure to appear.<sup>154</sup>

## 2. Bail Bondsmen on Every Corner

Most states have not eliminated the practice of commercial bail bonding.<sup>155</sup> In many of these states, pretrial release services are used in conjunction with the bail bond industry, but the relationship between pretrial services and the bail bond industry is rarely harmonious.<sup>156</sup> Because pretrial services can negatively affect their profit, the bail bond industry will often attempt to dismantle pretrial release programs.<sup>157</sup>

The bail bond industry is not always successful in pushing through legislation.<sup>158</sup> Many states oppose the additional regulation of pretrial release services that have been established in their state.<sup>159</sup> In Virginia, pretrial services agencies produce monthly reports and quarterly narratives on the outcomes of the defendants for whom they secure release.<sup>160</sup> Despite these existing report-

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<sup>153</sup> See COMMONWEALTH OF KY. DEP'T. OF PUB. ADVOCACY, KENTUCKY PRETRIAL RELEASE MANUAL 20 (2013) (explaining the pretrial release and bail process for Kentucky). Certain defendants are excluded from the ability to receive the \$100 per day credit. *Id.* The credit toward bail does not apply to any person convicted of or pleading guilty to, or entering an Alford plea (a plea of guilt without making an admission of guilt) to certain felonies. *Id.* The credit will also not apply to someone who is a violent offender, or who is determined by a court to present a flight risk or to be a danger to others. *See id.*; see also KY. REV. STAT. ANN. § 439.3401 (Lexis Nexis 2010).

<sup>154</sup> See KY. REV. STAT. ANN. § 431.066. If bail is set and the bond is to be partially secured by payment of ten percent, the defendant will receive the bail credit of \$100 per day. *See id.* The credit will apply to the ten percent needed to secure release and not the entire amount of the bail. *See id.*

<sup>155</sup> See Cliff Collins, *The Question of Commercial Bail: Bail Industry Wants Oregon to Return to a System It Once Rejected*, OR. ST. B. BULL., Oct. 2014, at 17 (noting that forty-six states still use a commercial bail system); see also DEVINE, *supra* note 107, at 4.

<sup>156</sup> See Alysia Santo, *When Freedom Isn't Free*, THE MARSHALL PROJECT (Feb. 23, 2015, 7:15 AM), <https://www.themarshallproject.org/2015/02/23/buying-time#.pREG4bAmf> [<http://perma.cc/WER7-8ZST>] (detailing bail industry arguments against the expansion of pretrial services and arguments for the use of traditional bail bonds). See generally MELANIE LEDGERWOOD, ACCREDITED SUR. & CAS. CO., FACTS REGARDING THE COMMERCIAL BAIL INDUSTRY (2012) (responding to common criticisms of the bail bonding industry from the criminal justice community).

<sup>157</sup> See LEDGERWOOD, *supra* note 156, at 7 (arguing that forcing a defendant into pretrial release agencies is equivalent to ignoring the fundamental principle of innocent until proven guilty); see also Nichols, *supra* note 4 (exploring the involvement of the bail bond industry in defunding Broward County PSAs).

<sup>158</sup> See Laura Sullivan, *Inmates Who Can't Make Bail Face Stark Options*, NPR (Jan. 22, 2010 12:00 AM), <http://www.npr.org/templates/story/story.php?storyId=122725819> [<https://perma.cc/79QS-4ZFK>] (noting some unsuccessful outcomes of the bail bondsman industry's attempts at regulation of pretrial release services).

<sup>159</sup> *See id.*

<sup>160</sup> See KENNETH ROSE, A "NEW NORM" FOR PRETRIAL JUSTICE IN THE COMMONWEALTH OF VIRGINIA: PRETRIAL RISK-BASED DECISION MAKING 4 (2013) (exploring the history of Virginia's

ing requirements, in 2009 a Virginia lawmaker proposed a bill based on Florida's Citizens' Right to Know Act.<sup>161</sup> The bill was unsuccessful.<sup>162</sup> The bill's text was identical to ALEC's proposed legislation for the Citizens' Right to Know bill, and some of the requisite measures would not have been applicable in Virginia.<sup>163</sup> In May 2009, a North Carolina legislator introduced the Citizens' Right to Know Act to the state.<sup>164</sup> North Carolina's legislators dropped this bill due to intervention from the legal community.<sup>165</sup>

Though unsuccessful in passing the bill, the bail bond industry still operates in these states and continues to challenge the viability of pretrial services agencies.<sup>166</sup> Pretrial services agencies must constantly fight to stay open and effectuate their goal of releasing qualified defendants through their programs.<sup>167</sup>

### 3. Washington, D.C.'s Pretrial Services Agency: The Gold Standard

Similar to the four states that have banned commercial bail bondsmen, Washington, D.C. ("the District") has largely eliminated commercial bail bonding in favor of alternative release methods.<sup>168</sup> The District accomplished this feat through a mix of practice and bail-related legislation that specifically

pretrial release services and the general pretrial practices of Virginia). *See generally* MARIE VAN-NOSTRAND ET AL., IN PURSUIT OF LEGAL AND EVIDENCE-BASED PRETRIAL RELEASE RECOMMENDATIONS AND SUPERVISION (2011) (detailing the reporting practices of Virginia's pretrial release services).

<sup>161</sup> *See* NAT'L ASS'N OF PRETRIAL SERVS. AGENCIES, THE TRUTH ABOUT COMMERCIAL BAIL BONDING IN AMERICA 5 (2009) (describing ALEC's attempts to pass a Citizen's Right to Know Act in Virginia).

<sup>162</sup> *See id.* The bill's failure was largely due to a fiscal impact statement prepared by the state's Department of Planning and Budget. *See id.* The statement estimated that passage of the bill would require one full-time equivalent staff person for each of the thirty programs. *See id.* Additionally, the overall cost of the bill would have been \$1.5 million annually. *See id.*

<sup>163</sup> *See Virginia*, ALEC EXPOSED, <http://www.alecexposed.org/wiki/Virginia> [https://perma.cc/YP5G-4Z5N] (detailing ALEC's legislative efforts in Virginia).

<sup>164</sup> *See* Ned Barnett, *A Primer on ALEC, Its Influence and Its Presence in North Carolina*, INDY WEEK (Sept. 28, 2011), <http://www.indyweek.com/indyweek/a-primer-on-alec-its-influence-and-its-presence-in-north-carolina/Content?oid=2666829> [https://perma.cc/KQ9F-ZDY4].

<sup>165</sup> *See id.*

<sup>166</sup> *See* Dietrich, *supra* note 119 (detailing the efforts of the bail bonding industry in Florida, North Carolina, Oregon, and Virginia to reduce pretrial services); Liptak, *supra* note 44 (exploring the practice of bail bond agents and the tension that exists between the agents and the pretrial services agencies).

<sup>167</sup> *See* JUSTICE POLICY INST., *supra* note 78; Sullivan, *supra* note 3 (exploring tensions between pretrial services agencies and the bail bondsman lobby).

<sup>168</sup> *See* D.C. CODE § 23-1321 (2012). The D.C. statute does not explicitly prohibit commercial bail, but the wide range of conditions of release only allow for detention in specific circumstances thus effectively eliminating commercial bail. *See id.*

spells out how money can be used in bail decisions.<sup>169</sup> The District did not rely merely on legislation banning the practice of commercial bail bondsmen.<sup>170</sup>

Instead of commercial bail bonds, the District relies on the D.C. Pretrial Services Agency (“D.C. PSA”) in its bail determinations.<sup>171</sup> The D.C. PSA serves two primary roles for the District: (1) collecting information about pretrial defendants and reporting this information to the court with its release or detention decision; and (2) supervising pretrial defendants released by the court with conditions of supervision and informing the court of any violations of these release conditions.<sup>172</sup> Through the use of a PSA, the District boasts significantly lower pretrial detainment rates than the national average.<sup>173</sup>

The D.C. Pretrial Services Agency conducts a risk assessment for defendants to assist judicial officers in determining whether pretrial release or detention is appropriate.<sup>174</sup> The decisions by the D.C. Pretrial Services Agency are centered on the premise that a defendant’s inability to pay should not determine the length of pretrial detention.<sup>175</sup> Therefore, 80% of people charged with an offense in D.C. are released on nonfinancial bail options and only 15% are kept in pretrial detention.<sup>176</sup> D.C. PSA has reported an 88% success rate for completion of appearance in court without being rearrested, which is higher than the national average.<sup>177</sup>

#### IV. ELIMINATION OF COMMERCIAL BAIL AND AN INCREASED RELIANCE ON PRETRIAL SERVICES AGENCIES

Conditions of pretrial release should be set only to the extent that they secure the reappearance of defendants in court.<sup>178</sup> Any conditions that go beyond securing release unreasonably burdens not only our criminal justice system but also effectively punishes pretrial detainees who have a presumption of inno-

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<sup>169</sup> *See id.*

<sup>170</sup> *See id.*

<sup>171</sup> *See* Bruce Beaudin, *The D.C. Pretrial Services Agency: Lessons from Five Decades of Innovation and Growth*, CASE STUDIES (n.d.) (exploring the function and history of the D.C. Pretrial Services Agency).

<sup>172</sup> *See id.*

<sup>173</sup> *See id.*

<sup>174</sup> *See id.* *See generally* KIDEUK KIM & MEGAN DENVER, A CASE STUDY ON THE PRACTICE OF PRETRIAL SERVICES AND RISK ASSESSMENT IN THREE CITIES (2011) (exploring the use of PSAs in Washington, D.C., New York City, and Baltimore).

<sup>175</sup> *See* D.C. CODE § 23-1321.

<sup>176</sup> Beaudin, *supra* note 171.

<sup>177</sup> *See id.*

<sup>178</sup> *See* CLARK, *supra* note 56, at 23 (describing the process a judge is expected to undertake when making bail decisions).

cence until proven guilty.<sup>179</sup> Additionally, detaining pretrial defendants solely based on their inability to pay is likely unconstitutional.<sup>180</sup> Pretrial services programs have demonstrated the ability to guarantee reasonable, risk-based assessments about the necessary conditions to secure reappearance.<sup>181</sup> Despite this, the commercial bail bondsman industry continues a systematic attack on the efficiency and viability of these programs.<sup>182</sup>

The U.S. criminal justice system has been drawn into public focus in recent years, and bail reform must become a part of this conversation.<sup>183</sup> Bail determinations are integral to the administration of criminal justice and affect many facets of our system, such as jail overcrowding and the very outcome of criminal cases.<sup>184</sup> Therefore, our system must ensure that private interests do not allow unjust outcomes in relation to our bail system.<sup>185</sup> Recognizing this, four states have eliminated the use of commercial bail bondsmen in their jurisdictions, and Washington, D.C. uses a system of pretrial release that practically eliminates commercial bail bondsmen.<sup>186</sup> The rest of the country must also undertake this process in order to properly reform our bail system.<sup>187</sup>

This Part argues that states should eliminate commercial bail bondsmen and create systems centered on alternative release methods rather than mone-

<sup>179</sup> See Nichols, *supra* note 4 (exploring the effects of expansion of Broward County's PSAs); Santo, *supra* note 156 (detailing bail industry arguments against the expansion of pretrial services and outcomes from states that use both bail bondsmen and the pretrial services agencies).

<sup>180</sup> See Pete Williams, *Justice Department Says Poor Can't Be Held When They Can't Afford Bail*, NBC NEWS (Aug. 19, 2016), <http://www.nbcnews.com/news/us-news/justice-department-says-poor-can-t-be-held-when-they-n634676> [https://perma.cc/L4R8-WZSM]; see also *supra* notes 102–106 and accompanying text (detailing DOJ's argument against unconstitutional bail conditions for indigent defendants).

<sup>181</sup> See BARRY MAHONEY ET AL., PRETRIAL SERVICES PROGRAMS: RESPONSIBILITIES AND POTENTIAL (2001) (detailing the process and overall outcomes of pretrial services agencies).

<sup>182</sup> See Murphy, *supra* note 138 (arguing that the return of commercial bail bondsmen would lead to reduced outcomes in Wisconsin); Sullivan, *supra* note 3 (exploring tensions between pretrial services agencies and the bail bondsman lobby).

<sup>183</sup> See Clifford T. Keenan, *We Need More Bail Reform*, PRETRIAL SERVS. AGENCY FOR D.C., <https://www.psa.gov/?q=node/390> [https://perma.cc/BK8Y-P3DX] (arguing that the U.S. system of bail needs to be reformed through the addition of PSAs).

<sup>184</sup> See PHILLIPS, BAIL, DETENTION, AND FELONY, *supra* note 45 (exploring differences in outcomes for felony defendants that have been detained pretrial and those who have not been detained); PHILLIPS, PRETRIAL DETENTION, *supra* note 45 (exploring differences in outcomes for nonfelony defendants that have been detained pretrial and those who have not been detained).

<sup>185</sup> See KENNEDY & HENRY, *supra* note 117, at 9 (noting that the greatest cost of commercial bail practices is the delegation of a court's power to private interests).

<sup>186</sup> See KY. REV. STAT. ANN. § 431.510 (Lexis Nexis 2010); OR. REV. STAT. § 135.245 (2015); WIS. STAT. § 969.12 (2013–14); see also *Stephens v. Bonding Ass'n of Ky.*, 538 S.W.2d 580, 584 (Ky. Ct. App. 1976) (refraining from nullifying a law prohibiting commercial bail bonding in Kentucky); *Kahn v. McCormack*, 299 N.W.2d 279, 283 (Wis. Ct. App. 1980) (holding a statute effectively banning commercial bail in Wisconsin constitutional).

<sup>187</sup> See Shima Baradaran, *The Right Way to Shrink Prisons*, N.Y. TIMES (May 30, 2011), [http://www.nytimes.com/2011/05/31/opinion/31baradaran.html?\\_r=0](http://www.nytimes.com/2011/05/31/opinion/31baradaran.html?_r=0) [https://perma.cc/D2TT-P92P] (exploring how effective pretrial release programs can help reduce the strain on criminal justice budgets).

tary bail.<sup>188</sup> Section A recommends that states pass legislation consistent with Wisconsin's bail reform statute to eliminate the use of commercial bail bondsmen.<sup>189</sup> Section B recommends that states create pretrial services agencies in order to help judges make fair and just bail determinations.<sup>190</sup>

### A. Eliminating the Commercial Bail Bondsman Industry

In order to recenter the bail system to focus on pretrial release via methods other than monetary bail, states should pass legislation that eliminates the use of commercial bail bondsmen.<sup>191</sup> Most crimes are tried in state courts, and each state controls its own bail administration.<sup>192</sup> Therefore, passage of state legislation is the most efficient and logical first step in reforming bail policies.<sup>193</sup>

Wisconsin's statute regarding bail and other conditions of release should act as a model for state legislation that eliminates the commercial bail industry.<sup>194</sup> This statute explicitly eliminates the commercial bail bondsman industry while also explicitly mandating that bail may only be set to the extent that it assures a defendant's reappearance in court.<sup>195</sup> There is a presumption of release in most instances that will help decrease the number of pretrial detainees.<sup>196</sup> Though there is typically a presumption of release, the statute provides

<sup>188</sup> See *infra* notes 178–216 and accompanying text.

<sup>189</sup> See *infra* notes 191–204 and accompanying text.

<sup>190</sup> See *infra* notes 205–216 and accompanying text.

<sup>191</sup> See KY. REV. STAT. ANN. § 431.510 (prohibiting commercial bail bondsmen from operating in Kentucky); OR. REV. STAT. § 135.245 (mandating that a magistrate must secure the reappearance of a defendant through the least onerous conditions, effectively eliminating commercial bail bondsmen through practice); WIS. STAT. § 969.12 (describing surety as a “resident of state” and barring compensation for acting as a surety).

<sup>192</sup> See DAVID W. NEUBAUER & HENRY F. FRADELLA, *AMERICA'S COURTS AND THE CRIMINAL JUSTICE SYSTEM* 105 (12th ed. 2016) (noting that state courts receive ninety-five times as many filed cases as federal courts). State courts have broad jurisdiction, and the only cases they are not allowed to hear are lawsuits against the United States and those involving certain specific federal laws. *What the Federal Courts Do*, FED. JUDICIAL CTR., <http://www.fjc.gov/federal/courts.nsf/autoframe?openagent&nav=menu2&page=/federal/courts.nsf/page/B91008A99B88857E85256A540009F8C1?openDocument> [<https://perma.cc/2PKN-RD62>].

<sup>193</sup> See KY. REV. STAT. ANN. § 431.510 (prohibiting commercial bail bondsmen from operating in Kentucky); OR. REV. STAT. § 135.245 (mandating practices that effectively eliminate commercial bail bondsmen through practice); WIS. STAT. § 969.12 (describing surety as a “resident of state” and barring compensation for acting as a surety).

<sup>194</sup> See WIS. STAT. ANN. § 969.12; Michael Phillis, *Wisconsin Judges Say Bail Bonds System Would Shortchange Crime Victims*, J. SENTINEL (Wis.) (June 15, 2013), <http://www.jsonline.com/news/statepolitics/wisconsin-judges-say-bail-bonds-system-would-shortchange-crime-victims-b9933511z1-211705671.html> [<https://perma.cc/K9KP-TGZG>] (arguing that a return to allowing commercial bail bondsmen in Wisconsin would result in a loss of millions of dollars for victims of crime); see also Murphy, *supra* note 118 (noting that the rate of defendants that fail to appear in Wisconsin is significantly below the national average despite the prohibition of commercial bail bonding).

<sup>195</sup> See WIS. STAT. ANN. § 969.12.

<sup>196</sup> See *id.*

for conditional detainment in cases in which a defendant is seen as a risk to the community or is accused of committing a violent crime.<sup>197</sup> Therefore, the Wisconsin statute ensures that most defendants are not detained before they are convicted, while adequately protecting the public from those defendants who may pose a true safety threat.<sup>198</sup>

Any attempts to pass such legislation are sure to face opposition from the bail bondsman lobby.<sup>199</sup> This opposition will likely be stronger in states in which ALEC has successfully helped pass legislation.<sup>200</sup> Similar to other political battles, passage of this reform legislation will depend on messaging and community support.<sup>201</sup> Initial targeting of states in which ALEC has failed to pass their model act will allow such a widespread reform to gain momentum.<sup>202</sup> Additionally, members from all facets of the criminal justice community support the elimination of commercial bail bondsmen.<sup>203</sup> This support from typically adversarial parties is essential to passage of this legislation.<sup>204</sup>

### *B. Increase the Use of Pretrial Services Agencies*

In order to fill the void in the criminal justice system created by the elimination of commercial bail bondsmen, states should also pass legislation that establishes pretrial services agencies.<sup>205</sup> A high-functioning pretrial services agency will help courts make informed pretrial release and detention deci-

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<sup>197</sup> See *id.*

<sup>198</sup> See *id.*; see also Jerry Hancock, *Nix Predatory Bail Bondsmen Plan for Wisconsin*, CAP TIMES (Madison) (June 15, 2013), [http://host.madison.com/ct/news/opinion/column/jerry-hancock-nix-predatory-bail-bondsmen-plan-for-wisconsin/article\\_968bba08-2d80-56d5-a6e0-8d641e894f7a.html](http://host.madison.com/ct/news/opinion/column/jerry-hancock-nix-predatory-bail-bondsmen-plan-for-wisconsin/article_968bba08-2d80-56d5-a6e0-8d641e894f7a.html) [<https://perma.cc/PL3V-KH52>] (discussing how the criminal justice system in Wisconsin has been better without the use of commercial bail bondsmen).

<sup>199</sup> See Collins, *supra* note 155, at 17 (chronicling the bail industry's attempts to return commercial bail bonding to Oregon).

<sup>200</sup> See LEDGERWOOD, *supra* note 125 (detailing the policy of the Citizens' Right-to-Know Act and reasons for its passage in Florida).

<sup>201</sup> See ROSE, *supra* note 160, at 4 (exploring the history of Virginia's pretrial release services and describing Virginia's denial of ALEC-sponsored legislations).

<sup>202</sup> See *id.* at 8 (describing Virginia's opposition to an ALEC-sponsored bill and detailing the legislative battle). Virginia recently battled against ALEC-sponsored legislation. See *id.* The bill's failure was largely due to a fiscal impact statement prepared by the state's Department of Planning and Budget. See *id.* The statement estimated that for the Commonwealth of Virginia, the "Citizens' Right to Know Act" would necessitate one full-time equivalent staff person for each of the thirty programs. See *id.* Additionally, the bill would have also required a significant change to the state's established management information system. See *id.* The overall cost of implementing the bill would have been \$1.5 million annually. See *id.*

<sup>203</sup> See Barnett, *supra* note 164 (detailing how widespread opposition from the legal community kept an ALEC-sponsored bill from gaining traction).

<sup>204</sup> See *id.*

<sup>205</sup> See D.C. CODE § 23-1301 (2012).

sions.<sup>206</sup> Additionally, for release methods other than monetary bail, the pretrial services agency will provide appropriate levels of supervision and treatment for released defendants.<sup>207</sup> By establishing such agencies, states will allow courts to move away from a bail system driven by money and private interests.<sup>208</sup>

The statute governing the pretrial services agency of Washington, D.C. can act as a model for states aiming to pass similar legislation.<sup>209</sup> The mission of these newly established pretrial services agencies would be to strongly encourage the use of non-financial release, the use of financial release only when non-financial options are not sufficient to ensure appearance, and the abolition of commercial surety bail.<sup>210</sup> As a result of performing these tasks, unnecessary pretrial detention would be minimized, jail crowding would be reduced, and the pretrial release process would be administered fairly.<sup>211</sup>

In establishing a PSA modeled after Washington, D.C.'s statute, states should adopt a similar mission to assist courts in giving defendants fair and just release conditions.<sup>212</sup> Defendants should be interviewed by a PSA officer within twenty-four hours of arrest, and—with a presumption of release—fewer cases would be brought to court and fewer defendants would be detained pretrial.<sup>213</sup> Additionally, adoption of a statute like D.C.'s has the potential to significantly lower pretrial detention rates.<sup>214</sup>

<sup>206</sup> See generally PRETRIAL JUSTICE INST. & THE AM. PROBATION AND PAROLE ASS'N, PROMISING PRACTICES IN PROVIDING PRETRIAL SERVICES FUNCTIONS WITH PROBATION AGENCIES: A USER'S GUIDE (2010) (exploring how probation offices can be effectively used to undertake the tasks of a PSA).

<sup>207</sup> See *id.*

<sup>208</sup> See *id.* (offering a wide range of pretrial release conditions that only allow for detention in rare and specific circumstances thus effectively eliminating commercial bail).

<sup>209</sup> See Ann E. Marimow, *When It Comes to Pretrial Release, Few Other Jurisdictions Do It D.C.'s Way*, WASH. POST (July 4, 2016), [https://www.washingtonpost.com/local/public-safety/when-it-comes-to-pretrial-release-few-other-jurisdictions-do-it-dcs-way/2016/07/04/8eb52134-e7d3-11e5-b0fd-073d5930a7b7\\_story.html](https://www.washingtonpost.com/local/public-safety/when-it-comes-to-pretrial-release-few-other-jurisdictions-do-it-dcs-way/2016/07/04/8eb52134-e7d3-11e5-b0fd-073d5930a7b7_story.html) [<https://perma.cc/4KVK-EQFZ>] (detailing the pretrial release process for Washington D.C.; see also D.C. CODE § 23-1301).

<sup>210</sup> See *id.*; COMMONWEALTH OF KY. DEP'T. OF PUB. ADVOCACY, *supra* note 153, at 20 (explaining the pretrial release and bail process for Kentucky); VANNOSTRAND ET AL., *supra* note 160, at 34 (detailing the reporting practices of Virginia's pretrial release services).

<sup>211</sup> See MAHONEY ET AL., *supra* note 181.

<sup>212</sup> See Beaudin, *supra* note 171, at 1 (arguing that the D.C. PSA is a national model for pretrial justice as articulated in standards of the American Bar Association and National Association of Pretrial Services).

<sup>213</sup> See *Mission and Vision*, PRETRIAL SERVS. AGENCY FOR D.C., [https://www.psa.gov/?q=about/mission\\_vision](https://www.psa.gov/?q=about/mission_vision) [<https://perma.cc/SH6J-6L6F>] (articulating the mission and vision of the Pretrial Services Agency for the District of Columbia to "promote pretrial justice and enhance community safety").

<sup>214</sup> See Jane Wiseman, *Dealing Fairly with Pretrial Detainees*, COMMONWEALTH (Oct. 13, 2015), <http://commonwealthmagazine.org/criminal-justice/dealing-fairly-with-pretrial-detainees/> [<https://perma.cc/ZNS2-DTRD>] (comparing the results of the D.C. Pretrial Services Agency to the national average). In D.C., 85% of defendants are released before their trial, and the rearrest rate in D.C. is 11% as compared to the national average of 29%. *Id.*

Much like the proposal to adopt a statute like Wisconsin's that would eliminate commercial bail bondsmen, a proposal to adopt D.C.'s approach of using pretrial services agencies would also likely face opposition.<sup>215</sup> Targeting states where ALEC has previously failed to promote commercial bond legislation and where there is support from the criminal justice community would allow legislation to gain momentum to eventually spread these reforms across the United States.<sup>216</sup>

### CONCLUSION

Inability to post bail should not solely determine a defendant's pre-trial detainment. Although there are instances in which monetary bail should be enforced, monetary bail should not become the default. Bail should be set only to the extent that it assures the reappearance of a defendant in court. Bail has a marked effect on every level of the criminal justice process, and as such, bail reform must be enacted in order to address an integral component of a broken criminal justice system. This can best be accomplished through elimination of commercial bail bondsmen and establishment of pretrial services agencies that focus bail decisions around non-monetary release methods. Given the adverse effects of pretrial detention, a fair and just criminal justice system cannot be based on a defendant's access to funds or be driven by private interests. Justice will not allow it.

THANITHIA BILLINGS

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<sup>215</sup> See ROSE, *supra* note 160, at 4 (describing Virginia's legislative fight to deny ALEC-sponsored bail legislation).

<sup>216</sup> See *id.* at 8 (describing Virginia's opposition to an ALEC-sponsored bill and detailing the legislative battle); Barnett, *supra* note 164 (detailing how widespread opposition from the legal community kept an ALEC-sponsored bill from gaining traction).

