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BAILING ON THE BONDSMAN: AN ARGUMENT FOR ABOLISHING MONETARY BAIL

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I. INTRODUCTION

In America, the criminally accused are innocent until proven guilty. Roughly 500,000 people, or two out of every three inmates, are awaiting trial in jails across the United States.[2] How do we square that statistic with the legal principle of innocent until proven guilty? Though America pompously flaunts the idea of freedom, it houses the highest proportion of inmates worldwide.[3] The notion of innocence seems to dissipate as soon as a defendant is handcuffed.

After arrest, most defendants may bond out of jail by paying bail. Money bail drives high incarceration rates and recidivism.[4] The research shows that pretrial detention does

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[1] As a graduate of Lincoln Memorial University, Duncan School of Law, this Note is dedicated to the LMU Law Review and its membership.

[2] Katherine Hood & Daniel Schneider, *Bail and Pretrial Detention: Contours and Causes of Temporal and County Variation*, 5 RUSSELL SAGE FOUNDATION J. OF THE SOC. SCIENCES 126, 126 (2019).

[3] Will Dobbie et al., *The Effects of Pretrial Detention on Conviction, Future Crime, and Employment: Evidence from Randomly Assigned Judges,* 108 AM. ECON. R. 201, 201 (2018).

[4] *Id.*

little to lower crime rates.[5] The United States and the Philippines are the only two countries in the world that still follow a cash bail system for pretrial release.[6] Over time, other countries have recognized that a system of pretrial release premised on monetary bail is not judicious.[7] On top of the negative societal outcomes that bail plays a role in, bail bondsmen are rarely made to pay the courts when defendants do not show up for court. So, aside from bolstering recidivism and perpetuating poverty, the bail industry is not profitable for governments. The only people profiting from bail bonds are private bail bond companies.

This Note examines the bail bond industry in three parts. Part I details a brief history of bail and how the bail bond industry works. It further explains how bail bondsmen make their money. Part II analyzes two main shortcomings of the monetary bail system in the United States: (1) how bail bonds and bond companies, in particular, perpetuate poverty and injustice; and (2) how courts fail to collect the money owed to them when a defendant skips bail. Part III of this Note will offer a solution to the bail bond crisis. Many jurisdictions have worked to establish solutions to the issue, but few have succeeded.

II. WHY MONEY BAIL WAS ORIGINALLY IMPLEMENTED AND HOW IT WORKS IN THE UNITED STATES

A. A BRIEF HISTORY OF BAIL

The term "bail" refers to the release of a person from custody upon the understanding, with or without one or more persons on their behalf, that they will abide by the orders of the

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[5] Tiana Herring, *Releasing People Pretrial Doesn't Harm Public Safety,* PRISON POL'Y INITIATIVE (Nov. 17, 2020), https://www.prisonpolicy.org/blog/2020/11/17/pretrial-releases/.

[6] Lucas Hammill, *Abolishing Bounty Hunters,* 110 GEORGETOWN L. J. 1219, 1226 (2022). *See also* Adam Liptak, *Illegally Globally, Bail for Profit Remains in the U.S.,* N.Y. TIMES (Jan. 29, 2008), https://www.nytimes.com/2008/01/29/us/29bail.html.

[7] *See* Hammill, *supra* note 6.

court in appearing and answering the charges against them.[8] Defendants often enter into contracts with commercial bail bondsmen in which a bond agent becomes legally responsible for the defendant's appearance at court.[9] In exchange for the bondsman paying a defendant's bail, the defendant relinquishes custody of himself over to the bondsman.[10] When a defendant skips bail, they have not shown up for a court appearance, or they have absconded.

To prevent defendants from skipping bail, bondsmen hire private citizens known as bail/bond enforcement officers or bounty hunters to ensure a defendant's appearance at court.[11] Because they are private citizens, bounty hunters do not have to adhere to constitutional guidelines when securing defendants.[12] Bounty hunters can cross state lines, search, and seize defendants without a warrant.[13] The legal authority that allows bounty hunters to avoid constitutional bounds dates to 1873.[14]

Throughout history, bail has existed as a way for judges to ensure a defendant's appearance at their hearings.[15] At English common law, releasing a defendant was regular practice, and courts relied mainly on a defendant's good word and that of their family to ensure that they would reappear for trial.[16] However, over time, judges realized that granting a bond with financial conditions kept defendants imprisoned indefinitely before trial.[17] Throughout the Middle Ages, courts

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[8] *Id.* at 1225.
[9] *Id.* at 1228.
[10] *Id.* at 1225.
[11] *Id.* at 1226.
[12] *Id.* at 1228-29.
[13] *Id.*
[14] *Id.; see also* Taylor v. Taintor, 83 U.S. 366 (1873) (explaining that bounty hunters may break into the defendant's house on the sabbath and no new process is needed because it is akin to rearrest by the sheriff when the prisoner had escaped).
[15] Liana M. Goff, *Pricing Justice: The Wasteful Enterprise of America's Bail System*, 82 BROOK. L. REV. 825, 888-89 (2017).
[16] *Id.* at 889.
[17] *Id.*

regularly implemented excessive bail prices as a means of pretrial punishment.[18]

Pricing out defendants from pre-trial release marked a shift in the philosophy of bail.[19] Before the introduction of monetary bail as a punishment tactic, the primary purpose of bail was to ensure a defendant's reappearance for subsequent court dates. Since the Middle Ages, however, bail has consistently been used as a punishment tactic under the guise of alternative terms. The Eighth Amendment to the United States Constitution sought to prohibit courts from using bail as punishment,[20] but there is little clarity on its ambiguous language. The Eighth Amendment states, "Excessive bail shall not be required, nor excessive fines imposed . . . ."[21] The language establishes that bail is allowed, but it does not specify what is "excessive." As a result, United States courts can attach financial conditions to a defendant's pretrial release with little to no pushback unless the bail amount is erroneous – a "you will know it when you see it" type of test.

At some point in American history, the bail analysis focused less on flight risk and more on public safety. If a judge thinks that a defendant has a propensity to harm the community, they will keep the accused behind bars – even before a jury of their peers has tried them.[22] This practice became known as preventive detention and is the primary rationale for pretrial confinement today.[23]

B. HOW THE BAIL BOND PROCESS WORKS

When a person is arrested, one of the first matters that they will have in front of a court is to determine if the court will award them bail and, if so, how much it will cost.[24] Bail is set by a judge and is supposed to be unique depending on the facts relevant to the case and the defendant. The primary factors that

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[18] *Id.*
[19] *Id.*
[20] U.S. CONST. amend. VIII, cl. 1, 2.
[21] *Id.*
[22] *Id.*
[23] *Id.*
[24] 8 AM. JUR. 2D *Bail and Recognizance* § 47 (2023).

a court examines when making a bond determination are whether the defendant is a flight risk and whether they pose a danger to the community.[25] The types of bail that a judge can award are largely statutory, limiting their discretion.[26] Generally, there are two forms of bail that a judge may grant a defendant: monetary and non-monetary. Non-monetary bail consists of property bonds and recognizance release. When a judge issues a recognizance bond, the defendant is allowed to leave jail and show up to their court dates of their own volition.[27] When a court issues a property bond, the defendant is allowed to pledge a piece of property as collateral if they do not appear for a court date.[28] In essence, a defendant is telling the court that their property can be sold if they do not appear.

Monetary bail primarily consists of third-party sureties and personal cash bonds.[29] These two types of bail bonds are similar – the key difference is who pays the court. With cash bail, the defendant pays the court, whereas a third-party lender pays the court when a commercial surety bond is granted.[30] A surety bond is a contract between a surety and the court. In essence, the surety is stepping into the shoes of the defendant for financial purposes.[31] A surety bond has also been described as a three-party contract – the state, which brings criminal charges; the defendant, as the principal; and a bail bond company, as surety for the defendant.[32]

America largely follows this system of monetary bail that includes sureties.[33] When a defendant is arrested, the court dictates an amount that they must pay to get out of jail while

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[25] *Id.* at §§ 26, 33, 34.
[26] Dobbie et al., *supra* note 3.
[27] Mary A. Toborg, *Bail Bondsmen and Criminal Courts,* 8 JUST. SYS. J. 141, 141 (1983).
[28] AM. JUR. 2D, *supra* note 24, at § 75.
[29] Toborg, *supra* note 27.
[30] *Id.*
[31] AM. JUR. 2D, *supra* note 24, at § 72.
[32] *Id.*
[33] Steven D. Schwinn, *The Bail Bond System and Rule of Law*, AM. BAR ASS'N (Jan. 27, 2022), https://www.americanbar.org/groups/public_education/publications/insights-on-law-and-society/volume-21/issue-3/the-bail-bond-system-and-rule-of-law/.

their charges are pending, and the defendant has the option of borrowing money from a commercial bail bondsman if they cannot afford their bail amount. The bondsman is a lender and typically secures the amount against collateral that the defendant owns.[34]

As with any debt contract, if the defendant fails to appear in court or uphold their end of the bargain, the lender can foreclose on the defendant's collateral. If the defendant appears at all their hearings, the court refunds the bond amount to the defendant or their surety. Judges have limited discretion in setting the amount a defendant must pay.[35] Judges can, however, waive bail or deny it entirely.[36] The average bail bond amount across the United States is roughly $10,000 – which is about eight months' income for a typical defendant.[37]

Bond companies normally charge a nonrefundable fee of approximately ten percent of the total bond amount.[38] Notably, commercial bond companies are in the business of making money. They work to ensure that defendants appear so they are not held responsible for the defendants' financial obligations to the court. To ensure that defendants appear, bond companies hire bounty hunters to corral defendants. Bounty hunters track down defendants and arrest them to make them appear in front of the court if they skip bail.

Aside from bounty hunters, which are not confined by constitutional constraints, a chief difference between personal bonds, such as cash bail and property bonds, and commercial surety bonds is the third party in the process. When a defendant deals with a bond company, many terms are the same as if they were dealing directly with the government. The bond companies and the courts will secure the defendant's promise to appear with some form of collateral. Many states use a deposit bond system in which the defendant pays only a

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[34] *Id.*

[35] *Id.*

[36] *Id.*

[37] *Id.*

[38] Bernadette Rabuy & Daniel Kopf, *Detaining the Poor: How Money Bail Perpetuates an Endless Cycle of Poverty and Jail Time*, PRISON POL'Y INITIATIVE (May 10, 2016), https://www.prisonpolicy.org/reports/DetainingThePoor.pdf.

percentage of their bail to the bond company, with the caveat that they must pay the full amount if they do not appear.[39] Courts use bond companies to complete logistical work with little oversight, contributing to cycles of inequity that exist within the justice system.

III. Shortcomings of the Bail Bond Industry

Virtually every criminal court in America uses bail bonds as a barrier to pretrial release. As noted previously, financial release from jail was originally implemented to keep defendants detained as punishment.[40] State judges and district attorneys are elected, so keeping a defendant imprisoned for as long as possible is sensible to their political motivations.[41] Politics, of course, rarely follows empirical data unless it is directly related to campaigning. Therefore, if a policy is counterintuitive to common sense and unpopular among the electorate, it will seldom be implemented. This is the issue regarding bail reform.[42] Because it is often politically popular to be tough on crime, keeping defendants behind bars is politically prudent – regardless of whether the defendants have been tried on their charges. This philosophy perpetuates poverty and rarely garners the money that cash bail is meant to collect.

A. Bail Bonds and Bond Companies Perpetuate Cycles of Poverty and Inequality

It is widely accepted that money bail contributes to poverty and recidivism.[43] Once behind bars, an overwhelming majority of defendants are unable to secure the funds needed to

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[39] Goff, *supra* note 15, at 891.
[40] *See* Goff, *supra* note 15, at 889.
[41] Joshua Page & Christine S. Scott-Hayward, *Bail and Pretrial Justice in the United States: A Field of Possibility*, 5 Ann. R. of Criminology 91, 93 (2022).
[42] *Id.* at 95-96.
[43] *See* Brandon L. Garrett et al., *Fees, Fines, Bail, and the Destitution Pipeline*, 69 Duke L. J. 1463, 1463 (2020).

pay their bail.[44] This leads to unequal criminal justice outcomes and undermines the socioeconomic stability of detainees and their families.[45] Every day that a defendant is kept behind bars, their ties to their community are weakened.[46] Their relationships with family and friends are strained while employment and educational opportunities are lost.[47] Even a day in jail may cost many workers their jobs. Defendants who cannot afford pretrial release are convicted at higher rates, sentenced to prison more often, and receive longer sentences than defendants who are awarded pretrial release.[48]

Former Arizona Chief Justice Scott Bales once opined, "Fines, fees, and bail not only can contribute to cycles of poverty, they can contribute to cycles of criminalization."[49] An interplay between socioeconomic conditions and inequities of the criminal justice system largely fuels recidivism.[50] Judges must decide whether to keep a defendant imprisoned or allow them back into the community while charges are pending. Implementing monetary bail for a defendant is a normal measure taken by courts. So through mere tradition, habit, or general practice, judges inadvertently contribute to systemic inequities by forcing defendants to pay money for pretrial release.

A court's decision to release a defendant from custody is largely based on such circumstances as the type of crime committed, the defendant's ties to the community, whether the defendant is a flight risk, and the safety of the community.[51] A judge rarely, if ever, will take into account a defendant's ability to pay bail based on their income or financial assets.[52] Although it is prudent to consider community safety along with other

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[44] Hood & Schneider, *supra* note 2, at 126-27.
[45] *Id.*
[46] *See* Goff, *supra* note 15.
[47] *Id.*
[48] Hood & Schneider, *supra* note 2, at 128.
[49] Garrett et al., *supra* note 43, at 1463.
[50] *See* Goff, *supra* note 15.
[51] *How Courts Work*, AM. BAR ASS'N (Sept. 9, 2019), https://www.americanbar.org/groups/public_education/resources/law_related_education_network/how_courts_work/bail/.
[52] Garrett et al., *supra* note 43.

relevant factors when determining the cost of bail, a more holistic approach should be normalized. The inattentiveness to a defendant's economic circumstances can prove detrimental to their ability to mount a proper legal defense or be released from pretrial custody.

When the indigent and impoverished remain in jail for long periods, they turn to bail bond companies that profit off them when they are at their most vulnerable.[53] Bond companies yield an estimated two billion dollars a year.[54] The profits come from nonrefundable fees that are charged for their services or from the collateral that defendants post in their contracts.[55] Frequently, bail bondsmen require collateral on top of their nonrefundable fees. Many bondsmen acknowledge that the way they make money is unfair.[56] Bill Kreins, a spokesman for the Professional Bail Agents of the United States, went on the record with the New York Times and stated, "Life is not fair, and I probably would feel the same way if I were a defendant."[57]

Because of most defendants' low income and heightened vulnerability, bail bond companies have gained a reputation for being predatory. Bail bondsmen often demand nonrefundable fees from people who can least afford to post bond.[58] Moreover, the commercial bail industry capitalizes on the justice system's racially unjust outcomes.[59] Black defendants are almost four times more likely to receive monetary bond conditions, and when bond is assigned, it is, on average, roughly $7,300 higher than that of similarly situated

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[53] Joshua Page, *Desperation and Service in the Bail Industry*, 16 AM. SOCIO. ASS'N 30, 30 (2017).
[54] *Id.*
[55] Rabuy & Kopf, *supra* note 38; *see also* Liptak, *supra* note 6.
[56] *See* Liptak, *supra* note 6.
[57] *Id.* (referring to the way the bond industry is set up – notably the fee system in particular—where a defendant must pay nonrefundable fees to a surety and navigate proper channels before a lender will allow them to borrow money for pretrial release).
[58] Allie Preston & Rachael Eisenberg, *Profit Over People: The Commercial Bail Industry Fueling America's Cash Bail Systems*, CTR. FOR AM. PROGRESS (July 6, 2022), https://www.americanprogress.org/article/profit-over-people/.
[59] *Id.*

white defendants.[60] As a result, black defendants are more likely to seek bail bond sureties to assist in their pretrial release.[61] The overarching result is that the commercial bail bond industry extracts the most money from communities of color that have faced generations of intentional disinvestment.[62]

B. COURTS FAIL TO EXTRACT THE MONEY OWED FROM BAIL COMPANIES WHEN DEFENDANTS DO NOT ATTEND COURT

The for-profit bail industry, although accepted, is highly criticized. The American Bar Association and the National District Attorneys Association have acknowledged the commercial bond industry discriminates against the poor, does little for public safety, and usurps decisions that should be reserved for those directly involved in the justice system.[63] However, courts are usually receptive to bail bondsmen for two main reasons. First, defendants usually cannot afford to pay the full amount of their bail.[64] Second, an overwhelming number of defendants appear for their court dates, so when a surety is involved, the government does not have to handle the logistical concerns of returning financial transactions to defendants.[65] When courts are directly involved with the handling of bail bond transactions, they often botch the process or do not collect the money owed.[66]

Some jurisdictions have alternative cash payment options for bail bonds.[67] In many states, defendants can pay ten

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[60] *Id.*; *see* David Arnold et al., *Racial Bias in Bail Decisions*, 4 QUARTERLY J. OF ECON. 1885 (2018), https://scholar.harvard.edu/files/cyang/files/ady_racialbias.pdf.; *see also* Beatrix Lockwood & Annaliese Griffin, *The Ins and Outs of Bail*, MARSHALL PROJECT (Oct. 28, 2020), https://www.themarshallproject.org/2020/10/28/the-ins-and-outs-of-bail.

[61] Preston & Eisenberg, *supra* note 58.

[62] *Id.*

[63] Liptak, *supra* note 6; *see also* Page, *supra* note 53.

[64] *Id.*

[65] *Id.*

[66] Rabuy & Kopf, *supra* note 38.

[67] *Id.*

percent of their bail amount to the court and post a bond to receive pretrial release.[68] Most defendants released on bail return for their court appearances.[69] However, for those who do not, courts expect the full amount of their bail to be paid.[70] After a defendant misses an appearance in court, forfeiture may take place.[71] Forfeiture is the procedure that allows courts to collect unpaid balances from defendants or their sureties.[72] Due to the complex relationship between bail agencies as sureties and defendants as principals, the forfeiture process is rarely cut and dried.[73] Moreover, many state laws allow bail agencies to avoid forfeiture.[74]

State law and judicial discretion often extend bond agents extra time to avoid forfeiture.[75] However, if the court does not adhere to the strict rules and deadlines of the forfeiture, bail agencies can then move to have their forfeiture set aside.[76] In Utah, within thirty days of a defendant's missed court date, the court clerk must mail notice of the nonappearance; notify the surety of the name, address, and phone number of the prosecutor; deliver a copy of the notice to the prosecutor when it is sent to the surety; and ensure that all statistical information listed on the bond is identical to that on the warrants.[77] The court clerk must do this for both the surety company and the specific agent in charge of the defendant.[78] Failure to complete this process in its entirety often relieves the bail agency of their financial obligation to pay.[79]

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[68] *Id.*

[69] STATE OF NEW JERSEY COMMISSION OF INVESTIGATION, Inside Out: Questionable and Abusive Practices in New Jersey's Bail-Bond Industry, at 60 (2014).

[70] Rabuy & Kopf, *supra* note 38.

[71] *Id.*

[72] *Id.*

[73] *Id.*

[74] Wendy Sawyer, *All Profit, No Risk: How the Bail Industry Exploits the Legal System*, PRISON POL'Y INITIATIVE (Oct. 4, 2022), https://www.prisonpolicy.org/reports/bail.html.

[75] *Id.*

[76] *Id.*

[77] *Id.*

[78] *Id.*

[79] *Id.*

In North Carolina, state law favors setting aside forfeiture judgments.[80] There, the bond agent can file a motion to have a forfeiture set aside during the initial grace period.[81] The reason and evidence should be attached, and the court can rule on it as they wish.[82] However, the prosecutor has twenty days to respond, and without objection, the court will grant the motion that forgives the bail agency's obligation to pay – with or without a reason.[83]

In some states, there is a statute of limitations on forfeiture proceedings.[84] If a court does not initiate or finalize the forfeiture process within a certain amount of time, it will be barred from doing so in the future. In Kansas, the court must enter a judgment within two years of the defendant's missed court appearance, and, in Texas, the court has four years.[85]

When courts require bail companies to pay, bond companies rarely provide the full amount they contracted to pay. A case study completed over New Jersey's twenty-one counties found that only pennies on the dollar are collected through forfeiture by the court.[86] In 2013 alone, almost 2,000 bail forfeiture cases were resolved through settlement negotiations.[87] Approximately $6.5 million was collected out of the $51.7 million in outstanding forfeiture judgments.[88] New Jersey does not stand alone. In 2015, of almost $116 million in issued bail bonds in Utah, only about $240,000 was paid by commercial bail bondsmen.[89] California estimates that nearly

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[80] *See id.*
[81] *Id.*
[82] *Id.*
[83] *Id.*
[84] *Id.*
[85] *Id.*
[86] STATE OF NEW JERSEY COMMISSION OF INVESTIGATION, *supra* note 69, at 60.
[87] *Id.*
[88] *Id.*
[89] Utah State Courts, *Report to the Utah Judicial Council on Pretrial Release and Supervision Practices* 48 (Nov. 23, 2015), https://www.utcourts.gov/content/dam/resources/reports/docs/Pretrial%20Release%20and%20Supervision%20Practices%20Final%20Report.pdf.

$1.1 million of bail went unpaid to the courts in 2016.[90] In Louisiana, there are reports that one bail bond company owes the government almost $1 million in bail bond debts.[91] The story is the same in Mississippi, where in 2016, private bail companies owed almost $2 million to the state – about $400,000 to a single county.[92] In New York City in 2011, bail companies owed $2 million for 150 cases in which judges ordered bail bonds be forfeited.[93] Similar scenarios exist in Pennsylvania and Texas, among others.[94] The list goes on for almost every state.[95]

For logistical and bureaucratic reasons, courts are not efficient in collecting the money owed by defendants who have skipped bail or violated their bond conditions.[96] Because of the difficulty in setting up a competent system of forfeiture, jurisdictions are slow to move away from the private bail bond industry. Unless courts abandon monetary bail, commercial bail bond agencies will always have a stake in the process, and courts will continue to miss out on money that should be collected through forfeiture.

IV. A SOLUTION: JURISDICTIONS ARE TRYING ALTERNATIVES, BUT WHAT WORKS THE BEST?

An effort to reform bail on a national scale was made once before.[97] In 1966, President Lyndon B. Johnson signed the Bail Reform Act and remarked, "[A poor defendant] languishes in jail weeks, months, and perhaps even years before trial. He

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[90] *See* Sawyer, *supra* note 74.
[91] *Id.*
[92] *Id.*
[93] *Id.*
[94] *Id.*
[95] Wendy Sawyer, *A Summary of 76 Investigations about Bail Forfeiture and Related Bail Bond Problems*, PRISON POL'Y INITIATIVE (Oct. 2022), https://www.prisonpolicy.org/reports/bail_forfeiture_investigations.html.
[96] Rabuy & Kopf, *supra* note 38.
[97] Rachel Smith, *Condemned to Repeat History? Why the Last Movement for Bail Reform Failed, and How This One Can Succeed*, 25 GEORGETOWN L. J. 451 (2018).

does not stay in jail because he is guilty . . . He does not stay in jail because he is any more likely to flee before trial. He stays in jail for one reason only – he stays in jail because he is poor."[98] The context of Johnson's words related to a man who sat in jail for fifty-four days awaiting trial for a traffic offense, which would only result in a maximum five-day sentence if he were found guilty.[99] During the 1960s, Johnson and others recognized that America's bail system was flawed and needed reform. The Bail Reform Act of 1966 allowed judges more leniency when setting bail.[100] Although Johnson aimed the Act at addressing pretrial release issues, the tough-on-crime movement of the 1980s and 1990s reversed any kind of reform that was beginning.[101]

Although Johnson and his colleagues in Congress worked at reforming the federal bail bond system, the Bail Reform Act did not go far enough in its enactments. It did not prohibit cash bail entirely but rather gave more deference to judges as to what bond conditions they wanted.[102] Further, the Act's main focus was setting up programs for offenders to receive services that helped resolve problems that led them to their initial arrest rather than centering on pretrial release.[103] The Act also introduced risk assessments into pretrial procedures.[104] These assessments work for some defendants but not others and are not without their flaws. The court or a third party acting on behalf of the court completes a risk assessment to determine the likelihood that a defendant will flee or commit another offense if they are released pretrial.[105]

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[98] *Id.*; Lyndon B. Johnson, *Remarks at the Signing of the Bail Reform Act of 1966* (June 22, 1966), https://www.presidency.ucsb.edu/documents/remarks-the-signing-the-bail-reform-act-1966.

[99] *Id.*

[100] Smith, *supra* note 97, at 452.

[101] *Id.*

[102] *Id.*

[103] *See id.* at 456.

[104] *Id.*

[105] *Bail Reform and Risk Assessment: The Cautionary Tale of Federal Sentencing*, 131 HARVARD L. R. 1125, 1131 (2018).

Risk assessments can be useful, but it is difficult to predict the future behavior of a defendant.[106]

Today, reformation efforts are repeating some of the same mistakes that were made in the 1960s.[107] Advocates are calling for measures such as pretrial release of low-risk defendants and other politically expedient reforms.[108] Though positive, these half-baked attempts at reformation will not generate permanent or long-term results. The only way to enact meaningful change is to abolish monetary bail and commercial bail bond companies.

Some jurisdictions have attempted to spearhead the issue directly. In New Jersey, the legislature passed a bill that would allow judges to use an informed risk assessment approach to pretrial release, which nearly eliminated their cash bail system in 2017.[109] However, after the legislature passed the bill, a handful of defendants facing gun charges committed violent crimes after being released pre-trial.[110] As a result, the state Attorney General's office put pressure on the Judiciary Committee to modify the inputs of the risk assessment tool to make it harder for people accused of gun crimes to be released pretrial.[111] The Judiciary Committee was impressed by the recommendation and created a presumption of pre-trial detention for those charged with a gun crime.[112] These changes were based on a few standout cases and had nothing to do with empirical data.[113] After the changes were implemented, anyone facing gun charges had an automatic presumption of pretrial detention, no matter what their risk assessment concluded.[114]

A large issue concerning risk-based tools is that they are grounded in evidence and empirical data, while legislatures are prone to follow emotions. Legislative bodies should abide by

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[106] *Id.*

[107] Smith, *supra* note 97, at 453.

[108] *Id.*

[109] Preston & Eisenberg, *supra* note 58; *see also* Herring, *supra* note 5.

[110] *Bail Reform and Risk Assessment: The Cautionary Tale of Federal Sentencing*, *supra* note 105, at 1138.

[111] *Id.*

[112] *Id.*

[113] *Id.* at 1139.

[114] *Id.*

the conclusions of risk-based assessments instead of usurping the assessment's findings when it is politically expedient. The legislature should tie itself to the proverbial mast and allow the risk assessment ship to find its way to shore.

Some jurisdictions are trying different methods of bail bond reform. In Illinois, courts have begun allowing defendants to pay ten percent of their total bail amount – bypassing the need for a surety.[115] Massachusetts initiated the same practice, all but eliminating the private bail bond industry.[116] New York City has begun giving defendants a fifty percent discount on their bail amounts, making it easier to pay the full amount up front.[117] However, one study on the practice found that defendants were still likely to use a private surety unless the discount was greater than sixty percent.[118]

In 2016, San Francisco, California enacted a policy allowing the dismissal of charges for first-time misdemeanor offenders who complete treatment plans.[119] The effect of this policy cut San Francisco's jail population in half.[120] Further, the city's new criminal activity rate – which measures the rate at which new crimes are committed by those awaiting trial – is ten percent.[121] In Philadelphia, the District Attorney's office stopped seeking financial bail for some misdemeanors and nonviolent felonies.[122] The change has had no noticeable effect on recidivism.

The flagship model for pretrial release policies is in Washington, D.C. Courts there have used risk assessment programs to identify proper bond conditions for defendants since 1967.[123] Today, the city's bail reform has gone much further. Judges are no longer allowed to set monetary bail that results in a defendant's pretrial custody, and there is a ceiling to the amount of time a defendant can spend behind bars after

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[115] Rabuy & Kopf, *supra* note 38.
[116] *Id.*
[117] *Id.*
[118] *Id.*
[119] *See* Herring, *supra* note 5.
[120] *Id.*
[121] *Id.*
[122] *Id.*
[123] *Id.*

arrest.[124] Moreover, D.C. has an agency that connects defendants to employment and housing services after they have been arrested.[125] D.C.'s reforms allow the release of ninety percent of defendants without a financial bond. Of those released, eighty-seven percent are not rearrested, and ninety-nine percent are not rearrested for a violent crime.[126]

Though all of the above are positive steps toward a permanent solution to the issues surrounding bail bonds, an outright elimination of monetary bail as a primary determination of pretrial release should be the goal. Washington, D.C., is the closest jurisdiction to enacting this measure, and it has had the most significant results. Courts should issue alternative bond conditions as a primary means of pretrial release. Courts should use risk assessments to determine a defendant's likelihood to flee but not reoffend. There should be no presumption of detention for any case, unless clear evidence points to a prediction that an offender will inflict great harm on society. The burden of proof for the prosecution in bail hearings should be beyond a reasonable doubt that the defendant will commit a violent crime.

The most important recommendation of all is the outright abolition of monetary bail. Aside from punishment, there is little reason to condition a defendant's pretrial release on financial circumstances.

V. CONCLUSION

Monetary bail is a practice unique to two countries globally. In the United States, monetary bail contributes to poverty, criminalization, systemic racism, and recidivism, among other inequities. The primary defense to monetary bail is that governments will profit if a person does not appear in court. When a defendant skips bail, courts are supposed to collect the debt, either from defendants or their sureties. However, this seldom happens.[127]

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[124] *Id.*

[125] *Id.*

[126] Herring, *supra* note 5.

[127] *See* Sawyer, *supra* note 74.

Little evidence exists to support an argument in favor of monetary bail. The truth of the matter is that the public enjoys a tough-on-crime posture, and forcing defendants to pay for pretrial release is a palatable form of punishment for those not yet convicted of a crime.[128] Because pretrial detention is primarily used for punitive reasons, it should be abolished. It is past time to get rid of monetary bail nationwide and return to a bond system that requires personal recognizance and community support for a defendant's appearance in court.

Monetizing bail conditions contributes to socioeconomic and criminal cycles. However, merely detaining the accused pretrial is the fundamental catalyst to furthering these inequities. Courts need to step away from the paradigm of pretrial detention as a punishment and focus on releasing nonviolent defendants. Across the nation, courts could release an additional twenty-five percent of defendants without any further harm to their communities.[129] These would be older defendants with clean records or defendants charged with financial crimes – in other words, those that do not have a propensity for violence.[130]

There is a presumption of bail in the federal system unless the prosecution shows that the defendant has committed a nonbailable offense, but the prosecution's burden of proof is only clear and convincing.[131] Though the federal government presumes that everyone should receive pretrial release, paying a fee is still a condition of that release.[132]

Commercial bail bondsmen are the only people who profit from pretrial detention premised on a defendant's financial conditions. They bond out inmates who cannot afford to pay their bail in exchange for a fee.[133] Bail companies promise to pay the court the full amount of the inmate's bond if they do not show up to future court dates. However, they are rarely made to pay.[134] In an ideal world, bondsmen would be

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[128] Page & Scott-Hayward, *supra* note 41, at 91.
[129] *Id.*
[130] *Id.*
[131] 8 AM. JUR. 2D, *Bail and Recognizance* § 47 (2023).
[132] *Id.*
[133] *Id.*
[134] *Id.*

seen as a guardian of the accused in the justice system. In reality, bail bond companies exploit the pretrial process as a way to make capital gains.[135]

To eliminate the predatory lenders attached to the criminal justice process, the United States should abolish monetary bail. However, that solution falls short politically and economically. Without cash bail, a billion-dollar industry would be eliminated, and tough-on-crime politics would take center stage in every debate nationwide. Thus, we must implore politicians, judges, and attorney generals to follow statistical data, rather than raw emotion, resulting in courts no longer failing to receive payment and an exponentially improved justice system.

[135] *Id.*